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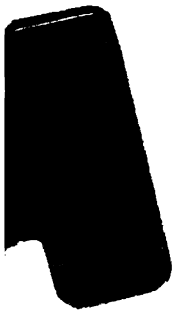

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THE

LAW JOURNAL REPORTS

FOR

THE YEAR 1901.

CASES DECIDED IN

The Chancery Division

OF

THE HIGH COURT OF JUSTICE

REPORTED BY

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MR. JUSTICE BYRNE MR. JUSTICE BUCKLEY	...	... W. A. G. WOODS, W. IVIMEY COOK, and ARTHUR LAWRENCE.
MR. JUSTICE FARWELL MR. JUSTICE COZENS-HARDY	...	... J. R. BROOKE, A. E. RANDALL, and JOSEPH E. MORRIS.

IN

The House of Lords

REPORTED BY

JAMES EYRE THOMPSON,

AND IN

The Court of Appeal

REPORTED BY

AUBREY JOHN SPENCER, AMYAND JOHN HALL, ARTHUR CORDERY, W. E. GORDON, G. HUMPHREYS, AND JOSEPH SMITH, BARRISTERS-AT-LAW.

EDITOR:

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JUDGES AND LAW OFFICERS, 1901.

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The Right Hon. Lord MACNAGHTEN, Lord of Appeal.
The Right Hon. Lord MORRIS, Lord of Appeal [Died Sept.].
The Right Hon. Lord DAVEY, Lord of Appeal.
The Right Hon. Lord ROBERTSON, Lord of Appeal.
The Right Hon. Lord LINDLEY, Lord of Appeal.

MEMBERS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The Right Hon. the EARL OF HALSBURY, Lord High Chancellor.

The Right Hon. Lord MACNAGHTEN The Right Hon. Lord MORRIS [Died Sept.]. The Right Hon. Lord DAVEY The Right Hon. Lord ROBERTSON The Right Hon. Lord LINDLEY	Lords of Appeal in Ordinary under the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59).
The Right Hon. Lord HOBHOUSE The Right Hon. Lord JAMES OF HEREFORD	Privy Council Act, 1833 (3 & 4 Will. 4. c. 41), s. 1.
The Right Hon. Sir RICHARD COUCH . .	Privy Council Act, 1833 (3 & 4 Will. 4. c. 41), s. 30.
The Right Hon. Sir HENRY STRONG The Right Hon. Sir HENRY DE VILLIERS	Judicial Committee Amendment Act, 1895 (58 & 59 Vict. c. 44), s. 1.
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The Right Hon. Sir ARCHIBALD LEVIN SMITH, Master of the Rolls [Resigned, and died Oct.].
The Right Hon. Sir RICHARD HENN COLLINS, Master of the Rolls [Oct.].
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The Right Hon. Sir JOHN RIGBY, Lord Justice of Appeal [Resigned Nov.].
The Right Hon. Sir RICHARD HENN COLLINS, Lord Justice of Appeal.
The Right Hon. Sir ROLAND VAUGHAN WILLIAMS, Lord Justice of Appeal.
The Right Hon. Sir ROBERT ROMER, Lord Justice of Appeal.
The Right Hon. Sir JAMES STIRLING, Lord Justice of Appeal.
The Right Hon. Sir JAMES CHARLES MATHEW, Lord Justice of Appeal [Oct.].
The Right Hon. Sir HERBERT HARDY COZENS-HARDY, Lord Justice of Appeal [Nov.].

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DECISIONS

OF THE

CHANCERY DIVISION

AND ON APPEAL THEREFROM

TO THE

COURT OF APPEAL AND HOUSE OF LORDS

AND

CASES IN LUNACY.

[IN THE COURT OF APPEAL.]

LORD ALVERSTONE, C.J.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
1900.
Oct. 25.

DOUGLAS *v.* BOLAM.

Trustee—Appointment of Judicial Trustee—Person not Named in Summons—Jurisdiction—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 1, *sub-ss.* 1 *and* 3; *Judicial Trustees Rules*, 1897, *rule* 23 (1).

On an application to appoint a named person or the official solicitor as judicial trustee, if the Court is not satisfied of the fitness of the named person there is jurisdiction to appoint a third person suggested by the retiring judicial trustee.

Appeal against a decision of Kekewich, J.

By the settlement dated June 27, 1865, made on the marriage of Jane E. Douglas and Robert S. Douglas (since deceased), real estate situate in South Acton in the parish of Feltham in the county of Northumberland, was assured to the use of the trustees J. A. Wilkinson and Mordey Douglas in trust to pay the rents and profits to Jane E. Douglas for her separate use without power of anticipation, and after her death upon trusts and limitations under which her four daughters, the only children of the marriage, were entitled in remainder, as tenants in common in tail with cross-remainders, and certain personal estate of between 4,000*l.* and 5,000*l.* in value, invested on mortgage and bond debts, was assigned to the trustees in trust to pay the income to Jane E. Douglas for her life for her separate use without power of anticipation, and after her death in trust for Robert S. Douglas as therein mentioned, and after the determination of such trusts on trusts in favour of the children of the marriage. The settlement contained a clause under which "any statutory power of appointing new trustees" was now vested in Jane E. Douglas.

This action was brought in 1896 against R. G. Bolam, the then surviving trustee of the settlement, to compel him to make good an alleged breach of trust. One daughter was under twenty-one years of age, and on August 9, 1897, a compromise was approved by the Court under which R. G. Bolam retired from the trusts and the plaintiffs *sui juris* undertook to apply for the appointment of a judicial trustee under the Judicial Trustees Act, 1896.

On August 2, 1898, J. Broadway was appointed to be judicial trustee of the settlement, and the defendant Bolam was discharged.

In June, 1899, J. Broadway desired to be discharged, and on June 20, 1899, Jane

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DOUGLAS *v.* BOLAM, App.

E. Douglas took out a summons for the appointment of her son-in-law, E. Brewis, or the official solicitor to be judicial trustee in place of J. Broadway.

J. Broadway did not at first give notice to the Court of his desire to be discharged under rule 23 (1)[1] of the Judicial Trustee Rules, 1897, but on this omission being pointed out by the Judge he gave such a notice, proposing that J. M. Winter, an accountant of Newcastle-on-Tyne, should succeed him as judicial trustee. Three of the daughters supported this proposal.

Kekewich, J., made an order on the summons in chambers appointing J. M. Winter as judicial trustee.

Jane E. Douglas moved to discharge the order, and Kekewich, J., dismissed the motion.

Jane E. Douglas now appealed, and by her notice of appeal asked to reverse the order appointing J. M. Winter to be judicial trustee, and that the official solicitor or some other fit and proper person might be appointed in lieu of J. M. Winter.

On the hearing of the appeal it was admitted that the appointment of Mr. Brewis would not be a desirable one.

Coldridge, for the appellant. — I do not press for the appointment of Mr. Brewis, but under the Judicial Trustees Act, 1896, s. 1, sub-s. 3,[1] the Judge had no power to appoint a third person instead of Mr. Brewis as judicial trustee, but only an official of the Court. Further, the Court ought not, in any case, to make the appointment against the wish of the person having power to appoint a new trustee.

Tomlin, for the three daughters, was not called on.

LORD ALVERSTONE, C.J.—Upon the application of Mrs. Douglas, the tenant for life, for the appointment of Mr. Brewis as judicial trustee of the settlement in succession to Mr. Broadway, the learned Judge has appointed Mr. Winter to be judicial trustee. It is contended that under sub-section 3 of section 1 of the Act, if the Court is not satisfied with the fitness of the person nominated by the applicant, the Court can only appoint an official trustee instead of the person so nominated. I think that would be too narrow a construction of the Act. Mrs. Douglas has not a general power of appointing a new trustee; she is only entitled to exercise any statutory power of appointing new trustees of the settlement. That power must be subject to the provisions of the Judicial Trustees Act. In my opinion the Court under sub-section 1 of section 1 has power to appoint any fit and proper person to be a judicial trustee, and to hold that where a person who is entitled to apply to the Court to make the appointment has nominated some one of whose fitness the Court is not satisfied, the power of the Court is confined to the appointment of the official trustee, would be to limit the beneficial operation of the Act. Sub-section 3 does not cut down the power conferred by sub-

(1) Judicial Trustees Act, 1896, s. 1, sub-s. 1: "Where application is made to the Court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the Court may, in its discretion, appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shewn, in place of all or any existing trustees."

Sub-section 3: "Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee, and, in the absence of such nomination, or if the Court is not satisfied of the fitness of a person so nominated, an official of the Court may be appointed, and in any case a judicial trustee shall be subject to the control and supervision of the Court as an officer thereof."

Section 5: "In this Act—The expression 'official of the Court' means the holder of such paid office in or connected with the Court as may be prescribed."

"The expression 'prescribed' means prescribed by rules under this Act."

Judicial Trustee Rules, 1897, rule 23 (1): "If a judicial trustee desires to be discharged from his trust he must give notice to the Court, stating at the same time what arrangements it is proposed to make with regard to the appointment of a successor."

(2) "The Court shall give facilities for the appointment on a proper application of an official of the Court to be judicial trustee in place of a judicial trustee who desires to be discharged, in cases where no fit and proper person appears available for the office, or where the Court considers that such an appointment is convenient or expedient in the interests of the trust."

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section 1; it is an enabling section applicable to the particular cases mentioned in it, giving the Court power to appoint the official trustee when the Court is not satisfied of the fitness of the person nominated by the applicant. But when another fit person is suggested by some of the parties the Court is not bound to appoint an official trustee. Upon the merits of the present case I think no ground has been shewn for interfering with the exercise of the discretion of the learned Judge. The appeal must be dismissed with costs.

RIGBY, L.J.—I am of the same opinion. A proper application was made to the Court for the appointment of a judicial trustee. The applicant wished Mr. Brewis to be appointed, but it has been admitted before us that that would be an impossible appointment, as it plainly would be. It is contended that if the Court does not appoint him it can only appoint an official trustee, and has no jurisdiction to appoint a third person. Rule 23 of the rules made under the Act provides that if a judicial trustee desires to be discharged he must give notice to the Court, "stating at the same time what arrangements it is proposed to make with regard to the appointment of a successor." Here the retiring trustee did not at first comply with this rule, but, on the omission being pointed out by the learned Judge, the trustee gave a proper notice, in which he suggested the appointment of Mr. Winter as his successor. In this way the name of Mr. Winter was fairly brought before the Court as an alternative to Mr. Brewis, and I have no doubt that the Court had ample jurisdiction under the Act to appoint Mr. Winter. I am satisfied that Mr. Justice Kekewich exercised the wisest discretion, and indeed I should have come to the same conclusion myself.

VAUGHAN WILLIAMS, L.J.—I agree.

Solicitors—Poole & Robinson, for the appellant; Flux & Leadbitter, for the respondents

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

LORD ALVERSTONE, C.J.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
1900.
Oct. 25.

DAY *v.* KELLAND.

Mortgage — Costs — Solicitor-Mortgagee — Foreclosure Judgment in 1893 *— Profit-Costs — Taxation in* 1898 *— Mortgagees' Legal Costs Act,* 1895 (58 *&* 59 *Vict. c.* 25), *s.* 3.

Where a foreclosure order has been made prior to the Mortgagees' Legal Costs Act, 1895, *finally settling the terms of redemption on payment of principal, interest, and costs, a solicitor-mortgagee will not be entitled to the benefit of section* 3 *of that Act because the taxation of his costs takes place under an order made after the Act has come into force.*

Eyre *v.* Wynn-Mackenzie (65 L. J. Ch. 194; [1896] 1 Ch. 135) *followed.*

Appeal from a decision of Cozens Hardy, J.

On February 6, 1891, W. H. Kelland deposited title-deeds to real estate with the Devon and Cornwall Bank to secure his account, accompanied by a memorandum of deposit by which he agreed to execute a legal mortgage when required.

On March 13, 1891, W. H. Kelland created a further equitable charge in favour of one Serle, which, on July 18, 1891, was transferred to R. Cuddeford.

On March 25, 1892, the plaintiff, a solicitor, paid off the Devon and Cornwall Bank, and took a transfer of their debt and a legal mortgage from W. H. Kelland to secure the same.

In 1893 the plaintiff, as first mortgagee, took out an originating summons against R. Cuddeford and other puisne mortgagees, in which, on April 19, 1893, an order was made declaring that the plaintiff was a mortgagee of the estate comprised in the title-deeds deposited with the Devon and Cornwall Banking Co., and directing an account of what was due to him for principal and interest under that deposit of title-deeds from February 6, 1891, until the chief clerk's certificate, "and mortgagees' costs and expenses (if any) and for his costs of this action such

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costs to be taxed by the taxing master"; and the order declared that such principal, interest, and costs were a charge upon the estate; and ordered that on R. Cuddeford paying to the plaintiff what should be certified to be due within six months after the certificate the plaintiff should convey the estate to R. Cuddeford, and in default of R. Cuddeford so paying what should be found due he should stand foreclosed; and in case of such foreclosure directed an account of what was due to the plaintiff under his mortgage of March 25, 1892, and gave further rights of redemption to R. Cuddeford and other puisne mortgagees.

By an order made on July 19, 1898, on further consideration, it was ordered that it be referred to the Taxing Master to tax the costs of the plaintiff of this action, including in such costs the costs properly incurred and paid by the plaintiff to the Devon and Cornwall Banking Co. in respect of their charges and expenses as mortgagees on the transfer of the equitable mortgage by deposit of February 6, 1891, and including also the costs properly incurred of the plaintiff of the legal mortgage of March 25, 1892, and including also any other costs, charges, and expenses properly incurred by the said Devon and Cornwall Banking Co. or the plaintiff as mortgagees and not already taxed or allowed; and the Taxing Master was to certify the amount of such costs so far only as they related to so much of the plaintiff's security as was declared by the order of April 19, 1893, to have priority over the security of R. Cuddeford, and also the residue of such costs.

The plaintiff had acted for himself in the proceedings to realise the security; and the Taxing Master allowed the plaintiff usual profit costs.

On a summons taken out by R. Cuddeford to vary the Taxing Master's certificate, Cozens-Hardy, J., held that the plaintiff was not entitled to the benefit of the Mortgagees' Legal Costs Act, 1895, on the authority of *Eyre* v. *Wynn-Mackenzie* [1895],[1] and varied the certificate accordingly.

The plaintiff appealed.

(1) 65 L. J. Ch. 194; [1896] 1 Ch. 135.

A'Beckett Terrell, for the appellant.—It is admitted that except for the Mortgagees' Legal Costs Act, 1895, s. 3, the plaintiff would only be entitled to costs out of pocket; but section 3 of that Act altered the law, and by sub-section 2 it is made retrospective. The order of April 19, 1893, did not determine on what principle the plaintiff's costs were to be taxed, and if, when the amount came to be ascertained, the Legislature had altered the principle of taxation in such a case the plaintiff is entitled to the benefit of the enactment. *Eyre* v. *Wynn-Mackenzie*[1] is distinguishable, since in that case the foreclosure order made before the Act came into force contained an express declaration that the solicitor-mortgagee was not entitled to charge profit-costs.

Stewart-Smith, for the respondent Cuddeford.—The rights of the parties were declared by the order of April 19, 1893, and cannot be varied by subsequent legislation. The plaintiff's costs, the subject of the enquiry then directed, were included in the amount, on payment of which successive redemptions were directed in the usual way; and in a case like the present, as the law stood at that date, the plaintiff's costs meant costs out of pocket only.

A'Beckett Terrell replied.

LORD ALVERSTONE, C.J.—In my opinion the decision of Mr. Justice Cozens-Hardy was perfectly right. I do not express any opinion on section 3 of the Mortgagees' Legal Costs Act, 1895, because, in my opinion, the question does not arise. I think that the rights of the parties were finally determined by the order of April 19, 1893. Counsel for the appellant did not dispute that this was the effect of the order, but he urged that because the Act of Parliament was subsequently passed the Court ought to give the plaintiff the benefit of rights conferred by the Act. In my opinion that would be to alter the rights of the parties by subsequent legislation. No question arises under the Act; and though I do not think the present case is covered by the decision of the Court of Appeal in *Eyre* v. *Wynn-Mackenzie*,[1] I think the principle of the decision applies, and that the plain-

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DAY *v.* KELLAND, App.

tiff's rights are to be determined by the rights as they were at the time of the foreclosure order.

RIGBY, L.J.—I am of the same opinion. Whatever rights were ascertained by the order of 1893 must be governed by the law as it stood at the time. I understand that to be the decision of Mr. Justice Cozens-Hardy, and I agree.

VAUGHAN WILLIAMS, L.J.—I agree.

Appeal dismissed.

Solicitors—Taylor, Hoare & Pilcher, for appellant; H. Mear, agent for Dunn & Baker, Exeter, for respondent.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
ROMER, L.J.
1900.
Nov. 15.

BOWDEN *v.* YOXALL.

Practice—Appeal—Interlocutory Order—Leave—Refusal to Commit—Liberty of the Subject—Supreme Court of Judicature Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 1 (*b*) (*i.*).

By the Supreme Court of Judicature Act, 1894, *s.* 1, *sub-s.* 1 (*b*), *no appeal lies without the leave of the Judge or of the Court of Appeal from an interlocutory order made by a Judge dismissing a motion to commit. Such an order is not within the exception contained in sub-clause* (*i.*) *of that section.*

This was an appeal by the plaintiff from an interlocutory order made by Buckley, J., dismissing a motion to commit the defendants for the alleged breach of an undertaking.

Buckley, J., had refused to grant leave to appeal, and no leave had been obtained from the Court of Appeal.

The respondents took the preliminary objection that by the Supreme Court of Judicature (Procedure) Act, 1894, s. 1, sub-s. 1 (*b*) (i.),[1] the appeal did not lie without leave.

G. F. Hart (with him *Rowden, Q.C.*, and *Lynn*), for the respondents.—The preliminary objection is fatal to the appeal. The intention of the Judicature Act, 1894, in sub-clause (i.) was to allow an appeal as of right to a person committed by the order of a Judge, but not to the person applying for the committal.

Levett, Q.C., *Alexander, Q.C.*, and *Condy*, for the appellant.—No leave to appeal was necessary, as the case is one in which the liberty of the subject is concerned, and is therefore within the exception in sub-clause (i.)—*Lancashire* v. *Hunt* [1895].[2] Sub-clause (ii.) draws no distinction between granting or refusing an injunction, and no such distinction ought to be made in cases under sub-clause (i.). In any case, we now ask the Court to grant leave to appeal, if necessary.

RIGBY, L.J.—We think that the preliminary objection is a sound one, and that an order refusing to commit is not within the exception contained in sub-clause (i.) of clause (*b*) of section 1 of the Act of 1894, and we are not disposed to grant leave to appeal now. The appeal, therefore, must be dismissed with costs.

VAUGHAN WILLIAMS, L.J., and ROMER, L.J., concurred.

Appeal dismissed.

Solicitors—Wingfield & Blew, for appellant; Baker & Nairne, for respondents.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

(1) The Supreme Court of Judicature Act, 1894, s. 1, sub-s. 1: "No appeal shall lie—(*a*) From an order allowing an extension of time for appealing from a judgment or order; nor (*b*) without the leave of the Judge, or of the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a Judge, except in the following cases, namely (*inter alia*), (i.) where the liberty of the subject or the custody of infants is concerned; and (ii.) cases of granting or refusing an injunction or appointing a receiver. . . ."

(2) 30 L. J. N.C. 204; W. N. (1895), 52.

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[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
ROMER, L.J.
1900.
Nov. 7, 8.

WHITAKER, *In re*;
WHITAKER *v.* PALMER.

Administration—Voluntary Creditor—Insolvent Estate—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 40, *sub-s.* 4.

In the administration of an insolvent estate in the Chancery Division the Bankruptcy Rules by virtue of the Judicature Act, 1875, *s.* 10, *apply as to the equality of provable debts, and therefore voluntary creditors rank pari passu with creditors for value.*

Decision of COZENS-HARDY, J. (69 L. J. Ch. 774; [1900] 2 Ch. 676), *affirmed.*

Smith *v.* Morgan (49 L. J. C.P. 410; 5 C.P. D. 337) *and* Maggi, *In re* (51 L. J. Ch. 560; 20 Ch. D. 545), *so far as they conflict with this rule, overruled.*

Appeal from a decision of Cozens-Hardy, J. (reported 69 L. J. Ch. 774; [1900] 2 Ch. 676).

By a voluntary settlement made on October 1, 1889, the testator in the action covenanted with the trustees of the settlement to pay to them 200*l.* a year for the benefit of his son, William Whitaker, during his life, and the testator further covenanted that his executors or administrators would, within six months from his death, pay to the trustees a sum of 5,000*l.* with interest to be applied by them as therein mentioned for the benefit of his said son. The son was a lunatic and a defendant to the action by his guardian *ad litem*.

The testator died in March, 1898. His estate was being administered in the Chancery Division, and proved insufficient to pay the voluntary creditors as well as the creditors for value in full. Certain arrears of the annuity of 200*l.* were due to the trustees of the voluntary settlement and also the principal sum of 5,000*l.* The claim of the trustees under the voluntary settlement was allowed by the Master, but he thought it must be postponed to the claims of the creditors for value.

Cozens-Hardy, J., held that by virtue of the Judicature Act, 1875, s. 10,[1] the bankruptcy rule ought to apply, and that the trustees' claim must therefore rank *pari passu* with the claims of the creditors for value.

The creditors for value appealed.

Eve, Q.C., and *Edward Ford*, for the appellants.—If the view taken by the learned Judge of *Leng, In re; Tarn* v. *Emerson* [1895],[2] is right, the result must be that under section 10 of the Judicature Act, 1875, all the rules in bankruptcy have been introduced into the administration of insolvent estates in Chancery. The object of the section was to make debts provable in Chancery as in Bankruptcy—to put an end, for instance, to the rule laid down in *Mason* v. *Bogg* [1837],[3] under which secured creditors could prove in Chancery without valuing their securities; but it did not introduce all the Bankruptcy rules into Chancery. The object was not to increase the estate to be administered; for instance, an executor's right of retainer was not interfered with—*Neville, In re; Lee* v. *Nuttall* [1879].[4]

(1) Judicature Act, 1875, s. 10: "In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

(2) 64 L. J. Ch. 468; [1895] 1 Ch. 652.

(3) 2 Myl. & Cr. 443.

(4) 48 L. J. Ch. 616; 12 Ch. D. 61.

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Neither was the mode of distribution. When once the liabilities have been ascertained the parties are left in the same position in which they were before the section came into force. The priority of a judgment creditor has not been taken away—*Maggi, In re; Winehouse* v. *Winehouse* [1882],[5] and *Smith* v. *Morgan* [1880].[6] *Leng, In re*,[2] was a different case; there the debt was held not to be a provable debt. In *Heywood, In re; Parkington* v. *Heywood* [1897],[7] Stirling, J., seems to have had the same misconception of the effect of *Leng, In re*,[2] that the learned Judge had in the present case.

Vernon Smith, Q.C., and *S. B. L. Druce*, for the respondents, the trustees of the voluntary settlement, were not called on.

Capron, for the executors of the testator.

RIGBY, L.J.—The question is whether in the administration of an insolvent estate in the Chancery Division the old and undoubted rule of the Court of Chancery that creditors for valuable consideration took precedence over those whose debts were not founded upon a valuable consideration must, notwithstanding section 10 of the Judicature Act, 1875, still prevail. In my opinion we cannot so hold.

Section 10 provides (among other things) that the rules for the time being in force in Bankruptcy as to debts provable shall apply in the administration by the High Court of the estate of a deceased insolvent. Upon the true construction of the words I think they do not simply deal with the proof of debts. The same rules are to prevail "as to debts and liabilities provable." I cannot read those words as meaning simply "as to the proof of debts and liabilities." I think they mean that whatever general rules are in force in the Court of Bankruptcy for the time being with regard to debts and liabilities provable shall apply in the administration of insolvent estates in Chancery. Now undoubtedly in Bankruptcy (it does not matter how it came about) the rule as to debts and liabilities provable is that all those debts and liabilities, whether contracted for value or not, shall rank *pari passu*. I think we should be cutting down unduly the plain words of section 10 if we were to allow an old rule of the Court of Chancery to override the present rule with regard to Bankruptcy in the present case. If ever that rule should be altered it would of course be a different matter. I do not suggest that it ought to be altered, but it is now a fixed rule that voluntary debts shall be on an equality with debts for value. If this view conflicts with the decisions in *Smith* v. *Morgan*[6] and *Maggi, In re*,[5] I can only say that we are not bound by those decisions; and if and so far as it is necessary (which probably means altogether) we must overrule them.

VAUGHAN WILLIAMS, L.J.—I agree. I do not think that section 10 is very artistically drawn, or that it is very easy to construe. Perhaps that is the reason why the decisions on the section are not very easy to reconcile. Speaking for myself, I should have thought that the decision of the Court of Appeal in *Leng, In re*,[2] was absolutely inconsistent with the decision of Mr. Justice Fry in *Maggi, In re*.[5] But Lord Justice Lindley, in his judgment in *Leng, In re*,[2] seems expressly to take the view that the two decisions are reconcilable, though I do not quite understand it.

One thing is quite clear—namely, that the section does not mean that in all respects the results of a bankruptcy and the consequent administration of the estate, and the results of death of an insolvent and the consequent administration of his estate, are to be absolutely identical. It was long ago decided that, notwithstanding section 10, you must still apply in Bankruptcy only those Bankruptcy rules, whether statutory or otherwise, which go to augment the bankrupt's assets as against third persons. So far it is plain that there is intended to be a distinction between bankruptcy and the consequent administration, and death followed by administration of the insolvent estate of the deceased. The section itself seems

(5) 51 L. J. Ch. 560; 20 Ch. D. 545.
(6) 49 L. J. C.P. 410; 5 C.P. D. 337.
(7) 67 L. J. Ch. 25; [1897] 2 Ch. 593.

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to me to point to an intention that the uniformity (if I may use the expression) shall be limited to some particular subjects, because it says, "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively." The section specifies four heads as to which uniformity is for the future to prevail. And, in my view, we have, in construing the section, to determine what are the limits of the four heads there specified, and then to see whether this rule of administration in Chancery, whereby voluntary creditors were postponed to creditors for value, is still to prevail.

It seems to me that this rule of Chancery administration comes under the first of the four heads—namely, the rule in Bankruptcy as to the respective rights of secured and unsecured creditors. In my opinion, if those words are properly read, they do not mean, as Mr. Justice Fry, in *Maggi, In re*,[5] assumed that they do, only the respective rights of the two classes of creditors, secured and unsecured, as against each other, but that they mean also the respective rights of those two classes *inter se*; and there can be no doubt that, as regards the rights of the creditors *inter se*, the rule in Bankruptcy differed from the rule in Chancery. In Bankruptcy, once given a provable debt, all the debts proved were entitled to payment of dividend *pari passu*. In Chancery a voluntary debt might be proved, but as regards payment of dividend it would be postponed to the creditors for value. It seems to me that under section 10 the rights of the creditors *inter se* must now be regulated by the Bankruptcy rule, and not by the old Chancery rule.

For these reasons I agree with Lord Justice Rigby.

ROMER, L.J.—I also agree. The important words in section 10 for the purposes of this appeal are, I think, those which provide that the Bankruptcy rules "as to the debts and liabilities provable" shall prevail in the administration of an insolvent estate in the High Court. The section does not say that only the rules as to what debts and liabilities shall be provable are to prevail; it speaks of all rules "as to debts and liabilities provable."

It appears to me that, if there be a rule in Bankruptcy that a debt shall be provable, but only in an inferior position to ordinary debts, that would be a rule "as to" that provable debt within the meaning of the section. And so if there be a rule in Bankruptcy that certain debts shall be provable, but in a superior position. And equally, to my mind, if the rule in Bankruptcy be that certain debts and liabilities are provable in no superior or inferior position to ordinary debts, but *pari passu* with them, there would be a rule "as to" those debts.

This has, I think, been decided in principle by the Court of Appeal in *Leng, In re*[2]; and in my opinion that case cannot properly be distinguished in the way which has been suggested on the present appeal. *Maggi, In re*,[5] can, I think, no longer be regarded as an authority. The attention of Mr. Justice Fry, when he decided that case, was not directed to, and he did not in his judgment deal with, those words of section 10 which formed the basis of the decision in *Leng, In re*,[2] and which form the ba sis of our present decision.

RIGBY, L.J.—The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors—Ridsdale & Son, agents for Grover & Grover, Cardiff, for appellants; Belfrage & Co., agents for H. J. Chaldecott, Dorking; Gamlen, Burdett & Gamlen, agents for Cottrell & Son, Birmingham, for respondents.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

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WRIGHT, J. 1900. Nov. 2, 7. } NORTH-WEST ARGENTINE RAILWAY, *In re.*

Company—Winding-up—Surplus Assets—Preferred and Deferred Shareholders—Distribution Inconsistent with Legal Rights—Right of Majority to Bind Minority.

Where a meeting of shareholders of a company had resolved by a majority upon a mode of distribution of surplus assets between preferred and deferred shareholders different from that to which the parties were legally entitled, the Court refused to draw an inference that the shareholders absent or not represented at the meeting had assented to such mode of distribution.

Somes *v.* Currie (1 K. & J. 605) *and* Beeston Pneumatic Tyre Co., *In re* (33 L. J. N.C. 188; W. N. (1898) 34), *distinguished.*

Summons by the voluntary liquidators in the winding-up of the North-West Argentine Railway Co., Lim. (hereinafter called "the Argentine Co."), for directions as to how and in what proportions a sum of 310,000*l.* Income Debenture Stock of the Cordoba Central Railway, Lim. (hereinafter called "the Cordoba Co."), ought to be distributed or divided as between the holders of preferred and deferred shares of the Argentine Co.

The Argentine Co. was incorporated in 1886 under the Companies Acts, 1862 to 1883, with a capital of 550,000*l.*, divided into 55,000 shares of 10*l.* each; 35,000 of these were preference shares, and were described in the memorandum of association as "being subject to a preference dividend and other rights as provided by the articles of association," and the other 20,000 were described in the memorandum as being "deferred shares with such rights as are declared by the articles of association."

The Argentine Co. had by its memorandum of association power to sell its undertaking, business, and property.

The articles provided (arts. 5 and 6) for the payment of a cumulative preferential dividend of 7*l.* per cent. per annum on the amount for the time being paid up or credited as paid up on the preferred and deferred shares respectively.

Art. 7 was as follows: "The surplus profits shall be divided among the members in proportion to the amounts paid or credited as paid on the shares held by them respectively."

There was no provision in the articles as to the distribution of the assets in the event of the company being wound up.

All the preferred and deferred shares had been issued, and were either paid up or credited as paid up.

By an agreement dated July 20, 1899, and made between the Argentine Co. of the one part and the Cordoba Co. of the other part, it was agreed that the Argentine Co. should transfer and the Cordoba Co. should take over the undertaking, property, and assets of the Argentine Co. Part of the consideration payable by the Cordoba Co. for such transfer was a sum of 310,000*l.* Cordoba Central Railway Income Debenture Stock (Central Northern Section) to be distributed among the holders of preferred and deferred shares of the Argentine Co., such stocks to be accepted by the shareholders in full satisfaction and discharge of their rights and interests in the undertaking agreed to be transferred. The agreement was made conditional on all necessary resolutions having been passed by the shareholders of the Argentine Co. These resolutions were duly obtained. The agreement was silent as to the proportions in which the 310,000*l.* stock was to be divided between the two classes of shareholders of the Argentine Co.

On July 17, 1899, the secretary of the Argentine Co., by order of the directors, gave notice to the shareholders that an extraordinary general meeting would be held on August 10, 1899, when the resolutions subjoined would be proposed, and that, should the resolutions be passed by the required majority, they would be submitted for confirmation as a special resolution to a second extraordinary meeting which would be subsequently convened. The proposed resolutions were as follows:

"1. That the agreement submitted to this meeting and expressed to be made between "the two companies "providing for the transfer of the company's undertaking and assets to the Cordoba" company "in exchange for 310,000*l.* Cordoba Central

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Railway Income Debenture Stock (Central Northern Section) be and is hereby approved and that the directors be and they are hereby authorised to carry the same into effect accordingly.

"2. That with a view to the distribution among the shareholders of their proportion of the purchase-price provided for by the said agreement in manner therein provided, the company be wound up voluntarily, and that the following gentlemen, being the directors of the company—namely [here followed their names and descriptions], be appointed liquidators for the purposes of the winding-up."

Accompanying the notice was the following circular:

"Sir or Madam,—In pursuance of the expression of opinion given by the shareholders at the annual general meeting, held on the 17th May last, the board have sealed and exchanged the *ad referendum* agreement providing for the transfer of this company's undertaking and assets to the Cordoba Central Railway Company, Limited, provided the approval of their company's debenture-holders and shareholders is obtained to the terms of transfer. I enclose herewith a notice convening an extraordinary general meeting to consider the proposal, and also send an epitome of the agreement, so that you may have time to consider the terms of the transaction before the meeting. I shall be happy to produce a full copy of the agreement to you, here, should you desire to inspect it. You will observe that the purchase consideration to the shareholders is 310,000*l.* Cordoba Central Income Debenture Stock, which at the wish of the Cordoba Central Railway Company, Limited, is to be distributed among the shareholders in the following proportions, viz., 210,000*l.* to the preferred shareholders and 100,000*l.* to the deferred shareholders."

At the meeting on August 10, 1899, A. Young and N. Spens, the receivers and managers in a debenture-holder's action against the Argentine Co., were called upon to address the meeting, and the former pointed out that if the company came to a winding-up the sum of 210,000*l.* stock offered to the preferred shareholders would be in excess of the amount to which they were legally entitled, and that the legal proportion payable respectively to the preferred and deferred shareholders would be 197,000*l.* to the former, and about 112,000*l.* or 113,000*l.* to the latter. On a show of hands, the chairman declared the first resolution had been carried by twenty-two hands to sixteen, and a poll was demanded and ordered to remain open for a week, with the result that it was subsequently declared to be carried by 30,728 votes to 11,462. The second resolution was ultimately withdrawn unanimously.

On August 17, 1899, the secretary of the Argentine Co., by order of the directors, gave notice to all the shareholders that an extraordinary general meeting of the company would be held on August 29, 1899, when the resolution "subjoined would be proposed." The resolution subjoined was in precisely the same terms as the resolution 1 which had been passed at the former meeting.

This notice was accompanied by a circular, in which it was stated that the 350,000*l.* first preference shares were to be exchanged for 210,000*l.* Cordoba Central Income Debenture Stock, and that 200,000*l.* deferred shares were to be exchanged for 100,000*l.* like stock. The circular also stated as follows: "These"—namely, the deferred shares—"have equal capital rights with the preferred shares, and, looking at the strength of their legal position, the apportionment of 100,000*l.* income bonds appears to afford a fair settlement of their claims."

At the meeting the chairman explained that it was required because an informality had been discovered in the notice of the previous meeting, inasmuch as only an ordinary and not a special resolution was then required. He also stated that the plan proposed was that the preference shareholders should receive 210,000*l.* in Income bonds, and that the deferred shareholders should receive 100,000*l.* in Income bonds. The resolution was proposed, seconded, and carried by the casting vote of the chairman.

In December, 1899, the Argentine Co. passed a special resolution, which was duly confirmed on January 4, 1900, to

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wind up voluntarily, and appointed A. Young and N. Spens liquidators.

The liquidators in their affidavit stated that the agreement of August 11, 1899, was in course of being completed and carried into effect, and that the income debenture stock was ready to be distributed and divided among the holders of preferred and deferred shares.

Whinney (*Swinfen Eady, Q.C.*, with him), for the summons.

Jenkins, Q.C., and *A. R. Kirby*, for the preferred shareholders. — The Court is asked to draw the inference that there was an assent on the part of the whole body of shareholders to a mode of distribution different from that to which they were legally entitled. In *Beeston Pneumatic Tyre Co., In re* [1898],[1] the Court came to such a conclusion on the authority of *Somes* v. *Currie* [1855],[2] and it is a reasonable one to arrive at here. Looking at the circulars, and what was said at both meetings, the absentee shareholders and those not represented must be deemed to have had full notice that it was proposed to divide the surplus assets in the manner mentioned.

Eve, Q.C., and *A. F. Peterson*, for the deferred shareholders.—There is no provision in the agreement as to how the 310,000*l.* stock is to be divided between the two classes of shareholders, nor does the resolution in terms provide for distribution in the manner pointed out. The resolution was merely an attempt to bind a minority to accept less than that to which they were entitled. That was illegal—*Griffith* v. *Paget* [1877],[3] followed by the Court of Appeal in *Simpson* v. *Palace Theatre* [1893].[4] In any case, the resolution is not binding on the shareholders who were either absent or did not assent to it. Even if the decision in *Beeston Pneumatic Tyre Co., In re*,[1] is correct, it does not follow that the same inference of fact will be drawn in this case as in that.

Jenkins, Q.C., in reply.—The Court is not asked to decide that a majority of shareholders can overrule a minority so as to alter the legal rights of the latter. All the Court is asked to do is to infer that the shareholders consented. If the Court does not see its way to do that, we ask for an enquiry as to the consents actually given.

[He referred to *Evans* v. *Smallcombe's Executors* [1868].[5]]

Cur. adv. vult.

Nov. 7.—WRIGHT, J.—There is no doubt that in this case the resolution for adopting the agreement with the Cordoba Co. would not have been passed but for the positive representation contained in the Argentine Co.'s circular that the stock which is in question was to be distributed in the manner therein suggested. The suggestion in the circular is in these words: "You will observe that the purchase consideration to the shareholders is 310,000*l.* Cordoba Central Income Debenture Stock, which, at the wish of the Cordoba Central Railway Co. Limited, is to be distributed among the shareholders in the following proportions, viz, 210,000*l.* to the preferred shareholders and 100,000*l.* to the deferred shareholders." On the faith of that representation a sufficient number of the preference shareholders either voted for the resolution or abstained from voting against it; and, as against those who adopted and took the benefit of that representation, effect ought, if possible, to be given to it. It seems, however, impossible on the present application to make an order or declaration affecting the shareholders collectively. In *Somes* v. *Currie*[2] and in *Beeston Pneumatic Tyre Co., In re*,[1] there were facts from which an inference was drawn that all the parties concerned had agreed upon a principle of distribution. In the present case there is no room for such an inference. The resolution did not purport to give effect to the representation; it was not unanimously passed; the majority had no power to bind the minority in this respect; not much more than half of the shareholders were represented at the meeting; and no consent or equity can be suggested as against the dissentients or the absentees.

(1) 33 L. J. N.C. 188; W. N. (1898) 34.
(2) 1 K. & J. 605.
(3) 46 L. J. Ch. 493; 5 Ch. D. 894.
(4) 69 L. T. 70, 72.
(5) 37 L. J. Ch. 793; L. R. 3 H.L. 249.

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But then it is argued that individual deferred shareholders who took part in supporting the resolution are bound by the representation contained in the company's circular. It is difficult to see the ground of the contention. The circular was not theirs; they made no representation, collectively or individually. Nor would it be practicable to discover by an enquiry which of the deferred shareholders who voted had any knowledge of the representation. If there is any remedy, I think it must be in another Court or by a different proceeding—a proceeding against the company or the directors or to set aside the resolution. The liquidators must give to the resolution as it stands its legal effect, unless the resolution itself can be set aside. It has not been suggested that any one wishes it to be set aside, nor could any proceedings for that purpose have much prospect of success, for the transfer to the Cordoba Co. has been completed and no equity arises as against them. All that I can do is to sanction some delay in the distribution of the stock so as to give an opportunity to the preferred shareholders to ask for consents from individual deferred shareholders to the distribution of the assets, so far as their individual interests are concerned, according to the scheme suggested in the circular, and an opportunity to consider whether any other proceedings can be taken with any prospect of success. I must therefore declare that the stock is distributable among the shareholders according to their legal rights.

Solicitors—Slaughter & May, for liquidators; Ward, Bowie & Co., for preferred shareholders; E. A. Leadam, for deferred shareholders.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

KEKEWICH, J. 1900. May 15. } BOND, *In re*; PANES *v.* ATTORNEY-GENERAL.

Crown—Bona Vacantia—Will—Real Estate—Conversion—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 22, *sub-s.* 5.

A testator who was possessed of freeholds devised all his property to his wife for life, and appointed trustees and executors, but made no further disposition. The trustees of the will were appointed trustees for the purposes of the Settled Land Act, and the widow sold portions of the land and paid the purchase-money to the trustees. On the death of the widow, there being no heir-at-law or next-of-kin of the testator,—Held, *that the proceeds of sale did not belong to the trustees beneficially, but went to the Crown as bona vacantia.*

By his will dated February 25, 1879, Edward Uvidale Corbett Bond, of Rosemount, Weston-super-Mare, declared that whatever property he might possess at the time of his decease should be enjoyed by his dear wife Ann Bond during her life; and he appointed the Rev. Prebendary W. W. Rowley and the plaintiff John Panes to be executors and trustees of his will. There was no other devise or bequest. The testator died on January 19, 1882, possessed of certain freeholds. In November, 1888, upon the application of the widow, the existing trustees of the will were appointed trustees of the settlement created by the will for the purposes of the Settled Land Act, 1882. In 1888 and 1892 the testator's widow sold portions of the real property of the testator, and the proceeds were paid to the trustees and invested by them upon mortgage securities. On August 6, 1895, the widow died. The trustees thereupon realised the mortgage investments, and retained the proceeds in their hands, amounting to 1,903*l.*

On June 9, 1896, a summons was taken out by the trustees asking for an enquiry as to who was the heir-at-law of the testator, and on July 20, 1896, an order was made directing an enquiry as to the heir-at-law and next-of-kin.

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By his certificate dated November 17, 1899, the Master certified that no person had come in or established a claim to be the heir-at-law or next-of-kin of the testator.

On February 9, 1900, a summons was taken out by the plaintiff as the surviving trustee of the will, claiming that he and the representatives of a deceased trustee were beneficially entitled to the money in question, and the Attorney-General was made a defendant.

Warrington, Q.C., and *O. Leigh Clare*, for the plaintiff.—The question is whether the Crown can claim this fund either by right of escheat or as *bona vacantia*. If under the doctrine of escheat, it must be claimed as land, whereas here it is money, and there is no equity in the Crown to have it reconverted into land. It is well settled that the title of the Crown by escheat does not arise by way of reversionary interest, but only in default of a tenant to perform the services incident to the tenure—*Burgess* v. *Wheate* [1759] [1] and *Walker* v. *Denne* [1793].[2] The law of escheat further does not apply to an equitable estate or to the proceeds of sale of real estate sold under directions in a will. *Taylor* v. *Haygarth* [1844] [3] is strongly in our favour on this point. The executors are not trustees for the Crown, as in *Middleton* v. *Spicer* [1780].[4] In *Cradock* v. *Owen* [1854] [5] the decision in *Taylor* v. *Haygarth* [3] was admitted to apply, and the Crown was held to be not entitled to claim the proceeds of the sale of real estate.

Nor can the claim of the Crown to this fund as *bona vacantia* be supported, as the fund is in the hands of the trustees as land, by virtue of section 22, subsection 5 of the Settled Land Act, 1882. The rights of the Crown were considered in *Dyke* v. *Walford* [1846] [6] and *Barclay* v. *Russell* [1797].[7] The case of *Higginson and Dean, In re; Att.-Gen., ex parte* [1898],[8] was different, the question there being as to the title to the goods of a dissolved corporation. The trustees, therefore, are entitled to hold the proceeds of sale for their own benefit.

Ingle Joyce (*The Attorney-General* (*Sir R. B. Finlay, Q.C.*) with him).—The Crown does not claim under an escheat. The trustees have never had a legal estate in the land, and this money is only considered land for the purposes of the Settled Land Act. The sale of the land cannot be admitted to be good as against the Crown, although the Crown is willing to confirm the sales. No such claim as is now made by the trustees has ever been held good by the Courts. The trustees are merely trustees under the Settled Land Act for the purpose of receiving the proceeds of sale. They hold this fund for the right heirs of the testator. These having failed, the Crown is entitled to the fund as a money fund. The case of *Taylor* v. *Haygarth* [3] is distinguishable, as in that case there was an express direction to the trustees to sell, and to stand possessed of the produce in trust for certain persons whom the testatrix omitted to specify. The other cases cited do not touch the claim of the Crown to this as a money fund.

Warrington, Q.C., in reply.—The Crown is bound by the sales, but the money is liable to be reconverted into land for the purposes of the settlement. The Crown is not entitled under the settlement.

KEKEWICH, J.—What the Court is called upon to deal with here is the proceeds of sale of land sold under the Settled Land Act, 1882. Counsel on behalf of the Crown says that, although the Crown is willing to affirm the sales, he must not be understood to say that the sales were good as against the Crown. I, on the other hand, must not be understood to assent to any possibility of the sales being otherwise than good. There was a legal devise to a tenant for life, and nothing further, in the will. The result was that, subject only to the appointment of trustees for the purposes of the Settled Land

(1) 1 W. Bl. 123.
(2) 2 Ves. 170.
(3) 14 Sim. 8.
(4) 1 Bro. C.C. 201.
(5) 2 Sm. & G. 241.
(6) 5 Moore P.C. 434.
(7) 3 Ves. 424.
(8) 68 L. J. Q.B. 198; [1899] 1 Q.B. 325.

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Act, the tenant for life could make a good title to purchasers, and this, I think, she did, as the trustees were appointed. The point has not been argued here, therefore what I say is not to be taken as an express decision; but it seems to me that, under these circumstances, the sales must be good as against the Crown and everybody else under the Act. The result is that what was land has been converted into money, but the money is liable to reconversion—that is to say, that any person interested under the settlement made by this will is entitled to have that money reconverted into land, and, according to the Act, it devolves in the same way as land, generally speaking. The trustees were appointed simply for the purposes of the Settled Land Act; they had only the duties cast upon them by the Act, and they received the money only as trustees for that particular purpose. They had no estate and interest in the land whatever. They now say, "The money belongs to us because it is really land, and, being land, the Crown cannot get the money, except by reconverting it into land actually, and there is no equity on the part of the Crown to get that done." That is conceded—there can be no question about that. But the real difficulty in the way of the claimants arises, to my mind, from the Settled Land Act, 1882, which provides by section 22, sub-section 5, that "Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same"—that is, the capital money, not the land, which does not exist except on a notional conversion—"shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement"; and the words "under the settlement," by force of section 2, sub-section 2 of the Act, comprehend the undisposed-of estate in reversion expectant on the termination of the estate for life, which was the only estate granted by the will. The result is that, the tenant for life being dead, this money is held for the right heirs of the testator, and the testator died without heirs. That seems to me to let in immediately the claim of the Crown, without any question of there being a conversion of the land into money, which the Crown cannot enforce. The Crown claims it in its present state as money, and says, "You shall not reconvert it, but you shall treat it as money, and it belongs to the Crown as money." That seems to me to be entirely consistent with all the cases cited on behalf of the applicants, including the one which was relied upon most—namely, *Taylor* v. *Haygarth*.[3] In that case there was a direction to sell, and to stand possessed of the proceeds in trust for a person who was not defined, because there was no codicil, and the person was to be named in the codicil. That, to my mind, was an entirely different case. Here there is no direction to sell, and the money is money in the hands of the trustees unless there is a reconversion; and the Crown, as representing the heir, instead of requiring it to be reconverted, requires it as money. It belongs to the testator's right heir as money, and in default of such right heir it belongs to the Crown as *bona vacantia*. I decide, therefore, in favour of the Crown.

The trustees must account for the money with 4 per cent. interest from the date of the conversion of the securities.

Solicitors—Meredith, Roberts & Mills, agents for Baker & Co., Weston-super-Mare; Solicitor to the Treasury.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

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WRIGHT, J. 1900. Nov. 7, 10. } UNITED SERVICE ASSOCIATION, LIM., *In re*; YOUNG, *ex parte*.

Company—Winding-up — Contributory —Action by Company for Calls—Discontinuance by Liquidator—Costs of Abandoned Action—Summons by Liquidator to Enforce Calls—Stay of Proceedings — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 101.

A company brought an action against Y. for calls. Before the trial the company went into liquidation. The liquidator put Y. on the list of contributories in respect of the calls, and after notice discontinued the action and took out an originating summons in the winding-up against Y. for a balance order. Y. applied for a stay of proceedings until his taxed costs of the discontinued action had been paid:—Held, *that the stay must be refused, but that the costs should be deducted from any sum recovered by the liquidator on the originating summons.*

Summons by John Young, a contributory of the above company, against the liquidator, asking—first, that the proceeding in an originating summons against him by the liquidator might be stayed until payment to him by the liquidator of his costs of an abandoned action in the Queen's Bench Division; secondly, that the liquidator might be ordered to give security for costs; and thirdly, for discovery.

On September 6, 1899, the company issued a specially indorsed writ against the applicant in the Queen's Bench Division claiming 375*l.* in respect of calls alleged to be due upon 500 shares held by him in the company.

On September 14, 1899, the company took out a summons in the action under Order XIV. for liberty to sign judgment against the applicant, and on the hearing the applicant obtained leave to defend and also an order against the company for discovery. The company did not comply with the order, and took no further steps in the action.

On May 14, 1900, the company passed a resolution for voluntary liquidation, and appointed a liquidator.

The liquidator applied to the applicant for payment of the 375*l.*, and on his default in so doing settled him on the list of contributories in respect of that amount.

On July 31, 1900, the liquidator gave notice to the applicant of discontinuance of the action in the Queen's Bench Division, and issued an originating summons in the winding-up against the applicant for payment of the 375*l.* The applicant's costs of the action in the Queen's Bench Division had been taxed and allowed at 13*l.* 1*s.* 2*d.*, but the liquidator refused to pay this sum. The applicant thereupon took out the present summons.

In an affidavit filed on behalf of the applicant, it was stated that the only asset of the company consisted in the alleged liability of the applicant, and that the liquidator had no funds whatever to meet the costs of the proceedings in the event of an order being made against the company for payment of the applicant's costs; that the case was one which ought to be tried in open Court, and that the course which the liquidator had taken in abandoning the proceedings in the Queen's Bench Division, in which an order for trial and for discovery had been made, and commencing the proceedings in winding-up was vexatious, and would cause the applicant unnecessary trouble and expense, even assuming that the liquidator paid to the applicant his costs of the proceeding, which had been discontinued.

Giveen, for the summons.—First, the liquidator ought to be restrained from proceeding with the originating summons until he has paid the applicant's costs of the discontinued action. The principle on which the Court acts in such cases is thus stated by Lord Fitzgerald in *M'Cabe* v. *Bank of Ireland* [1889][1]: "it has been part of the inherent jurisdiction, and never doubted, of every Court in Ireland to stay proceedings in an action before it, where a prior action has been brought substantially asserting the same rights against the same parties in the same or another Court, until the costs of that prior action have been paid." The case is analogous to, and is entirely covered by

(1) 59 L. J. P.C. 18, 20; 14 App. Cas. 413, 416.

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Cook v. *Hathway* [1869],[2] in which it was held that where a plaintiff, who had been ordered to pay the costs of a proceeding in the suit, became bankrupt, and the suit was revived by his assignee, the Court would stay proceedings until payment of the costs which the plaintiff had been ordered to pay. And the same principle is embodied in Order XXVI. rule 4. Here the liquidator can derive no advantage in applying to this Court. He might have continued the action in the Queen's Bench Division, unless he was afraid of the order for discovery made in that action. It is said that it would be a hard thing to deprive the liquidator of his chance of obtaining the 375*l.* from the applicant if he does not provide the 13*l.*; but if the creditors desire the liquidator to proceed, they ought, as was said by Vaughan Williams, J., in *London Metallurgical Co., In re; Parker, ex parte* [1895],[3] to provide an indemnity fund.

Secondly, further, the liquidator ought to be ordered to give security for costs. It is admitted that the only assets of the company are the claim against the applicant. *Powell & Sons, In re* [1896],[4] clearly establishes the principle that in cases where the Court would not order a liquidator to pay costs personally, the other party is entitled to come to the Court and ask for security for costs.

[He also referred on this point to *Palmer's Company Precedents*, vol. ii. (8th ed.), p. 618, Form 785, p. 749.]

Thirdly, as regards discovery, the company being in voluntary liquidation the liquidator is not an officer of the Court, and therefore the ordinary rules as to liquidators do not apply.

[*Martelli.*—The liquidator is willing to give the fullest discovery.]

Martelli, for the liquidator.

[WRIGHT, J.—You need not trouble as to the question of security for costs.]

The present case does not fall within the general rule as to the costs of abandoned proceedings being required to be paid before other proceedings for the same matter can be taken against the same person. Here the action was not commenced by the liquidator, and by reason of the liquidation the rights of other parties have intervened. The liquidator was therefore right in pursuing the statutory remedy given him by section 101 of the Companies Act, 1862. If the liquidator had proceeded with the action in the Queen's Bench Division, various defences would have been open to the applicant, of which he cannot now avail himself.

[He was stopped.]

WRIGHT, J.—I have already dealt with the application that the liquidator may be ordered to give security for costs, and have refused to order him to do so. As regards the application that he may be ordered to give discovery, I understand that he undertakes to produce and give the applicant inspection of all documents relating to the matters in question in the summons.

The application that the liquidator's proceedings by originating summons may be stayed must be refused, for I do not think that the case comes within the principle of the authorities cited on behalf of the applicant. There is nothing vexatious in the ordinary statutory proceedings which the liquidator is now taking. He was not bound to go on with the action commenced by the company, and he seems only to have been doing his duty when he discontinued that action. There is no analogy between this case and that of oppressive litigation or proceedings being continued by a person who succeeds to a plaintiff's interest as his representative. I must take it that the action was properly brought, but that it was rightly discontinued; and I cannot say that the liquidator's proceedings by way of originating summons ought to be stayed unless he pays the costs of an action which he did not bring himself. The effect of that would be to give the present applicant his full costs of the action instead of leaving him to prove for the amount in the liquidation. The case may no doubt be one of hardship, but it is a hardship which is caused by the liquidation and not by any fault of the liquidator. The 13*l.* costs in the action ought to be allowed to the applicant out

(2) 39 L. J. Ch. 99; L. R. 8 Eq. 612.
(3) 64 L. J. Ch. 442; [1895] 1 Ch. 756.
(4) 65 L. J. Ch. 454; [1896] 1 Ch. 681.

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of any moneys which the liquidator may recover against him. The costs of the present application will be the liquidator's costs in the originating summons.

[An application was then made for leave to appeal from this decision, but leave was refused, the amount in question being small.]

Solicitors—Harwood & Stephenson, for applicant; Poole & Robinson, for liquidator.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

LORD ALVERSTONE, C.J.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
1900.
Nov. 19.

LONDON GENERAL OMNIBUS CO. *v.* LAVELL.

Trade—Passing-off Goods—Probability of Deception—Evidence—View by Judge—Rules of Supreme Court, 1883, *Order L. rule* 4.

In an action to restrain the defendant from running omnibuses so got up as to be a colourable imitation of the plaintiffs' omnibuses, the plaintiffs offered no evidence of actual deception or probability of deception; but the Judge, having inspected the omnibuses, and come to the conclusion on their appearance that the defendant's omnibuses were calculated to deceive, granted an injunction:—Held, *on appeal, that a Judge is not entitled to place his impression derived from a view in the place of such evidence as should be given to support an action of deceit, and that the plaintiffs' case failed for want of evidence.*

A view under Order L. rule 4 *is not intended to take the place of evidence, but is merely to enable the tribunal to understand the questions raised, and to follow and apply the evidence.*

Appeal from Farwell, J.

In this action the plaintiff company claimed an injunction to restrain the defendants from using an omnibus, No. 4,057, or any other omnibus, having painted, stamped, printed, or written thereon any names, words, panels, or devices, painted, stamped, printed, written, or arranged thereon, in such manner as to form or be a colourable imitation of the words, panels, and devices painted, stamped, printed, written, or arranged on omnibuses of the plaintiffs, or so painted, lettered, decorated, contrived, and prepared as to represent or lead to the belief that such omnibus was an omnibus belonging to the plaintiffs.

The defendant in his defence alleged that the omnibus referred to and the defendant's other omnibuses had for upwards of ten years, without any objection from the plaintiffs, been running on the same route and in the same condition as to colouring, lettering, size, and shape, except that in 1895 the defendant caused four words on the panel of the omnibuses to be changed from "London General Post-Office" to "Liverpool Street Railway Station."

The omnibuses in question ran on the route from Hammersmith Broadway to Liverpool Street Railway Station, and were alleged to be got up to imitate the plaintiffs' omnibuses on the same route, and to lead to the belief that they were omnibuses belonging to the plaintiffs. They bore the name "Hammersmith" painted in large letters on a red ground on side panels. The defendant had never painted his name on the omnibus complained of, but his initials were on it.

At the trial of the action the plaintiffs did not offer any evidence that any one had been actually misled by the similarity of the defendant's to the plaintiffs' omnibuses.

Farwell, J., by the consent of the parties inspected the omnibuses, and having come to the conclusion on his view that the defendant's omnibus was calculated to deceive, he granted an injunction.

The defendant appealed.

Bramwell Davis, Q.C., and *Boome*, for the appellant.—The user of our omnibuses for a considerable period of time bars the plaintiffs' right to relief—*Fullwood* v. *Fullwood* [1878].[1]

Hughes, Q.C., and *T. L. Wilkinson*, for respondents.

(1) 47 L. J. Ch. 459; 9 Ch. D. 176.

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LONDON GENERAL OMNIBUS CO. *v.* LAVELL, App.

[LORD ALVERSTONE, C.J.—How can the plaintiffs succeed in an action of deceit without giving evidence of deceit?]

It is enough to shew that the defendant's omnibus is calculated to deceive. Evidence of people being actually deceived is not necessary. Farwell, J., having viewed the omnibus, came to the conclusion that it was calculated to deceive.

[LORD ALVERSTONE, C.J. — I never heard it suggested that after a view you could go on without further evidence.]

[VAUGHAN WILLIAMS, L.J., referred to the judgment of Thesiger, L.J., in *Mitchell* v. *Henry* [1880].[2]]

The resemblance between the panels of the omnibus cannot be accidental. Evidence of deception is not necessary, if the appearance is calculated to deceive—*North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* [1898].[3]

In the same case before the Court of Appeal[4] Rigby, L.J., says: "I do not think it is important to go fully into the evidence. The case does not require much evidence, and I must say that when the title was read out I at once thought that there must have been an amalgamation of two companies." In *Hecla Foundry Co.* v. *Walker, Hunter & Co.* [1889][5] Lord Herschell says: "It seems to me, therefore, that the eye must be the judge in such a case as this, and that the question must be determined by placing the designs side by side." When the Court can judge for itself of the similarity there is no necessity to call evidence. This Court will not overrule the decision of Farwell, J., acting as a jury, unless it was against reason and the weight of evidence. The defendant's intention to deceive is plain from the general get-up—*London General Omnibus Co.* v. *Fulton* [1896].[6]

No reply was called for.

LORD ALVERSTONE, C.J.—In my opinion this judgment for the plaintiff cannot stand. The action is for deceit upon the ground that the defendant has run an omnibus which is likely to divert passengers from the plaintiffs' omnibuses. The judgment proceeds on the theory that the plaintiffs are entitled to succeed on the simple proof of colour and design of their own omnibus, and on the learned Judge viewing the defendant's and the plaintiffs' omnibuses and comparing them together. In my opinion, that is not sufficient to justify the plaintiffs in obtaining either an injunction or damages in an action for deceit. We have no evidence before us as to what is the custom, practice, or habit of persons who are riders on omnibuses. We have no evidence before us as to what have come to be regarded as the leading features of omnibuses on this particular route. But we are asked to say that the learned Judge was right in coming to his conclusion because he thought that the two omnibuses so resembled one another that they might be mistaken; and that that is sufficient evidence to support a judgment in an action for deceit. I wish to say, in the first place, that I think if any such view were to prevail a very undesirable and erroneous practice might grow up with reference to the viewing or seeing the subject-matter of an action or anything involved in an action by learned Judges. It is quite true that by Order L. rule 4 it is provided that, "It shall be lawful for any Judge, by whom any cause or matter may be tried or heard with or without a jury, or before whom any cause or matter may be brought by way of appeal, to inspect any property or thing concerning which any question may arise therein." But I have never heard it said, and, speaking for myself I should be very sorry to endorse the idea, that a Judge is entitled to put the view, or an impression derived from the view, in the place of evidence. A view, as I have always understood it, is for the purpose of enabling the tribunal to understand the questions that were being raised, and to follow and to apply the evidence. Of course it is quite possible that there may be cases in which all the circumstances connected with the matter in dispute are of such common knowledge and are so well known to the tribunal that no evidence may be necessary—for instance, the common case of the make-up of an article which is going

(2) 15 Ch. D. 181, 196.
(3) 68 L. J. Ch. 74, 75; [1899] A.C. 83, 85.
(4) 67 L. J. Ch. 351, 355; [1898] 1 Ch. 539, 548.
(5) 59 L. J. P.C. 46, 48; 14 App. Cas. 550, 555.
(6) 12 Times L. R. 213.

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to be sold in shops; though in that case the Judge, if there were differences between the two articles so that he was not able to say that they were identical, ought not, I think, to act without evidence before him that the articles were so made as to be calculated to deceive people. I need scarcely say it is not necessary to shew actual deception, because a thing may be calculated to deceive, and the plaintiff may be justified in coming and stopping the practice before the actual deception has taken place.

This case seems to me a case of all others in which evidence should have been given of the character which I have indicated. It is not disputed, in fact it is proved upon the evidence, that the defendant's omnibus has been running upon the road for ten years in the same condition. Up to five years ago another omnibus of the defendant had upon it the words "London General Post-Office," as to which the plaintiff company were taking exception in the case of other persons. That was taken off, and the words "Liverpool Street" put on, and at or about the same time or subsequently the name "J. Lavell," which had been put in full on some of the defendant's omnibuses, was taken off. [His Lordship further considered the facts, and continued:] If the London General Omnibus Co. are going to base their action upon the contention that the alleged infringing omnibus is calculated to deceive, some evidence must be given to justify the Judge in coming to that conclusion beyond the mere view. It is said that in *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*[3] the Lord Chancellor said that he would not have required any evidence in that case. He, perhaps, in one respect went further, and said that the particular question could not have been put to witnesses because it was a question which the Judge had to try. But I am satisfied myself that the Lord Chancellor did not mean to lay down any general rule that no evidence that things were calculated to deceive was ever to be required. In that case evidence had been given, and the question turned merely on the comparison of two names which, one may say, speak for themselves. Here the Court is obliged to make itself acquainted with, or to make an assumption as to what are the habits of people travelling by omnibuses and other important matters for their consideration. In my opinion, it is quite impossible to say that that can be done by simply looking at the omnibuses—both of which have been running upon the same road for a good many years—and then coming to a conclusion without any evidence at all which would lead the Court to think that passengers might be misled by this alteration or this resemblance, or the other alteration or the other resemblance. I of course do not express my opinion as to what might have been the proper judgment to give if evidence such as I have indicated had been before the learned Judge. I think the evidence for the plaintiffs was wholly insufficient, and upon the evidence as it stood the action ought to have been dismissed. The appeal will be allowed and the action dismissed with costs.

RIGBY, L.J.—I entirely agree, and I certainly should not have been disposed to add a word but for the fact that we are differing from the learned Judge in the Court below. I think sufficient ground for our differing from him is to be found in the fact that he had no evidence before him that persons had in fact been deceived, and the omnibus having been running for some years exactly, as far as the evidence goes, in the same condition in which it is now, there ought, if substantial damage was done to the plaintiffs, to have been persons who had been deceived. I have come to the conclusion that such evidence cannot be found, and that is not very far from the conclusion that there is really no deception practised; in fact, looking to the front of the omnibus, I think no one would say that persons could be deceived reasonably. [His Lordship considered the resemblances and differences between the omnibuses, and continued:] As to the observations of the Lord Chief Justice in reference to the view, I can only say that I entirely agree in those observations. I consider in this case the fact that it has taken the plaintiffs ten years practically before they

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thought it worth while to bring this action, or that they had a sufficiently good case to have a probability of success, is a very important matter. I do not say that they are barred, but when you have not direct evidence to deal with, but only a conclusion to be arrived at by a consideration of the appearance of the two omnibuses, I think it is a very important consideration.

VAUGHAN WILLIAMS, L.J.—I entirely agree. These actions, which in their origin undoubtedly are actions of deceit, actions based upon an allegation of deceit by the defendants, have in course of time come to be treated very much as actions brought against defendants for having trenched upon the private rights of the plaintiffs. But, in whichever way you regard these actions, in my judgment the conclusion arrived at in this case cannot be justified, because in whichever way you regard this action there can be no doubt that if you do not prove deception of the public—using the word in the sense of the section of the public who use omnibuses or are interested in the matter—I say, if you do not prove actual deception, you must prove that there is a reasonable probability of deception, or, as it is sometimes expressed, you must prove that there is a resemblance which is calculated to deceive. In my judgment there is no proof of that which it was necessary here to allege and prove. It may very well be that in some cases you require no proof beyond the proof of the mere resemblance. The case of *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*[3] was an example of that sort, because what was there complained of was the taking of a similar name, and it is quite plain that in such a case the similarity is a similarity which would appeal to the ear, quite independently of the proof of surrounding circumstances or the proof of the experience of those who had come commercially in contact with the name. But that is not a case in any way resembling the present case. In the present case that which is complained of is really a want of difference of detail in two things which necessarily resemble each other to a large extent; in colour apparently they must resemble each other by the police regulations; in shape it is admitted that they are in the general shape, and there is nothing to complain of at all. Therefore the resemblance which is complained of is a want of difference in the details; and it is said, and necessarily said, in this case that there is such a want of difference in the details between these two omnibuses that those using the omnibuses are likely to be deceived. In such a case it is obviously possible to adduce evidence of those who have been in the habit of using the omnibuses and of those who have as officers either of the company or of the private omnibus proprietors, been in the habit of checking the user of the omnibuses and seeing the passengers as they get in and out of the omnibuses, and hearing complaints of deception and one thing and another. In such a case it is possible to give evidence, and the moment one gets a case in which it is possible to give evidence and in which such evidence would obviously be material and important, one draws the very strongest inference from the fact that no such evidence is called or tendered. In my judgment, this being a case in which the circumstances were such that it was possible to give evidence that the resemblance or want of difference was calculated to mislead—a case, indeed, in which it was perfectly impossible to form an accurate judgment unless there was some such evidence—I say in such a case it seems to me, with all deference to the learned Judge, that his conclusion cannot be supported merely upon the evidence of the secretary of the company and the painter of the omnibus, which was all that the plaintiffs offered.

Appeal allowed.

Solicitors—H. Clifford Turner & Co., for appellant; Hicks, Davis & Hunt, for respondents.

[*Reported by A. J. Spencer, Esq., Barrister-at-Law.*

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[IN THE COURT OF APPEAL.]

LORD ALVERSTONE, C.J.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
1900.
Nov. 5, 6.

BRITISH MOTOR SYNDICATE *v.* JOHN TAYLOR AND SONS.

Patent — Infringement — Infringing Articles Bought in England—Articles Sent Abroad for Sale There—"Exercise"—"Use"—"Put in practice"—Measure of Damages—Patents &c. Act, 1883 (46 & 47 *Vict. c.* 57), *Sched. I. Form D.*

The defendants purchased in England twenty-seven articles which had been made in infringement of the plaintiffs' patent. They sold seven of them and used another in England. The remaining nineteen they sent to their branch house in France, where the article was not patented, and sold them there to various foreign persons:—Held, *that there had been an infringement of the plaintiffs' patent in respect of all the twenty-seven articles, and that in estimating the damages the test was what the defendants would have had to pay for the permission to do that which they did wrongfully.*

Decision of STIRLING, J. (69 L. J. Ch. 377; [1900] 1 Ch. 577), *affirmed.*

Per LORD ALVERSTONE, C.J.—*It was not intended in* Minter *v.* Williams (5 L. J. K.B. 60; 4 Ad. & E. 251) *to lay down as a rule of law that the exposure for sale of a patented article by a person not having a licence from the owner of the patent could not be an infringement of the patent. If the decision could bear that construction it ought to be overruled.*

Per VAUGHAN WILLIAMS, L.J.—*It was intended in* Minter *v.* Williams *to lay down the above rule, and the case was wrongly decided.*

Per VAUGHAN WILLIAMS, L.J.—*Mere possession of a patented article need not necessarily constitute a user, but acquisition and possession of such an article for trade purposes constitute a user, whatever the nature of the article may be.*

Appeal from a decision of Stirling, J. (reported 69 L. J. Ch. 377; [1900] 1 Ch. 577).

The plaintiffs were the registered proprietors of a patent for an apparatus for starting gas-motors. The patent was in the Form D in the First Schedule to the Patents &c. Act, 1883. The plaintiffs brought this action for infringement on November 15, 1897.

On April 4, 1898, a judgment was taken by consent for an injunction and delivery up of the infringing articles, and for the following enquiry: "What damages have been sustained by the plaintiffs by reason of the defendants' infringement of the letters patent."

The facts were shortly as follows: In May, 1897, the plaintiffs had recovered judgment against a firm of Richter & Green, who had manufactured starters which were an infringement of the plaintiffs' patent, but they had been unable to obtain any damages from them. The defendants had prior to May, 1897, bought from Richter & Green in England twenty-seven infringing articles not knowing that they were infringements of the plaintiffs' patent. They had sold seven of them, and used another in England; and they had sent abroad to their French house in Paris the remaining nineteen, where they sold them to various foreign firms, but it did not appear when that was done.

The Master assessed the damages on the basis that the defendants had infringed in respect of twenty-seven articles, and put them at 10*l.* for each article. The defendants did not dispute that they had infringed the patent as regards the eight articles sold and used in England, but they contended that they had infringed as regards those articles only, and that the amount of the damages ought to be 3*l.* for each article. They took out a summons to vary the Master's certificate.

Stirling, J., was of opinion that the defendants had made use of the patented invention as regards the articles sent abroad, and they were consequently liable for infringement in respect of all the twenty-seven articles; and he assessed the damages at 5*l.* for each article.

The defendants appealed.

Bousfield, Q.C., Hume-Williams, Q.C., and *Lainé*, for the appellants.—Even if there was any user of the patented article by the appellants, there has been no damage to the respondents. The basis of

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a claim of this sort is damage. If we had chosen to destroy the articles there would have been no damage. By sending to Paris we did no injury to the plaintiffs, as the article is not patented abroad. If we had bought these articles from a licensee the profit to the respondents would have been 3*l.* only. The real question is, what have they suffered by our act?—*United Horse Shoe and Nail Co.* v. *Stewart & Co.* [1888].[1] Stirling, J., assessed the damage on a wrong footing.

But, further, we say we did not infringe the patent at all. The prohibition is against "making use of or putting in practice." The appellants did none of these things. "Buying" is not forbidden. All that was done was to buy and transport the articles abroad. That is not an infringement—*United Telephone Co.* v. *London and Globe Telephone and Maintenance Co.* [1884][2] and *Minter* v. *Williams* [1835].[3] The words "make, use, exercise, and vend" do not cover what was done here. "Using" means using the patented article for the purpose for which it was intended—*Badische Anilin- und Soda-Fabrik* v. *Basle Chemical Works, Bindschedler* [1897],[4] *Nobel's Explosives Co.* v. *Jones, Scott & Co.* [1881],[5] and *Holmes* v. *London and North-Western Railway* [1852].[6]

Moulton, Q.C., and *A. J. Walter*, for the respondents.—To purchase for purposes of sale is an infringement of the patent. To send articles abroad is an infringement. *Minter* v. *Williams*[3] was a decision on a point of pleading only.

[They were stopped upon this point.]

The point of time at which the measure of damages must be ascertained is when the infringing articles are in the store. On the evidence the Judge came to a wrong conclusion when he assessed the amount of damages for each article at only 5*l.*, and thus reduced the amount fixed by the Master by one-half.

Hume-Williams, Q.C., in reply.—The fallacy in this case is in assuming that there has been any exposure for sale. There is no reported case which shews that mere possession with no exposure for sale entitles the patentee to damages for infringement. In *United Telephone Co.* v. *London and Globe Telephone Co.*,[2] Bacon, V.C., granted an injunction, it is true, but no harm could have been caused thereby.

[VAUGHAN WILLIAMS, L.J., referred to *Penn* v. *Jack* [1867].[7]]

Oxley v. *Holden* [1860][8] is in favour of the appellants.

LORD ALVERSTONE, C.J.—A number of questions have been raised in this appeal which may require very careful consideration in any case in which the facts before the Court enable them to be raised; but I am of opinion that we cannot reverse the finding of Mr. Justice Stirling upon either point. [His Lordship referred to the facts, and continued:] I think if any distinction were going to be drawn with regard to the measure of damages, as apart from the question of infringement, between the nineteen articles sent abroad and the eight sold in England, the materials ought to have been brought before the Court; and it has been candidly stated by counsel for the appellants that no such distinction was sought to be drawn in the Court below. We have been pressed to say that we ought to act on the view that the nineteen articles were sent abroad in the ordinary course of business long before any complaint was made against the defendants. I do not think that we ought to draw that conclusion for the purpose of interfering with the judgment of Mr. Justice Stirling, the point not having been raised before him. Moreover, in the judgment to which the defendants assented upon April 4, 1898, they assented to an order that the defendants should forthwith deliver up to the plaintiffs all infringing articles, and that an enquiry as to damages should take place. Mr. Justice Stirling most certainly did not come to the conclusion that the defendants had parted

(1) 13 App. Cas. 401.
(2) 53 L. J. Ch. 1158; 26 Ch. D. 766.
(3) 5 L. J. K.B. 60; 4 Ad. & E. 251.
(4) 67 L. J. Ch. 141; [1898] A.C. 200.
(5) 50 L. J. Ch. 582; 17 Ch. D. 721. Affirmed, [1882] 52 L. J. Ch. 339; 8 App. Cas. 5.
(6) 22 L. J. C.P. 57; Macrory's Pat. Cas. 4, 13, 22.
(7) 37 L. J. Ch. 136; L. R. 5 Eq. 81.
(8) 30 L. J. C.P. 68. 8 C B. (N.S.) 666.

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with the articles before any proceedings were taken. [His Lordship referred to the judgment, observing that the order was for delivery up, not destruction.[9]]

On the facts two important questions arise: First, whether with regard to the nineteen articles there was any evidence of infringement; and secondly, what should be the measure of damages in respect of either the whole twenty-seven or part of the twenty-seven. I will take the case of infringement first. I wish to state it as clearly as I can. I am clearly of opinion that there was evidence of infringement with respect to the whole twenty-seven articles. The facts are that the defendants bought the whole twenty-seven with a view of realising them, and did sell or use eight of them in this country. I come to the conclusion that they bought the whole twenty-seven for the purposes of sale here if opportunity arose; and I consider that there is no decision, certainly no principle, upon which we ought to hold that the fact that they disposed of part of the articles by sale to customers abroad, not knowing the circumstances at all in which they were sold beyond that they were sent out to their agents, enables us to say that there is no infringement with regard to the nineteen. Under the patent the patentee has the sole right of making, using, exercising, and vending the invention; and the patent further provides that the patentee shall have and enjoy the full benefit of the invention, and all subjects are enjoined during the fourteen years from either directly or indirectly making use of or putting in practice the invention, or any part of the same, or from imitating the same. It is said that it was decided in *Minter* v. *Williams*[3] that exposure for sale was not infringement in itself; but, in my opinion, that case has never been considered to be an authority for such a proposition; and I think it is quite plain that the learned Judges who decided it did not mean to lay down any such proposition. Not only was it a case of a pure pleading point, but, in addition, Mr. Justice Coleridge points out that it did not appear from the demurrer that the exposure for sale was necessarily injurious to the patentee; "it may on the contrary," he says, "be very beneficial; it is not therefore necessarily the vending, which is exclusively granted to him." Those who are acquainted with the old system of pleading will remember that on demurrer anything could be assumed consistent with the allegations in the pleadings for the purpose of dealing with the point. Any construction might be put upon the pleadings that they could bear. To my mind, the decision was solely a decision against the plaintiffs' departing from the well-known form of count, which charged as a breach the making, using, exercising, or vending, in the words of the patent, by adding a fourth count, using the words only "expose to sale." It was certainly never intended in that case to lay down any rule of law that exposure for sale might not be an infringement. When that case was cited in *Oxley* v. *Holden*[8] Mr. Justice Byles said, referring to the case before the Court, "The jury found that they were manufactured for sale, and that the defendant endeavoured to sell them: and I told them, that, that being so, there had been a user of the patent." It is true, as was pointed out, that in that case the defendant had manufactured. In my opinion, that can, on principle, make no difference. A person who buys an article which is manufactured by an infringer gets possession of it, and thereby is able to use it for the purposes for which it was intended that the patentee alone should use it during the fourteen years, and I am quite satisfied that it makes no difference whether he has manufactured it himself or whether he has purchased it from some person as a ready-made article. I think that the practice for years has been in accordance with this view. Any other view would be inconsistent with the case of *United Telephone Co.* v. *London and Globe Telephone Co.*,[2] because there could be no injunction unless the Court was of opinion that there had been an infringement. In *United Telephone Co.* v. *Sharples* [1885],[10] before Mr. Justice Kay, who was a Judge of great experience in these matters, the whole point argued was whether the

(9) 69 L. J. Ch. 380; [1900] 1 Ch. 582.

(10) 54 L. J. Ch. 633; 29 Ch. D. 164.

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possession for experimental purposes of articles imported from abroad was an infringement of a patent, and it was held that it was. I may perhaps be permitted to say that in all my experience I have never heard the point raised here suggested, and I have never heard *Minter* v. *Williams*[3] cited as an authority for the proposition put forward. There must have been scores of cases in which the point could have been raised if it had been so regarded, and I should not hesitate to overrule *Minter* v. *Williams*[3] if the decision there bore the construction which has been attempted to be put upon it. I therefore hold that there was clear evidence of infringement in this case with regard to the whole of the twenty-seven articles.

I expressly abstain from saying anything with regard to the point which was reserved by Lord Herschell in *Badische Anilin- und Soda-Fabrik* v. *Basle Chemical Works*,[4] because, in my opinion, the question of whether there is infringement by transporting from place to place depends entirely upon the nature of the invention, which is protected by the letters patent; and, speaking for myself, I should equally wish to reserve consideration of that point. There may be transportation which would be no infringement, and there may be transportation, as in *Neilson* v. *Betts* [1871],[11] which undoubtedly would involve infringement.

I now come to what is, to my mind, the more difficult question, whether the learned Judge was right in assessing the sum of 5*l.* each in respect of the whole of these articles. I do not think it is open to the defendants in this Court to raise the point that they ought not to pay damages because judgment has been recovered against Messrs. Richter & Green in respect of the twenty-seven articles. I think that might be a most substantial defence under certain circumstances, as was pointed out by Vice-Chancellor Wood in *Penn* v. *Jack*.[7] If it had turned out that the plaintiffs had received what was equivalent to a royalty upon these twenty-seven articles, I think very different questions might have arisen. That point, however, is not before us. For the same reason, I do not think it is open to the defendants to raise any question that the nineteen articles were sent abroad before action, and that, therefore, there was no infringement in respect to them. I think that when once it is decided that the purchase and possession of the articles with the view of sale are sufficient to constitute user of the invention amounting to infringement, as I think they do, then the defendants have not put themselves in a position to raise any question with regard to *quantum* of damages. The only remaining question, therefore, is whether or not there were materials before the learned Judge upon which he could assess the sum of 5*l.*

I desire to say that I do not wish to be thought to support the view which was referred to by Vice-Chancellor Wood in *Penn* v. *Jack*,[7] that persons may be punished because they were infringers beyond the amount of damages which the plaintiff has really sustained. I do not think that principle has ever been acted upon, and I do not think it would be good law. I adopt entirely the language of the late Lord Chief Justice and of Lord Justice Collins, in *Pneumatic Tyre Co.* v. *Puncture-Proof Pneumatic Tyre Co.* [1899],[12] which was cited in the judgment of Mr. Justice Stirling. The Lord Chief Justice said, "the measure of damage may in such cases be the cost of the license. It may be; but I think, upon an examination of all these cases, it will be found that underlying the measure of damage there is the assumption that, if it had not been that the particular defendant manufactured the particular things, then that those particular things would have been manufactured by the plaintiff or his licensees." And Lord Justice Collins said, "They (the plaintiffs) have to shew, therefore, that they have sustained pecuniary loss, and, as far as the nature of the case may permit, the amount of that loss." I take the same view of the facts that Mr. Justice Stirling has adopted, and therefore I need say no more about them. I think it is shewn that, although to manufacturers who

(11) 40 L. J. Ch. 317; L. R. 5 H.L. 1.

(12) 16 Rep. Pat. Cas. 209.

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guaranteed to construct a minimum quantity the plaintiffs charged a royalty of 3*l.*, in other cases they used to get larger amounts varying according to the size of the engine, and the extent to which persons who paid were going to use the patented apparatus. The defendants are not persons in the position of manufacturers coming to take a licence upon those terms. They may or may not be in the position of persons who would have had to pay the larger amount. That we do not know; but when once we get beyond the 3*l.*, the question is one for the learned Judge. I see no materials upon which we can properly come to the conclusion that the learned Judge, adopting, as in my opinion he has rightly adopted, the test of what the defendants would have had to pay for the permission to do that which they wrongfully did, was wrong in assessing the figure at 5*l.* For these reasons—and I am particularly desirous that it should not be thought that we are deciding anything more than we have actually decided—I am of opinion that this appeal should be dismissed.

Rigby, L.J.—I am of the same opinion, and for the same reasons, which I do not propose to repeat in any way. All that I wish to say is this: The case of *United Horse Shoe and Nail Co.* v. *Stewart & Co.*[1] was cited as though the House of Lords had at any rate given colour to the view, even if they had not decided it, that only articles sold were to be considered for the purpose of assessing damages. The House of Lords did not and could not entertain that question, for the pursuers could not and did not open it. They, for reasons which may have been good or may have been bad, only sued in respect of the articles sold, and therefore in the House of Lords it would have been quite impossible for any one to suggest that they ought to be paid damages in respect of the articles not sold.

Vaughan Williams, L.J.—I agree. I do not think that this case is an entirely satisfactory case. I have no doubt that one ought when one is hearing a case to apply all those rules which have been laid down for the purpose of giving finality to litigation, but, speaking for myself, I never decide a case with so much satisfaction when I decide it upon the ground that this or that substantial and relevant question which has been argued before us cannot and ought not to be dealt with because the point was not taken in the Court of first instance. I cannot help feeling myself to a very great extent that that is what we are doing to-day.

With regard to *Minter* v. *Williams*,[2] I think myself that that case was wrongly decided. We are not bound by it here, and it is our duty, if we think it was wrong, not to follow it. Speaking for myself, I have no doubt whatever that the Court of Queen's Bench did decide, and intended to decide, the very point for which it was used as an authority here. It is said that what they decided was a mere pleading point, but, generally, if it was desired to get an abstract question decided in a clear and decisive manner, a demurrer to the old-fashioned common-law declaration was the best way of obtaining it. The declaration in *Minter* v. *Williams*[2] employed all the words "use, vend, and put in practice," and when Mr. John Evans argued the case, the breach having been alleged as an "exposing to sale," he first argued that "exposing to sale" came within the term "vend"; and he said that, if it did not, it came within the term "use." To my mind, both Mr. Justice Patteson and Mr. Justice Coleridge intended to say that the exposure for sale was neither vending nor using; but I quite agree with the other members of the Court that that was not a satisfactory conclusion.

I wish to say that I am not satisfied that mere possession of every patented article does constitute a user within the meaning of the words in the letters patent. That must depend upon the nature of the article. It may amount to a user, and it may not; but what is put forward here is that there was not a mere user, but that there was acquisition and possession of these articles for trade purposes with the intention of using them in trade. In my judgment, such an acquisition and such a possession of an article, whatever its nature may be, is a user. I agree, therefore, with Mr. Justice

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Stirling that there was a clear user in this case.

With regard to the question whether any advantage can be taken by the defendants of the fact that a judgment has been obtained against the manufacturers who did the original wrong, and as to whether people who have bought from them are to be treated as buying from licensees, I wish to say nothing, because the question has not been raised here.

There still remains the question, What is the measure of damages in the case of a user of the kind that we have here? We have got a user for trade purposes, as is evidenced by the admitted fact that the defendants did sell articles—it is true they sold them out of the country, but they did sell the articles which they had possessed in this country. Are we in such a case to assume that the measure of damages is necessarily the amount that the plaintiffs, the patent owners, ordinarily charged for a licence to vend or use their invention? I do not agree myself with the proposition that that necessarily is the measure of damages. It undoubtedly is the measure of damages if there has been a sale within the area covered by the patent, but whether or not it is the proper measure of damages in every case of an infringement by user is a question that I should, if I had to decide it, wish to consider further; because I have no doubt myself that, whatever the measure used is, what has to be measured is the actual damage sustained by the plaintiffs whose patent has been infringed. But I do not think that it is open to us to consider this matter, because at the time of the trial all the twenty-seven articles which were purchased by the defendants from the manufacturers, who were the infringers, were dealt with upon the same basis, no distinction being drawn between the articles which had been sold in this country and those which had been sold abroad.

In my judgment, if there is a user of the nature which has been proved here, coupled with a sale in England, the measure of damages applied by Mr. Justice Stirling was the right one—that is to say, the measure of the ordinary charge by the patentees for a licence for such a vending or user.

With regard to what the Lord Chief Justice has said about the amount—5*l.*—I entirely agree that we cannot go into that question. It is a question for the learned Judge who tried the case.

Appeal dismissed.

Solicitors—Everett & Hodgkinson, agents for Parker Woodward, Nottingham, for appellants; Norris, Allens & Chapman, for respondents.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

FARWELL, J. 1900. Nov. 7, 9. } POPE, *In re*; SHARP *v.* MARSHALL.

Will—Discretionary Trust for Benefit of Person for Life—"Accumulation" of Surplus Rents—Devolution—Income or Capital of Residuary Estate—Accumulations Act, 1800 (39 & 40 *Geo.* 3. *c.* 98).

Where a testator, who died in 1865, *gave certain freehold houses to his trustees upon trust to receive the rents, and after making certain payments thereout to apply the residue at their discretion for the benefit of his daughter for her life, and after her decease to stand seised of the premises with any surplus or accumulation of rents that might not be applied for the benefit of his daughter in trust for her children with limitations over in default of children, and he also gave his residuary real and personal estate to his trustees upon trust for, amongst other persons, his daughter for life, and after her decease upon trust for other persons, it was held that by reason of the Accumulations Act*, 1800, *the surplus rents after the expiration of twenty-one years from the testator's death formed part of the capital of the testator's residuary estate, and must be invested, and that the income only of such investment was payable to the tenants for life.*

To direct the accruing income of a fund to be invested and the income of the invest-

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ment to be paid to a tenant for life is not to direct an accumulation.

Crawley *v.* Crawley (4 L. J. Ch. 265; 7 Sim. 427) *and* O'Neill *v.* Lucas (2 Keen, 313) *followed.* Phillips, *In re*; Phillips *v.* Levy (49 L. J. Ch. 198), *commented on and not followed.*

The testator, Roof Pope, who died on November 8, 1865, by his will dated August 21, 1865, gave to his trustees certain freehold houses upon trust to receive the rents and profits, and after making certain payments thereout to apply the residue or such part thereof in such manner and in such sums and at such times as his trustees should in their absolute discretion think proper, unto or for the benefit of his daughter Frances Pope for her life, and after her decease to stand seised of the premises and any surplus or accumulation of rents that might not be paid to or applied for the benefit of his daughter upon certain trusts for her children who should attain the age of twenty-one years, and if she should leave no child who should attain that age he gave the same premises to his trustees upon trust for his daughter Florence Pope for her life, and after her decease upon trust for her children who should attain the age of twenty-one years.

He gave all the residue of his real and personal estate to his trustees upon trust to convert into money such part thereof as should not consist of houses or lands, and to invest the proceeds and to pay the rents, profits, interest, dividends, and income thereof to his three daughters, Frances, Elizabeth, and Florence in equal shares during the life of each of them, and after the decease of any or either of them upon trust to stand possessed of the share of any such daughter upon trust for their or her children who should attain the age of twenty-one years; but so that the child or children of such daughter should take only the parent's share. The will contained cross executory trusts of both the original and accrued shares in favour of the respective daughters and their children.

The testator's widow, Sarah Pope, died on December 27, 1891. The testator's daughter Frances was of weak intellect, and from the testator's death in 1865 down to her death on June 13, 1900, the trustees made an allowance for her maintenance out of the rents of the freehold houses, and accumulated the surplus rents, which now amounted to about 2,700*l.* Frances died intestate and unmarried. Elizabeth died in 1871, and Florence died in 1886. They had both married and each left children, some of whom were defendants. Another daughter of the testator predeceased him and left one child only, who was also a defendant.

Various claims having been made to the accumulations, this originating summons was taken out by the trustees of the will for the determination of the following questions:

(1) Whether the sum of 2,700*l.* or thereabouts in the hands of the plaintiffs as trustees of the will, and being accumulations of rents and profits of the properties devised by the will for the benefit of Frances Pope (then deceased), which had not been applied for her benefit, devolved in the same way as the premises were directed by the will to devolve after the death of Frances Pope; or

(2) Whether or not the sum of 2,700*l.* or thereabouts formed part of the testator's residuary estate; or

(3) Whether or not the sum of 2,700*l.* or thereabouts was undisposed of by the testator and devolved on his next-of-kin.

(4) Whether or not the sum of 2,700*l.* or thereabouts formed part of the estate of Frances Pope deceased.

After hearing counsel on behalf of the different parties interested, Farwell, J., held that the trust for accumulation was void after the expiration of twenty-one years from the testator's death, and that the surplus rents and profits as from 1886 formed part of the testator's residuary estate. His Lordship then allowed the summons to be amended by asking the further question whether in the event of the Court being of opinion that the sum of 2,700*l.* or thereabouts formed part of the testator's residuary estate the whole or any and, if so, what part thereof ought to be treated as income, and so belonged to the tenants for life of such residuary estate, or whether the whole or any and, if so, what part thereof

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ought to be treated as forming part of the capital of such residuary estate.

This question was then argued, and is the only one that calls for a detailed report.

Hatfield Green, for the trustees.

Butcher, *Q.C.*, and *Kimber*, for the persons entitled to the residue in remainder.—The surplus rents ought since 1886 to have been invested from time to time by the trustees, and the income only of such investments paid to the tenant for life of the residuary estate. When once the surplus income gets into the residue there is no accumulation—*Crawley* v. *Crawley* [1835][1] and *O'Neill* v. *Lucas* [1838].[2]

These cases are referred to with approval in all the text-books, and the only doubt as to their correctness is occasioned by a decision of Malins, V.C., in *Phillips, In re; Phillips* v. *Levy* [1880].[3] That case, however, has been practically disregarded by the profession. It is not referred to in *Jarman on Wills* (5th ed.) or *Lewin on the Law of Trusts* (10th ed.); whereas *Crawley* v. *Crawley*[1] is considered in both those works as good law. In *Hargrave on the Thellusson Act* (1842), 168, 174, there is a similar statement of the law. The point did not necessarily arise for decision in *Phillips, In re*.[3] That case, consequently, even if it be good law, is distinguishable. If it is wrong the Court ought to follow the earlier authorities.

No question could have arisen if the interest given had been simply an estate *pur autre vie*. It cannot make any difference in principle that the surplus rents are a sum of money varying from time to time in amount. It was the duty of the trustees to convert and invest the proceeds and to stand possessed of the investments in trust for the tenants for life and the persons entitled in remainder. The Accumulations Act, 1800 (known as the Thellusson Act), has never been held to apply to a disposition like the present one. The mischief against which the Act was directed was accumulation in the sense of rolling a fund up by way of compound interest.

Cassel, for the next-of-kin of Frances Pope.—In the last edition of *Theobald on the Law of Wills* (5th ed.) the earlier statement of the law is altered so as to accord with the decision in *Phillips, In re*,[3] which is the latest authority in point of date. The testator has expressly excepted the lands and houses from the trust for conversion, his intention being that the tenants for life should have the rents of the houses, and the accumulations may fairly be regarded as coming within the exception. This is analogous to the case of a contingent legacy, and the principle of *Allhusen* v. *Whittell* [1867][4] applies. *Chesterfield's (Earl) Trusts, In re* [1883],[5] has no application.

Jenkins, *Q.C.*, and *M. L. Romer*, and *Capron*, who appeared for other defendants, took no part in the argument on this point.

FARWELL, J.—This summons is to be treated as amended by raising the further question suggested, which, if it had not been for authority, I should have thought was really unarguable. The testator devises two freehold houses specifically, and he directs the income of these two houses to go to the extent to which the trustees should think fit for the maintenance of a daughter of unsound mind, with an accumulation of the residue. I have already held that the accumulation of that residue is bad beyond twenty-one years. From that period the surplus rents fall into residue. The question now raised is whether, inasmuch as the residuary property of the testator is given to trustees upon trust to convert all excepting lands and houses, and to invest and pay the income to the tenant for life with remainders over, the surplus income which is so let loose and falls into the residue by reason of the Accumulations Act, 1800, is to be paid to the tenant for life of the residue as income or is to be invested by the trustees and the income only to be paid to the tenant for life. In my opinion it is reasonably clear that the

(1) 4 L. J. Ch. 265; 7 Sim. 427.
(2) 2 Keen, 313.
(3) 49 L. J. Ch. 198.
(4) 36 L. J. Ch. 929; L. R. 4 Eq. 295.
(5) 52 L. J. Ch. 958; 24 Ch. D. 643.

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tenant for life under this will gets the income only. I cannot adopt the suggestion of counsel for the next-of-kin that lands and houses include these surplus rents let loose after the twenty-one years by reason of the Accumulations Act. It is much the same as an estate *pur autre vie* that is given to the trustees on trust to convert. They have not in fact converted it, but they have received and retained the whole of the rents down to the present time since 1886, when the twenty-one years expired.

So far as the authorities go, it has been held by the Vice-Chancellor Shadwell in *Crawley* v. *Crawley*,[1] and by Lord Langdale in *O'Neill* v. *Lucas*,[2] that the income so let loose does not under circumstances such as the present, where the residue is given to the tenant for life with remainders over, belong entirely to the tenant for life, but that it is a portion of the *corpus* of the residue, and it is to be treated as such by way of investment. All the text-books, so far as my attention has been called to them, down to the last edition of *Theobald on the Law of Wills*, treat those cases as settling the law, but counsel for the next-of-kin has referred me to a decision of Vice-Chancellor Malins which happens to be last in point of date —*Phillips*, *In re*[3]—where he decided exactly the contrary. The headnote of that case is as follows: "Where the income of a particular fund is directed by a testator to be accumulated for more than 21 years from his death, and the residue of the personal estate is given to A for life, with remainder over, the income of the particular fund, and of the accumulations, forms, after the 21 years, part of the income of the tenant for life, and does not fall into the capital of the residue." I have, therefore, a clear decision of Vice-Chancellor Malins on this particular point directly in the teeth of the two earlier authorities; but counsel for the residuary legatees has pointed out, and I think rightly, that there were two questions in that case, and that the second question, to which the headnote was directed, was not really necessary to the decision of the case because the point never arose. As far as I can see, it appears to me that there never was such a fund, but I am bound to deal with the decision as I find it, and if it stood by itself I should possibly feel bound to follow it, although it is not actually binding on me technically. But when I find that the Vice-Chancellor is in fact overruling *Crawley* v. *Crawley*,[1] and the case before Lord Langdale—*O'Neill* v. *Lucas*[2]—which was not cited to him, and when the reason he gives for overruling it is that he does not understand that it decides this particular point; when to my mind, with all respect, it seems to be the very point decided in *Crawley* v. *Crawley*,[1]—I feel at liberty to consider the judgment, and to see whether the reason given is one which satisfies my mind, because in the state of the authorities I feel that I am entitled to form my own judgment. Now the reason given by the Vice-Chancellor is this: "To say—as Mr. Wood" (who argued the case) "does—that, although you cannot go on accumulating beyond the 21 years, you may, after that period, go on investing; and that the widow is only to have the interest of the investment, is what I cannot agree to. To go on investing the income (after the 21 years) is, to all intents and purposes, to go on accumulating; but the Thellusson Act says that the accumulations shall stop at the end of the 21 years. To my mind, the accumulations necessarily stop at the end of 21 years. They then fall into residue." Apparently, so far as I am able to follow it, that means that you accumulate within the meaning of the Accumulations Act, 1880, although you do not direct the income as it is received to be invested and accumulated. But if you direct the income to be invested, and the income of those investments to be paid to a tenant for life, you do not accumulate. The preamble of the Act is as follows: "Whereas it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained." Then it goes on to enact that no person shall by any deed or will (reading it shortly) "settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or

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produce thereof, shall be wholly or partially accumulated for any longer term," and so on. Now, I have referred to Dr. Murray's great dictionary, under the head "Accumulation," and I think that the definition of that word accords with my own view of its meaning. The second definition is, "the action or process of growing into a heap, or large amount. The growth of a sum of money by the continuous addition of the interest to the principal." If that is the true definition (and it appears to me to be so) I really do not understand what the Vice-Chancellor meant by saying that investing and paying the income to a tenant for life and not accumulating it is accumulating within the meaning of the Thellusson Act. With every respect to the memory of the late Vice-Chancellor, I am wholly unable to follow that case; but I shall follow the two earlier authorities, which I think are sound.

I think the better plan will be—I understand there will be no difficulty—to ascertain the sums that from year to year were actually retained by the trustees as not required for the daughter of unsound mind, and the investments in which they were put, so as to get the actual income which the tenant for life would have been entitled to receive if this decision had been given in 1886, and then the net result will be that her next-of-kin will get that sum. I do not think I can give compound interest, or any interest.

Solicitors—Trinder, Capron & Co., for all parties.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

FARWELL, J. 1900. Oct. 25, 26, 30.

HUNT *v.* LUCK AND OTHERS.

Vendor and Purchaser — Mortgage — Property in Occupation of Weekly Tenants —Enquiry of Tenants—Rents Paid to House Agent — Landlord's Title — Constructive Notice.

A tenant's occupation of property sold or mortgaged is notice to the purchaser or mortgagee of all that tenant's rights, but not of his lessor's title or rights. Actual knowledge, however, on the part of the purchaser or mortgagee that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor or mortgagor, is notice of such person's rights.

The mere fact that the rents of property let to weekly or yearly tenants are known to be paid to a house agent is not so inconsistent with an apparently good paper title to the property in the vendor or mortgagor as to put the purchaser or mortgagee on enquiry, or fix him with notice of the rights of the person for whom the agent collects the rents.

Bailey *v.* Richardson (9 Hare, 734) *and* Barnhart *v.* Greenshields (9 Moore, P.C. 18) *followed.* Mumford *v.* Stohwasser (43 L. J. Ch. 694; L. R. 18 Eq. 556) *not followed.*

Trial of action with witnesses.

In this action the question arose whether mortgagees were to be deemed to have had constructive notice of the rights of the person from whom the tenants in occupation of the mortgaged property held.

The material facts were as follows:

The defendants Sayer, Slater, and Hodgson were mortgagees of certain houses and lands at Wimbledon, conveyed to them in fee-simple by William Mercer Gilbert, the mortgagor, by way of mortgage for securing the principal sums advanced. The negotiations for the mortgage were conducted at Hastings, where Gilbert was carrying on business as an auctioneer and estate agent. He furnished the defendant mortgagees with an abstract disclosing an apparently good title in him to the property under an

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indenture of conveyance on sale dated October 10, 1896, from Alfred Hunt, a former owner in fee. This deed contained an acknowledgment by Hunt of the receipt of the purchase-money, which was stated to be 12,000*l.* The abstract also disclosed that part of the property comprised in this deed had been conveyed by Hunt to Gilbert by a deed of gift of March 31, 1896. The defendant mortgagees, who were trustees, employed a valuer named Woodhams to inspect and value the property, which consisted of twenty-seven houses, twenty-five of them being in the occupation of weekly tenants, and the remaining two in the occupation of yearly tenants. It appeared that when Woodhams visited the property, he enquired of the tenants to whom they paid their rents, and on being informed that they paid them to Woodrow, a well-known local estate agent, he pursued the enquiry no further. It also appeared from the evidence in this action that the tenants did not even know that Hunt was their landlord. The requisitions on title were answered to the satisfaction of the defendant mortgagees, who then advanced their money, and on the execution of the mortgages the title-deeds were handed over to them by the Hastings branch of Lloyd's Banking Co., with whom Gilbert had previously deposited them as security for a loan.

As a matter of fact, if the defendant mortgagees had pursued their enquiries, they would have found that the rents were being collected by Woodrow as agent for Hunt, and that notwithstanding the conveyance of October 10, 1896, Hunt had never relinquished possession of the property, but had continued to receive the rents through his agent, and that Gilbert was not in reality beneficially entitled to the property.

Hunt died on June 10, 1898, having devised all the residue of his property on trust for his wife, the plaintiff, for her life. Hunt had received the rents of the property down to his death, and since then they had been received by the plaintiff, to whom letters of administration with the will annexed had been granted.

Gilbert died on September 6, 1898, and the defendant, Fannie Luck, was his executrix and residuary legatee and devisee. Gilbert's estate was insolvent.

Subsequently, the plaintiff commenced this action against the defendants for the delivery up and cancellation of the deeds of March 31, 1896, and October 10, 1896, on the ground that they were either forgeries or executed by Hunt when incapable of transacting business through mental infirmity, and that such execution and the subsequent possession of the title-deeds were procured by the misrepresentation of Gilbert when arranging the terms upon which he was to act as Hunt's agent in managing this property. She further alleged that the defendant mortgagees were guilty of negligence in omitting to make the proper searches and enquiries of the tenants, and consequently had constructive notice of the defect in Gilbert's title. It was also alleged by the plaintiff that the consideration of 12,000*l.* in the deed of October 10, 1896, was altogether illusory, and that in fact no money whatever had been paid by Gilbert in respect of the alleged purchase-price. At the trial, however, it was not proved whether any money had passed or not, and the question of constructive notice was argued on the assumption that further enquiries of Woodrow on the part of the defendant mortgagees would have disclosed Gilbert's alleged fraud and the defect in his title to the beneficial interest in the property.

The defendant Fannie Luck was not represented by counsel at the trial.

Upjohn, Q.C., and *W. F. Webster*, for the plaintiff.—The mortgagees having had notice that the rents were being paid to Woodrow, were bound to ask him to whom he accounted for the rents so received. Not having done so, they are affected with constructive notice of Hunt's rights.

[FARWELL, J.—The Court refused to extend the doctrine of constructive notice so far as that in *White* v. *Wakefield* [1835].[1]]

There is no evidence that the 12,000*l.* was paid; and unless the plaintiff can fix the mortgagees with notice, directly or indirectly, that Hunt was still receiving the rents, it is agreed that they will be

(1) 4 L. J. Ch. 195; 7 Sim. 401.

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entitled to rely upon the receipt for the purchase-money in the deed—*Lloyd's Bank* v. *Bullock* [1896].[2] It is necessary, therefore, to bring the case within section 3 of the Conveyancing and Law of Property Act, 1882. Now the mortgagees had notice indirectly that Hunt was still receiving the rents, for notice that a person is in possession of property is notice of the title under which that person claims—*Holmes* v. *Powell* [1856][3]; and that notice is not limited to the rights of the terre-tenant, but it extends also to the rights of the person who is known to receive the rents from the occupier of the land—*Knight* v. *Bowyer* [1858],[4] which is exactly in point. There are *dicta* in *Barnhart* v. *Greenshields* [1853][5] which seem adverse to our contention; but that case was referred to in *Knight* v. *Bowyer*,[4] which extended the doctrine of notice. *Caballero* v. *Henty* [1874][6] involves a different principle, and is not applicable.

[They also referred to *Sugden's Vendors and Purchasers* (14th ed.), 774.]

Hughes, Q.C., *Rufus Isaacs, Q.C.*, and *C. G. Church*, for the defendant mortgagees, were not called upon.

FARWELL, J., after reviewing the evidence, and coming to the conclusion that the deeds had been validly executed by Hunt while quite capable of transacting business, continued as follows: Then comes the question on which I have heard an ingenious argument. It is said: "True it is that on October 10, 1896, Hunt executed this conveyance which contains in the body of it an acknowledgment of the receipt of the purchase-money, but the mortgagees, the defendants, are affected with notice of the fact that Hunt was the true owner at the time they negotiated the mortgage, and that Gilbert the mortgagor was not interested beneficially at all." This doctrine of constructive notice, imputing as it does knowledge which the person affected does not actually possess, is one which the Courts of late years have been unwilling to extend. I am not referring to cases where a man wilfully shuts his eyes so as to avoid notice, but to cases like the present, where honest men are to be affected by knowledge which every one admits they did not in fact possess. So far as regards the merits of the case, even assuming both parties to the action to be equally innocent, the man who has been swindled by too great confidence in his own agent has surely less claim to the assistance of a Court of equity than a purchaser for value who gets the legal estate and pays his money without notice. Granted that the vendor has every reason to believe his agent to be an honest man, still, if he is mistaken and trusts a rogue, he, rather than the purchaser for value without notice who is misled by his having so trusted, ought to bear the burden.

In the present case an attempt has been made to fix the defendants with notice in this way: The property consisted of twenty-seven houses—twenty-five occupied by weekly tenants, and two by tenants from year to year. The defendants employed Woodhams, a valuer, to value the property for the purposes of their advance. The rents were then collected by Woodrow, an estate agent. Woodhams did not see Woodrow at all; but the defendants' solicitors' clerk stated that he believed that Woodhams enquired of the tenants to whom they paid their rents. From this it is argued that the defendants had constructive notice of Hunt's title. It is not suggested, and certainly is not proved, that the tenants knew anything of Hunt. If they were asked, they would say that they paid to Woodrow, who was a well-known house agent and rent collector at Wimbledon. The plaintiff's contention, therefore, is that it was the duty of the mortgagees to direct their agent—first, to enquire of the tenants, not merely whether they claimed any, and what, interest in their holdings, but also who was the person to whom their rents were paid; and secondly, having ascertained to whom the rents were paid, to enquire of the recipient on whose behalf those rents were received.

Now, in my opinion, on the authorities as they stand, it is not the duty of a

(2) 65 L. J. Ch. 680; [1896] 2 Ch. 192.
(3) 8 De G. M. & G. 572.
(4) 27 L. J. Ch. 520; 2 De G. & J. 421.
(5) 9 Moore P.C. 18.
(6) 43 L. J. Ch. 635; L. R. 9 Ch. 447.

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purchaser to enquire of the tenants to whom they pay their rents. The fact that a tenant is in occupation is notice of his own rights, but is not notice of the rights of the persons through whom he claims. I take the law as stated in 1853 by Lord Kingsdown, then Mr. Pemberton Leigh, in *Barnhart* v. *Greenshields*[5]: "With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor* v. *Stibbert* [1794],[7] but also to interests under collateral agreements, as in *Daniels* v. *Davison* [1809][8] and *Allen* v. *Anthony* [1816],[9] the principle being the same in both classes of cases; namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact, is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it, whatever it may be. . . . The last case on the subject, *Bailey* v. *Richardson* [1852],[10] rests on precisely the same principles; and although in the argument at the Bar it was suggested that the language of the learned Judge in that case, goes further, and lays down that it is the duty of a purchaser to make inquiries of a tenant in possession, not only for the purpose of protecting himself against any interest of the tenant, but for the purpose of guarding against interests of other persons; it is clear from the context, that such is not the meaning of the words used, and we know from the learned Judge himself, that he had no intention of laying down any such doctrine. In all the cases to which we have referred, it will be observed, that the possession relied on was the actual occupation of the land; and that the equity sought to be enforced, was on behalf of the party so in possession. There is no authority in these cases for the proposition, that notice of a tenancy is notice of the title of the lessor; or that a purchaser neglecting to inquire into the title of the occupier, is affected by any other equities than those which such occupier may insist on. Whatever authority there is upon the subject, is the other way." That is an authoritative and correct statement of the law as it was then, and as I understand it is still. Counsel for the plaintiff did not contest the correctness of the propositions which I have just read, but they relied on *Knight* v. *Bowyer*[4] as extending that doctrine. The case is very lengthy and somewhat involved, but for the present purpose it is sufficient to state that Henrietta Lady Bowyer, who purchased the reversionary interest in a mortgage from the tenant for life in possession of settled estates, in whom that interest was previously vested, had actual knowledge of the fact that a receiver appointed under a deed was in receipt of the rents for certain annuitants. The whole gist of the case in my view rests on the proposition that the receiver was to the knowledge of the purchaser receiving for annuitants. I take the proposition from Lord Justice Turner, who says: "Now, that Lady Bowyer knew that Bridger was in the receipt of the rents of the estate, and in receipt of them on behalf of annuitants, seems to be clear upon the evidence." That seems to me to be the point on which it turns. Reading for "annuitants" in the present case "Hunt," this would then be a case on all-fours with *Knight* v. *Bowyer*.[4] If here the mortgagees had known that Woodrow was in receipt of the rents, and in receipt of them on behalf of Hunt, there would have been then an entirely different case to consider. The meaning of the learned Lord Justice is rendered even plainer by a passage a few lines lower down on the same page: "The cases fully establish that purchasers are bound to make inquiries of occupying tenants as to their rights, and are affected by notice of those rights if they fail to make such inquiries; and I do not see upon what principle it can be held that inquiry must be made of an occupying tenant, but that if a stranger be found in the enjoyment of the estate no inquiry need be made of him. To hold that such inquiry must be made is not, as I think,

(7) 2 Ves. 437.
(8) 16 Ves. 249; 17 ib. 433.
(9) 1 Mer. 282.
(10) 9 Hare, 734.

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any extension of the doctrine of constructive notice, which certainly I am by no means inclined to extend." It is clear, therefore, that Lord Justice Turner did not himself intend in any way to make any addition to the doctrine as already laid down in *Barnhart* v. *Greenshields*,[8] and by himself in *Bailey* v. *Richardson*,[10] therein referred to, but was expressly pointing out that it was no extension of such doctrine to apply it to the annuitants who were known by the purchaser to be in enjoyment of the rents. The rule established by these two cases may be stated thus—first, a tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights; and secondly, actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor, is notice of such person's rights. In the present case I am by no means satisfied that Woodhams ever enquired of the tenants to whom they paid their rents; but assuming that he did, and that he was informed that the rents were paid to Woodrow, a well-known local estate agent, that, in my opinion, affects him with no notice at all. Many landlords have agents, and there is nothing inconsistent with the title shewn to the mortgagees by the abstract in the fact that the rents of the property were collected by a house agent. If it could have been proved that the mortgagees were told that Woodrow collected the rents as Hunt's agent, the case would have been within *Knight* v. *Bowyer*[4]; but the mere fact that rents are known to be paid to a house or estate agent puts the purchaser on no enquiry and fixes him with no notice.

Even if any such extension of the doctrine could ever be applied, it certainly could not apply to a case like the present, where the defendants rely on Hunt's signature to the receipt, and the plaintiff is attempting to fix them with constructive notice of facts which would make it their duty to distrust and disbelieve such signature. If authority be necessary to shew that the doctrine of constructive notice is not carried to that length I think it is to be found in *White* v. *Wakefield*,[1] to which I have already referred during the course of the argument. The headnote is: "Where a vendor signs a receipt for the whole purchase-money, but suffers the purchaser to retain part of it, and remains in possession of the estate as tenant to the purchaser; his possession is no notice, to a subsequent purchaser or incumbrancer, of his lien on the estate for the sum retained." Supposing that in the present case I found that the deed was the deed of Hunt, and was binding on him, but that the purchase-money had not been in fact paid, the plaintiff's right would be that of the plaintiff in *White* v. *Wakefield*[1] —namely, the right of an unpaid vendor to a lien for his purchase-money. Vice-Chancellor Shadwell disposed of that claim in that case by words which appear to me to be applicable to the present. He says: "Suppose however that it were otherwise, and that there had been a lien; then the question would be whether, if there were no actual notice to the annuitants, they would be bound by the lien, because their attorney had notice that the plaintiff was in possession of the estate. The only fact of which they could have had notice, was that the money was not paid. But as White had declared by the conveyance, in the most solemn manner, that he had received all the money, no man could be expected to inquire whether the purchase-money had been paid: and, therefore, if there had been any lien, the case must have totally failed as against the annuitants." Constructive notice is the knowledge which the Courts impute to a person upon a presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him to further enquiry, or from his wilfully abstaining from enquiry to avoid notice. How can I hold that the mortgagees here wilfully neglected to make some enquiry which is usual in cases of mortgages or sales of real estate in order to avoid acquiring some knowledge which they would thereby have obtained?—see *Bailey* v. *Barnes* [1893].[11] When the plaintiff's counsel admitted that, so far as they knew, there was no authority covering

(11) 63 L. J. Ch. 73; [1894] 1 Ch. 25.

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the present case, how can I hold that the mortgagees had actual knowledge of some defect, enquiry into which would disclose others? The action therefore fails as against the mortgagees, and as against them I dismiss it with costs.

Since delivering my judgment my attention has been called to Sir George Jessel's statement of the law in *Mumford* v. *Stohwasser* [1874],[12] where he says, "at that time the house was undoubtedly in the possession of the tenant of the plaintiff's, and therefore he"—the defendant—"had constructive notice of this tenancy, *and consequently notice of the plaintiff's title.*" The last sentence is directly contrary to the statement of the law by the Privy Council above set out. It does not purport to be a decision of a new point, but is the recollection of Sir George Jessel, M.R., of the law as it had always stood. Neither the case in the Privy Council nor any other authority on the point appears to have been cited, and it is clear that the law was not as stated by Sir George Jessel, M.R., unless he intended to alter it by his decision. With all respect for that eminent Judge, I am driven to the conclusion that his memory had failed him for the moment in this respect. The Privy Council had stated the law in 1853, and no case had occurred to alter it in the meantime, and I cannot accept the words italicised above as a correct statement. Further, the proposition appears to me unreasonable. The purchaser is fixed with notice of the tenant's rights, because he can enquire of the tenant and can practically compel an answer, for a tenant who was told that the purchaser proposed to buy on the footing that the tenant's interest was to the effect appearing in his lease, and who refused to answer, would find it difficult to establish any greater right against such purchaser. But the tenant runs no risk by refusing to answer an enquiry to whom he pays his rent, and it is surely unreasonable to apply the doctrine that a man has constructive notice of a fact which he could have discovered by enquiry to a fact which he could not so discover. If a vendor or mortgagor offers property stated to be subject to tenancies, there is nothing in the fact that tenants are in possession to give rise to any suspicion. It might well be otherwise if the mortgagor or vendor stated that there was no tenant, and a tenant was in fact found in possession; but this would depend on the circumstances of the case and on the suspicion that might or might not be fairly deemed to be aroused thereby.

(12) 43 L. J. Ch. 694, 697; L. R. 18 Eq. 556, 562.

Solicitors—Henry H. Fanshawe, for plaintiff; Leslie & Hardy, agents for Sayer & Colt, Hastings, for defendants.

[*Reported by R. J. A. Morrison, Esq. Barrister-at-Law.*

COZENS-HARDY, J. 1900. Oct. 30, 31. Nov. 10. } NEAVERSON v. PETERBOROUGH RURAL COUNCIL.

Prescription — Private Road — User— Herbage—Inclosure Award—Presumption of Grant.

Where a local authority has for fifty years let the herbage of a private road, without any restriction as to grazing, the Court will presume a lost grant of a right co-extensive with the usage. It makes no difference that the herbage was given to the predecessors of the local authority by an inclosure award, with the restriction that it was to be grazed by sheep only, or that the usage purported to be in exercise of the right given by the award.

Action brought by the tenant and occupier of lands adjoining a private road called Moor Road, in the parish of Newborough, in Northamptonshire, against the Rural District Council of Peterborough and their tenant, Virgette, for an injunction restraining them from grazing horses or stock, other than sound healthy sheep, upon the said Moor Road.

The lands forming the parish of Newborough were formerly open and common waste fen known as the Borough Fen

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Common and the Four Hundred Acre Common, and were drained, inclosed, and formed into a parish under an Act of 52 Geo. 3. c. cxliii. This Act (section 21) gave the Commissioners power to set out public and private roads, and provided "that the Herbage thereof should belong to and be the property of the person or persons to whom the Commissioners should allot and award the same." The Act also directed the Commissioners to allot (section 26) "to the Lords of the Hundred, or to the King's Majesty, or to the Lords of the several manors, if any such there should be, who should establish a right to the soil of the said common or waste land one twentieth part in value of such parts of the common as they should respectively establish such right over"; and it declared (section 27) that "the allotments so allotted in respect of the right of soil (if any such should be established) should be had and taken by the person or persons respectively to whom the same should be allotted in lieu, full bar of, and compensation for all right of soil in the said open common and waste land therein directed to be inclosed."

The Commissioners made their award on February 14, 1822, and thereby set out several private roads, of which Moor Road was one; and after stating that the said several private roads had been set out and awarded for the use and convenience of the present and future owners and proprietors of lands and estates in Borough Fen Common and the Four Hundred Acre Common, awarded "that the same shall be for ever hereafter supported and kept in repair by and at the expense of such owners and proprietors in such shares and proportions as they by law severally and respectively are, or hereafter will be, liable to contribute to the support and repair of the public carriage roads and highways set out by the Award."

And as to the herbage the award provided as follows: "And we do hereby direct and award that all the grass and herbage which shall from time to time grow and arise upon the public and private roads (other than certain roads therein mentioned which did not include Moor Road) hereinbefore awarded by us except such grass and herbage as is hereinbefore otherwise disposed of shall belong to and be the property of the Surveyor for the time being of the Highways to be appointed for the said Common and Waste land called Borough Fen Common and the Four Hundred Acre Common, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever, at and for the best rent or rents that can be reasonably obtained for the same; and that such rent or rents shall be annually paid and applied towards defraying the charges and expenses of maintaining and keeping in repair the said public and private roads."

The rural district council, who were the successors of the surveyors, in 1899 put up the herbage of Moor Road and the other highways and private roads in Newborough to be let by public auction, upon conditions which provided that not more than six horses or twelve beasts, and no swine or geese, should be allowed to graze upon the road, and imposed a penalty for putting scabbed sheep or diseased or entire cattle upon the roads, and gave the hirer of Moor Road liberty to hang a gate at its juncture with Thorney Road.

The herbage was taken by the defendant Virgette, who put horses and cattle upon the road in excess of the prescribed number, and the plaintiff alleged that they had caused damage, by poaching and trampling the soil and breaking down the edge of the dyke which formed the fence of his land; and also by trespassing on his land. The defendant Virgette had paid 40*s.* into Court, which the plaintiff had taken out in satisfaction of damage, and he was discharged from the action.

The district council had also paid in 40*s.*, with a denial of liability. The plaintiff admitted that this sum was sufficient to answer his claim for damages, and the action was continued for an injunction only.

It was proved that from the year 1846 the herbage of the roads had been regularly let upon the same conditions as in 1899. The plaintiff had occupied his present farm from 1888, he had been a waywarden from 1889 to 1893, and taken an active part in letting the herbage

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without restriction. He had never made any objection to Moor Road being so let, and had upon several occasions taken it himself, and stocked it with horses and cattle.

Rawlins, *Q.C.*, and *H. Percival*.—The rural district council have no rights over this road except the right to let the herbage according to the award. The soil appears to be vested in the representatives of the Marquis of Exeter, in whom the soil of the common was found to be vested at the time of the award. *Poole* v. *Hutchinson* [1843] [1] shews that where compensation is given to the lord for land allotted to others, the soil of that which is not allotted remains in the lord. In *Rex* v. *East Mark Tything Inhabitants* [1848] [2] the soil of a road was held to be taken out of the lord because he received compensation for it. Here the roads were not allotted to any one, and no compensation was given for them. The only power which the council have is that given by the award. They have let in a manner not allowed by the award, and the plaintiff is damaged thereby.

Eve, *Q.C.*, and *Schiller*, for the council. —Since 1822, the date of the award, the herbage of the roads has been openly and persistently let without the restrictions imposed by the award.

Haigh v. *West* [1893],[3] which is very like this case, shews that the Court will presume a lost grant in favour of the long-continued user. In that case it was presumed against the lord of the manor. In the present case it is not clear whether the soil of the road was vested in the lord of the manor or in the allottees of the adjoining lands; but that makes no difference to the defendants. A lost grant will be presumed against the owner, whoever he is.

[COZENS-HARDY, J.—It will be said that I know the origin of this user; it began with the award.]

The usage is not confined to, and therefore cannot be attributed to, the right given by the award.

The plaintiff is personally disqualified from suing by his long acquiescence.

[They also argued that as the plaintiff was claiming to compel the council to perform a statutory duty, the Attorney-General was a necessary party.]

Rawlins, *Q.C.*, in reply.—*Haigh* v. *West* [3] has no application. There the parish had no rights whatever over the road, and it was held that the Court ought to find some origin for the long usage. Here the right of the council originated in the award. The character of the right cannot be altered by the usage.

The plaintiff's acquiescence is of no importance unless it amounted to a final abandonment of his right. No case of abandonment is made out; there was no serious injury until 1898.

Cur. adv. vult.

Nov. 10.—COZENS-HARDY, J., after stating the facts of the case as above.—These facts being admitted or proved, several questions arise for my decision. In the first place, it is by no means clear in whom the soil of the road is now vested. It may be vested in persons claiming under the Marquis of Exeter, in whom the soil of the common was vested at the date of the award, on the ground that it was not allotted to any one else. This seems to have been the view of Mr. Baron Parke in *Poole* v. *Hutchinson*,[1] where he says, dealing with a similar case as to the ownership of the soil: "I do not apprehend that there is any difficulty. It remains in the lord of the manor, for that portion of the soil only is taken from him for which he receives compensation, and which is allotted to others." A different view was, however, expressed by the Court of Appeal in the recent very similar case of *Haigh* v. *West*,[3] where Lord Justice Lindley, in delivering the considered judgment of the Court, used the following language: "Having regard to the fact that the allotments to the lord and to the owners of common fields and to the commoners were expressly made in satisfaction of all their respective former rights not expressly reserved to them, the soil in the lane set out would not remain in its former

(1) 11 M. & W. 827, 830.
(2) 17 L. J. Q.B. 177; 12 Jur. 332.
(3) 62 L. J. Q.B. 532; [1893] 2 Q.B. 19.

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owners, but would *prima facie* pass to the allottees of the land abutting on the lane; the allotments on each side extending to the middle of the lane, although described as bounded by the lane."

Having regard to sections 26 and 27 of the Inclosure Act (52 Geo. 3. c. cxliii.) I think I must hold that the soil of Moor Road became vested in the owners of adjoining allotments, including that of which the plaintiff is the occupier, subject only to a right of way and to the right of the surveyor of the highways to the herbage thereon. This being so, I am relieved from considering some of the arguments addressed to me, as to the right of a private individual to maintain an action to enforce the performance by a public body of a statutory obligation. It seems to me that the plaintiff must be entitled, *prima facie*, to assert that the land of which he is in occupation ought not to be subjected to any greater burthen than was imposed upon it by the award.

Assuming this to be the legal position immediately after the award, has anything happened to change it? It is plain that an owner of land subject to a limited right may enlarge that right, or release any restrictions upon the exercise of that right. Now I find an open and regular and unchallenged dealing with the herbage of this road, and similar roads, for more than fifty years in a manner and to an extent not authorised by the award. The depasturing of horses and cattle was apparently to the advantage of the owners and occupiers of the allotted lands. More money was obtained for the repair of all the parish roads. The plaintiff himself recognised this advantage, for he took an active part in letting the herbage, and, moreover, himself stocked the road with horses and cattle. Some justification or explanation of these acts ought to be discovered; a lawful origin ought to be presumed from the long usage, and I think I must presume a lost grant by the owner of the soil of the road, by virtue of which the surveyor was released from the restriction imposed by the award as to the mode of grazing. The case of *Haigh* v. *West*[3] above referred to is a strong authority in support of this presumption.

The result is that in my opinion the action fails and must be dismissed with costs.

Solicitors—Clarke, Rawlins & Co., agents for Percival & Son, Peterborough, for plaintiff; J. M. Voss, agent for J. W. Buckle, Peterborough, for defendant.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

[IN LUNACY.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
ROMER, L.J.
1900.
Nov. 12, 16.

LANGDALE, *In re.*

Lunacy—Jurisdiction of Master—Stock in Joint Names of Lunatic and Another—Lunatic a Retired Trustee—Vesting Order—"Management and administration"—Lunacy Act, 1890 (53 *Vict. c.* 5), *ss.* 116–130, 133 *and* 136, *sub-s.* 2—*Lunacy Act*, 1891 (54 *&* 55 *Vict. c.* 65), *s.* 27, *sub-s.* 1.

L. and another person were jointly entitled to certain funds as trustees of a settlement. In 1887, *L. retired from the trust, and a new trustee was appointed. The trust property was then transferred to the new trustees, with the exception of a sum of* 430*l.* 11*s.* 3*d. Consols, which was overlooked. L. became a lunatic in* 1896. *The present trustees of the settlement applied for a vesting order of the* 430*l.* 11*s.* 3*d. Consols*:—Held, *that what was proposed to be done could not properly be described as a matter in the administration or management of the lunatic's estate, and the Master had no jurisdiction to make the order.*

Fuller, *In re* (69 L. J. Ch. 738; [1900] 2 Ch. 551), *distinguished.*

The powers of administration and management conferred on the Masters by sub-section 1 *of section* 27 *of the Lunacy Act*, 1891, *are not confined to the powers of management and administration contained in the group of sections* (116–130) *so headed in the Lunacy Act*, 1890, *but extend to any powers of management and administration properly so called in the Act of* 1890.

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LANGDALE, IN RE.

Dicta in Browne, *In re* (63 L. J. Ch. 729, 732, 733; [1894] 3 Ch. 412, 417, 419), *followed.*

This was a petition in the matter of a person of unsound mind by G. Manley and A. Stourton, the present trustees of a settlement dated September 12, 1865, asking that the right to transfer or call for a transfer of a sum of 430*l.* 11*s.* 3*d.* Consols standing in the joint names of the lunatic and Manley, and arrears of dividends thereon standing to their joint credit, might vest in the petitioners.

The lunatic and Manley were appointed trustees of the settlement in September, 1884. In September, 1887, the lunatic retired from the trust, and a new trustee was appointed in his place, and on that occasion the property subject to the trusts of the settlement was vested in Manley and the new trustee, with the exception of the 430*l.* 11*s.* 3*d.*, which had apparently been overlooked.

Committees of the person and estate of the lunatic were appointed in June, 1896. The petition was served upon the committee of the estate.

The question was whether the vesting order could be made by the Master. The matter was referred to the Judge, and referred by him to the Court.

H. M. Humphry, for the petitioners.—It was decided in *Fuller, In re* [1900],[1] that a Master could when a new trustee was appointed make a vesting order. In the present case there is no necessity for the appointment of a new trustee, and the question is whether he can make the vesting order. It comes to this—whether the Master can make the vesting order in any case where it is necessary. It would seem that if he can do it in the one case, he could do it in others.

Under sub-section 1 of section 27 of the Lunacy Act, 1891, subject to rules in lunacy, "the jurisdiction of the Judge in lunacy as regards administration and management may be exercised by the Masters." The group of sections (116 to 130) in the Lunacy Act, 1890, are headed "Management and Administration," but the powers of administration are not necessarily limited to the particular cases mentioned in those sections. In *Fuller, In re*,[1] the order was made under section 129 of the Act of 1890. In the present case it is asked for under sub-section 2 of section 136, which gives the Judge power to make a vesting order as regards stock or *choses in action* to which any persons are jointly entitled with a lunatic. A vesting order is a matter of administration, and *prima facie* a Master would have jurisdiction to make it. The Bank of England would accept any order sanctioned by this Court—*Shortridge, In re* [1894].[2]

[RIGBY, L.J.—It may be a question whether this is a matter of "administration" within the meaning of the Act of 1890.]

It must be that or nothing. The word "administration" is wide enough to cover a case of this kind, and it is not limited by the Act to property in which the lunatic has a beneficial interest.

A vesting order of stock in the name of a trustee who is of unsound mind is part of the lunacy jurisdiction. The High Court can appoint a new trustee in the place of such a person, but it is doubtful whether it can make a vesting order in such a case—*M., In re* [1898].[3]

[VAUGHAN WILLIAMS, L.J., referred to the Trustee Act, 1850 (13 & 14 Vict. c. 60), s. 5, and the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), ss. 137 and 138.]

Cur. adv. vult.

Nov. 16.—RIGBY, L.J.—We are asked to say that a vesting order may be made by the Master under the circumstances of this case. I am unable independently of the Lunacy Act, 1890, to consider the making of a vesting order such as this as being any part of the management or administration of the lunatic's estate. *Prima facie*, therefore, the words of section 27 of the Lunacy Act, 1891, do not provide for such a case as this, and do not apply. I agree that if we found such a matter treated in the Act of 1890 as a matter of management and administration,

(1) 69 L. J. Ch. 738; [1900] 2 Ch. 551.

(2) 64 L. J. Ch. 191, 194; [1895] 1 Ch. 278, 285.

(3) 68 L. J. Ch. 86; [1899] 1 Ch. 79.

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we might so regard it. The case of *Fuller, In re*,[1] which was decided in this Court earlier in the year, was cited to us as an authority. It is no sort of authority for what is proposed here. I think that the *ratio decidendi* in that case was that we did find in the Act the actual words giving jurisdiction in the case which had arisen. The order in that case was to be made under section 129 of the Act of 1890, one of the sections included under the head of "Management and Administration," and therefore it came expressly within the terms of section 27 of the Act of 1891. These vesting orders are mere matters of statutory regulation, and there must be found a statutory jurisdiction of the Master or Court sitting in lunacy before it can be exercised. To say that it ought to follow from certain provisions that there is a jurisdiction is an argument which ought to be addressed to the Legislature rather than to the authority, whoever it may be, who is merely administering the jurisdiction.

It is a very strange thing that when *Fuller, In re*,[1] was before us, and still more strange that when this case was heard, a most important authority was not brought to our attention. How that can have happened I do not know. Counsel who argued this case had not that authority in his mind, and I mention for his justification that he has very properly called our attention to it before we gave our judgment. However, before that information had been received, we had considered that case, and also some of the arguments that might have been addressed to us upon it. I confess that that case was not in my mind when we heard this case, and we could not have had it in our minds when we heard *Fuller, In re*.[1] Possibly it was not necessary in that case that we should, but in this case it was obviously of importance. The case to which I am referring is *Browne, In re* [1894].[4] It is rather a long case, and we need not go into it in detail, but I wish to take notice of one or two passages. The material question was as to the power of appointing a receiver of the dividends of a sum of Consols; and it is clear from what was said by the Judges that we may assume that the words "administration and management" in section 27 of the Act of 1891 are not confined to the matters dealt with by sections 116–130 of the Act of 1890. Lord Justice Lindley said: "The power to appoint a receiver is clearly a power relating to 'management and administration,' and, although not specially mentioned in the group of sections so headed, is within the general words with which section 116 commences. This being so, the power can be exercised by a Master, and it need not be exercised by a Judge in person. Soon after the Rules in Lunacy, 1892, had been made, a question arose whether a Master had jurisdiction to make a vesting order under sections 133 *et seq.* of the Lunacy Act, 1890; and, after carefully examining the Acts and Rules, all the members of the Court of Appeal came to the conclusion that he could, and such orders have ever since been made accordingly." It must be borne in mind that section 133 is outside the group of sections headed "Management and Administration" in the Act of 1890. Lord Justice Davey in the same case said: "I think that the Act means what it says, and that all powers and provisions relating to 'management and administration' which are found in Part IV. of the Act, are included." Plainly, therefore, we are not confined to the specific powers of management and administration conferred by the sections contained in the group so headed, and if we find that there is a power of management outside that group which would apply to this case, then we are at liberty to say that the Master has power to make the order, since by sub-section 1 of section 27 of the Act of 1891 the powers of management conferred by the Act of 1890 can be exercised by the Masters. I am, however, satisfied that what is proposed to be done in this case cannot properly be described as a matter of the administration or management of the lunatic's estate. It is the exercise of a power which does not come within sections 116 to 130, or any other section applicable to the powers of the Masters.

As regards *Fuller, In re*,[1] we were

(4) 63 L. J. Ch. 729; [1894] 3 Ch. 412.

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urged not so much to follow it as to extend it. The decision in that case went upon the ground that specific power to do the very thing that was proposed to be done was contained in the sections as to management and administration; and that being so, we held, and no doubt rightly, that the case came within subsection 1 of section 27 of the Act of 1891; but it does not follow that a power not included in the group of sections 116 to 130 comes within section 27 of the Act of 1891. Therefore I say that the power in question here cannot be exercised by the Masters independently of these sections. I hold that this power cannot be exercised by the Master.

VAUGHAN WILLIAMS, L.J., and ROMER, L.J., concurred.

Solicitors—Gribble, Oddie, Sinclair & Johnson.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

COZENS-HARDY, J.
1900.
Nov. 6, 16.

JOHNSON *v.* BRAGGE.

Marriage Settlement — Rectification — Mistake—Parol Evidence—Appointment—Non-execution of Power — Statute of Frauds (29 *Car.* 2. *c.* 3), *s.* 4.

The Statute of Frauds is not a valid defence to an action for the rectification of a marriage settlement where there is satisfactory parol evidence of a mistake made in drawing up the settlement, and of an intention to include a fund over which the husband had a power of appointment. Such an action is not one seeking "to charge any person upon any agreement made upon consideration of marriage" within section 4 of the statute. The settlement, being under seal, will, when rectified, operate as a valid exercise of the power of appointment over the fund.

The plaintiff was Eliza Madeline Florence Johnson, widow, and formerly the wife of John Walter Hawkesworth. The defendants were the trustees of the plaintiff's marriage settlement, and the children of that marriage, or persons claiming under them. The facts are mainly taken from the judgment of the Court.

On July 16, 1865, J. W. Hawkesworth wrote to his solicitor, William Rowcliffe, a letter in which he said:

"I have in contemplation a matrimonial alliance. The lady has means of her own, and it is necessary as a preliminary that I should have a conversation with her father as to the property we mutually possess either at the present time or that is coming to us at a future period. If the conversation turns out satisfactory I shall most probably come to town directly to ask you to do what is necessary on my part of the affair. Meanwhile I shall be much obliged if you will acquaint me with my present and future means and prospects, in order that I may put your letter into the hands of the lady's father. It seems to me desirable also that you should sketch out very shortly the heads of a settlement for my guidance.

"The lady has been introduced to my father and mother, and it is necessary that the business part of the affair be immediately taken in hand."

In reply to this letter, William Rowcliffe wrote to J. W. Hawkesworth a letter dated July 21, 1865, of which the material parts are as follows:

"I have now carefully looked into the documents, and am enabled to answer your letter of the 16th.

"(1) Under your grandfather's will you will be absolutely entitled, on the death of your mother, to one fourth of his estate, after deducting 5,000*l.* which was given as a portion by your grandfather on his marriage. This sum may be estimated in round figures at 4,000*l.* Under the same will you will also probably become entitled to considerable parts of the shares of your three aunts; this however depends upon the periods of deaths of several parties, so that no estimate can be made.

"(2) Under the settlement which was executed the other day" (meaning an indenture dated December 9, 1864) "you will be entitled for your life on the death of your father and mother to funds amounting together to about 7,000*l.*, and this

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deed gives you a power to settle the income on your wife after your death for her life, and to give the capital among your children as you may think fit. Failing your children you may give it as you please. Supposing you marry I think you may fairly give the lady a life interest in the latter fund, and I think you should settle all the personal property which you may derive under your grandfather's will in the same way, namely: On yourself for life: after your death on your wife for life: after the death of the survivor on your children: and failing these, you may give it to whom you may think fit. I have, of course, only stated the property to which you are absolutely entitled, but the lady's father should distinctly understand that your expectations under your grandfather's will are very considerable, but as they are subject to contingencies they cannot, of course, be treated as certain. I shall be very glad to see you, and explain the matter more fully to you, which can be done more satisfactorily at an interview than by letter; and if this explanation is not quite intelligible and satisfactory to you, I hope you will talk it over with me before you show it to the lady's father."

The lady referred to in these letters was the plaintiff.

"The settlement which was executed the other day," referred to in the letter of July 21, 1865, was an indenture dated December 9, 1864, under which Mr. Hawkesworth, subject to the life interests of his father and mother, was entitled to the income for his life of certain trust funds, with power by deed or will to appoint a life interest to any wife who might survive him, and, subject thereto, the trust funds were settled upon Mr. Hawkesworth's children as he should by deed or will appoint, and in default for his children at twenty-one or marriage.

On July 25, 1865, Mr. Hawkesworth replied thanking Mr. Rowcliffe for his letter, which contained all the information he required, and saying that he would probably see Mr. Rowcliffe in the course of a short time. According to the evidence of the plaintiff, which was accepted by the Court, the result of various conversations was that Mr. Hawkesworth said he would settle about 11,000*l.*, coming, as to 7,000*l.*, from the settlement made by his parents on December 9, 1864, and, as to 4,000*l.*, from his grandfather's will. A solicitor friend of the family was applied to by the plaintiff's father. Mr. Rowcliffe's letter was read over to him, and he was asked to prepare the necessary document. The solicitor friend took Mr. Rowcliffe's letter and, in pursuance of the instructions therein contained, prepared the settlement of August 5, 1865, which was subsequently signed by all parties, and was under seal. This settlement was entirely in the handwriting of the solicitor friend, and, so far as material, was as follows: After reciting that a marriage had been agreed upon between John Walter Hawkesworth and the plaintiff, and that it had been mutually agreed and arranged by and between the parties to the said articles in manner following, that was to say: "The properties subject to this agreement and to be subject to and included in the more formal settlement hereby agreed and intended to be made, shall consist, on the part of the said John Walter Hawkesworth, of two several sums of money to which he is entitled under the will of his maternal grandfather, John Walmesley, after and subject to the life interests of his father and mother, or of one of them therein, and which sums are now estimated for the purposes of this agreement and of the settlement to be hereafter made as aforesaid, as not exceeding the sums of 4,000*l.* and 7,000*l.* respectively." And it was agreed that "the property of the said John Walter Hawkesworth" should be settled upon trust for himself for life, and after his decease upon trust for the plaintiff for her life, and subject thereto the property was to be settled upon their children and issue as J. W. Hawkesworth and the plaintiff should by deed or deeds, without power of revocation, jointly appoint, or as the survivor should by deed or will appoint, and in default of appointment among the children and issue equally as tenants in common; and if there should be none living to attain twenty-one or marriage, then the property of J. W. Hawkesworth was to go to him, his executors, administrators, and assigns. On August 7, 1865,

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the marriage took place. No further formal settlement was ever executed pursuant to these articles. By a deed of November 2, 1891, Mr. and Mrs. Hawkesworth, on the occasion of the marriage of one of their daughters, appointed one-eighth of the trust property in her favour after the decease of the survivor of her parents. By a further deed of January 15, 1898, Mr. and Mrs. Hawkesworth appointed trustees of the settlement, and, in exercise of the power of appointment conferred by the articles, also appointed that the remaining seven eighth parts of the property subject to the settlement should, after the death of the survivor of Mr. and Mrs. Hawkesworth, be held for the remaining seven children in equal shares.

On January 31, 1898, Mr. Hawkesworth died, and questions having arisen as to the construction of the articles of settlement, in particular as to whether the plaintiff was entitled to a life interest in the 7,000*l.*, an originating summons was issued before North, J. On April 26, 1899, the Court declared that the whole of the share of J. W. Hawkesworth under the will of J. Walmesley, not exceeding 11,000*l.*, was bound by the articles, and the Court declared that the articles did not operate as an exercise of the power of appointment in favour of the plaintiff. The present action was accordingly commenced by the plaintiff for the rectification of the settlement, and, so far as necessary, of the deed of January 15, 1898, (*a*) by the insertion, after the words "two several sums of money to which he was entitled under the will of his maternal grandfather John Walmesley," of the words "and the settlement made by his parents, dated December 9, 1864, respectively"; (*b*) by the insertion, after the words "the property of the said John Walter Hawkesworth," of the words "or which he had power to appoint." The effect of the proposed alterations would be to give the plaintiff a life interest in the 7,000*l.*

The plaintiff gave evidence as to the intention of the parties to the articles and of the mistake which was made.

Vernon Smith, Q.C., and *Gatey*, for the plaintiff.—The evidence is clear as to the intention of the husband, and it was acted upon by the deeds of November, 1891, and January, 1898. The plea of the Statute of Frauds is not valid. The case is outside the statute altogether, as this is not an action whereby it is sought "to charge any person upon any agreement made upon consideration of marriage" within the meaning of section 4. The question is what property was intended to be settled, and parol evidence has always been admitted for the purpose of the rectification of a settlement owing to an accidental slip or mistake. The letters which passed at the time are also abundant corroboration of the intention. The document should be put in the form in which it was intended to be drawn. As to the other defence that equity will not assist the non-execution of a power, that is inapplicable, as there was a valid execution of the power; the only question is over what property it operated. Once the property is ascertained, nothing more is required to be done. The Court will assist an imperfect or defective execution of a power—*Shannon* v. *Bradstreet* [1803].[1]

Eve, Q.C., and *R. J. Parker*, for some of the defendants.—The Statute of Frauds is a good plea. There is no agreement by the husband to exercise this power of appointment in favour of the plaintiff. Her case is that words must be inserted. There is no part performance referable to the agreement which is sought to be enforced. In *Olley* v. *Fisher* [1886][2] North, J., said that the Statute of Frauds could not be pleaded, because there had been part performance. Secondly, will the Court now, after the death of the husband, who was the donee of the power, aid the execution of a power which has never been executed? The Court is asked to read into the articles the exercise of a power which North, J., held was never exercised. The plaintiff is bound by that decision. It is not assisting the defective execution of a power—*Tollet* v. *Tollet* [1728].[3] No action will lie for the specific performance of the execution of a power—*Farwell on Powers* (2nd ed.), pp. 333, 335, 336; *Coffin* v. *Cooper* [1865],[4] and

(1) 1 Sch. & Lef. 52, 60, 63.
(2) 56 L. J. Ch. 208; 34 Ch. D. 367.
(3) 2 P. Wms. 489.
(4) 34 L. J. Ch. 629; 2 Dr. & Sm. 365.

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JOHNSON v. BRAGGE.

Palmer v. *Locke* [1880].[5] The remedy, if any, is for damages for breach of a covenant to execute the power.

Edward Ford, for beneficiaries under the settlement.

Curtis Price, for a purchaser of the interest of one of the beneficiaries, referred to *Fowler* v. *Fowler* [1859].[6]

Vernon Smith, *Q.C.*, in reply, referred to *Bedford* (*Duke*) v. *Abercorn* (*Marquis* [1836].[7] The Statute of Frauds must not be used as a means of fraud.

Cur. adv. vult.

Nov. 16.—COZENS-HARDY, J.—This is an action seeking rectification of a marriage settlement under somewhat peculiar circumstances. The plaintiff is the lady whom Mr. Hawkesworth intended to marry and did marry, and the letter of July 16, 1865, was written from her father's house. [His Lordship read the letters relating to the preparation of the settlement and the articles themselves, and stated the other facts.]

The plaintiff, who is the only survivor of the parties to the transaction, gave her evidence in a manner which satisfied me that she is a witness of truth. I accept her statements as to what took place. She seeks to have the settlement rectified so as to give her a life interest in the 7,000*l.* Some of the defendants dispute the plaintiff's claim; others do not contest it. Now, I am satisfied by the evidence that it was intended by all parties that the settlement should operate in favour of the plaintiff upon the two sums of 4,000*l.* and 7,000*l.* mentioned in Mr. Rowcliffe's letter of July 21, 1865, and that the power of appointment which Mr. Hawkesworth possessed over the 7,000*l.* should be exercised by the settlement, and that all parties thought it had been exercised thereby, and that Mr. Hawkesworth died in this belief, but that a mistake was made by the solicitor friend who treated the 7,000*l.* as coming from the same source as the 4,000*l.* This being so, I think I ought to rectify the settlement unless I am prevented by reason of two objections which were strenuously urged before me.

In the first place, the Statute of Frauds is pleaded, and it is contended that a marriage settlement cannot be rectified on parol evidence. In the second place it is contended that, as Mr. Justice North has decided that the power of appointment was not exercised, the Court, according to well-settled rules, cannot give relief against a non-execution, as distinct from an imperfect execution of a power. Now, the plea of the Statute of Frauds somewhat surprised me, for the books are full of cases in which marriage settlements and conveyances of land have been rectified on parol evidence. But I was told that the Statute of Frauds had not been pleaded in those cases, although it might have been. The reason why the Statute of Frauds was not pleaded in modern cases is because it was settled at least a century and a-half ago that parol evidence is admissible in an action to rectify a mistake in a marriage settlement, notwithstanding the Statute of Frauds. Such an action is not one seeking "to charge any person upon any agreement made upon consideration of marriage" within the meaning of section 4. In *Thomas* v. *Davis* [1757][8] the bill was to rectify a mistake in a conveyance. The evidence of the attorney who received the instructions to prepare the deed, and did prepare the deed, was held admissible, though in that case not sufficient. Sir Thomas Clarke says, "The objection is, that it is a direct contradiction to the Statute of Frauds; but I am clear it may be read. Parol evidence is admitted for several purposes: It is allowed to rebut an equity. It is often admitted to prove an original fraud, or mistake." See also *Rogers* v. *Earl* [1757][9] and *Sugden's Vendors and Purchasers* (14th ed.), p. 172. In *Alexander* v. *Crosbie* [1835],[10] which was a suit to rectify a settlement, Sir E. Sugden says: "In all the cases, perhaps, in which the Court has reformed a settlement, there has been something beyond the parol evidence, such, for instance, as the instructions for preparing the conveyance or a note by the attorney, and the mistake properly accounted for; but the Court

(5) 50 L. J. Ch. 113; 15 Ch. D. 294.
(6) 4 De G. & J. 250.
(7) 5 L. J. Ch. 230; 1 Myl. & Cr. 312.
(8) 1 Dicken, 301.
(9) 1 Dicken, 294.
(10) Ll. & G. (Sugden), 145.

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would, I think, act where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach." See also *M'Cormack* v. *M'Cormack* [1877].[11] In *Story's Equity Jurisprudence* (12th ed.), s. 158, it is laid down that "the exceptions to the rule" (rejecting parol evidence to contradict written documents) "originating in accident and mistake, have been equally applied to written instruments within and without the Statute of Frauds." In my opinion the Statute of Frauds is not a valid defence.

As to the second objection, I am unable to appreciate its force. The instrument of August 6, 1865, is under seal. No further deed will be required. The deed, when rectified by inserting the few words needed to correct the blunder made by the solicitor friend, will be a perfectly valid appointment. The jurisdiction I am asked to exercise does not depend upon any doctrine peculiar to powers. When once the deed is made to accord with what I find to have been the real bargain and intention of all parties to it, no further relief will be needed.

The result is that I must grant the relief asked by the plaintiff. I shall declare that the deed of August 6, 1865, was, in the particulars hereinafter specified, executed under mistake, and that the deed ought to be rectified by reading the same as if in the recital, after the words "under the will of his maternal grandfather John Walmesley" there had been added the words "and of the settlement made by his parents dated the 9th of December 1864 respectively"; and I shall order a copy of this declaration to be indorsed upon the settlement.

Solicitors—Skewes-Cox, Nash & Co., for plaintiff; Nye, Moreton & Clowes, for J. K. Nye & Treacher, Brighton; Arkcoll, Cockell & Chadwick, for defendants.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

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(11) 1 L. R. Ir. 119.

JOYCE, J. 1900. Nov. 6, 14.

HARE AND O'MORE'S CONTRACT, *In re.*

Vendor and Purchaser—Misdescription in Particulars—Verbal Rectification by Auctioneer—Statement not Heard by Purchaser—Specific Performance—Compensation—Injustice to Vendor.

The Court will not enforce specific performance of a contract for sale where, owing to a mistake on the part of the defendant, injustice would be done to him by a decree for that purpose.

Accordingly, where in a purchaser's action for specific performance, with compensation for a material misdescription in the particulars of sale, it appeared that the auctioneer had before the biddings commenced drawn attention to and rectified the misdescription, but that the purchaser had not heard his statement, the Court, notwithstanding a condition for compensation in that behalf, dismissed the action and rescinded the contract.

Manser v. Back (6 Hare, 443) *applied.*

Trial of action with witnesses.

These proceedings originated as a purchaser's vendor and purchaser summons for compensation in respect of misdescription in the particulars of sale of certain property comprised in a contract of March 23, 1900, and made between Mary Hare of the one part, and Evan O'More, the purchaser, of the other part.

Stirling, J., in chambers, ordered the summons to be set down as a witness action in order that evidence of what happened at the auction might be gone into; the action to be treated as the purchaser's action for specific performance with compensation.

The property in question constituted lot 5 in the particulars of sale. Lot 4 was described in the particulars as containing "Four capital private houses, each with hall entrance, gardens and outbuildings in the rear." Lot 5 was described as containing "Four similar houses adjoining the last lot." The rental of lot 4 was stated to be 72*l.* 16*s.*, that of lot 5 to be 67*l.* 12*s.* The purchaser obtained a copy of the particulars of sale, and inspected the houses comprised in

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lot 4 before the auction, and noted that the houses had waterclosets. Seeing that lot 5 was described as containing "similar houses," he did not inspect them. The houses, in fact, were not similar, those in lot 5 having no hall-entrances or waterclosets. Lot 5 was knocked down to the purchaser at 580*l.*, and he signed the contract annexed to the particulars and conditions of sale. Upon discovering that the property had been misdescribed in the particulars, he applied to the vendor for 77*l.* compensation, which was refused, and thereupon these proceedings were instituted.

The conditions of sale provided (*inter alia*) that any error, misstatement, or omission in the particulars should not annul the sale, but if pointed out before the completion of the purchase, and not otherwise, should form the subject of compensation, which should be allowed by the vendor or purchaser as the case might require.

At the trial of the action, it appeared from the evidence of the auctioneer, corroborated by other witnesses, that before putting lot 5 up for sale he more than once called attention to the dissimilarity between the houses and the consequent difference in the rentals. A written statement by the auctioneers to the effect that he had done this was asked for by the purchaser's solicitor when investigating the title, and such a statement was furnished accordingly.

The purchaser, on the other hand, said that no such statement was made, or that, if made, it was not heard by him.

Jolly, for the purchaser.—Evidence to vary the particulars of sale is inadmissible on the part of the defendant—*Dart's Vendors and Purchasers* (6th ed.), p. 124, and *Gunnis* v. *Erhart* [1789],[1] referred to with approval in *Ogilvie* v. *Foljambe* [1817].[2] Moreover, even if the purchaser had been aware of the misstatement in the particulars, the vendor would not thereby be relieved from making him compensation according to the condition—*Lett* v. *Randall* [1883].[3] In this case the purchaser did not hear the statement in the auction-room, and so this case is different from *Edwards to Daniel Sykes & Co., In re* [1890],[4] where he was taken to have heard the auctioneer's statement, and was refused compensation. *Manser* v. *Back* [1848][5] is distinguishable; that was a case of hardship and mistake, and, moreover, the auctioneer had no authority to sign the original unaltered contract.

E. P. Hewitt, for the vendor.—*Gunnis* v. *Erhart*[1] was an action on the case. In equity, evidence of the alteration of the particulars at the time of sale is admissible on behalf of the vendor when defendant—*Townshend* (*Lord*) v. *Stangroom* [1801][6] and *Sugden's Vendors and Purchasers*, p. 161–2. *Manser* v. *Back*[5] was a case where the particulars were altered, and the purchaser did not hear or know of the alterations; there evidence of the alterations was admitted, and the Court refused to decree specific performance without the alterations against the vendor. I rely on that case. *Lett* v. *Randall*[3] does not apply. The decision there was merely that the purchaser's knowledge of the misdescription did not prevent him from enforcing the contract.

Jolly replied.

Cur. adv. vult.

Nov. 14.—JOYCE, J., stated the facts, and continued: It is clear that, whether the houses were similar or not, they were not alike in every respect. The house in lot 5 had neither hall entrances nor waterclosets, and the houses in lot 4 had both. That seems to me to be a material difference affecting the value of the houses in lot 5, and if it had not been material I do not see why the auctioneer should have taken the trouble to explain the difference before putting lot 5 up for sale. I think, therefore, that there was, by inadvertence or otherwise, a material misdescription of the property in the particulars of sale. On the facts I find that in the auction-room a distinct statement was clearly made more than once by the auctioneer to the effect that there was a

(1) 1 H. Bl. 289.
(2) 3 Mer. 53.
(3) 49 L. T. 71.
(4) 62 L. T. 445.
(5) 6 Hare, 443.
(6) 6 Ves. 328.

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difference between the houses in lot 5 and those in lot 4, and he gave that difference as the reason for the smaller rental derived from lot 5. At the same time I cannot say, and I do not find as a fact, that the purchaser heard the statement.

The question therefore arises whether, when such a statement is made clearly by the auctioneer in the auction-room, and it is not shewn that the purchaser to whom the property is knocked down did hear such statement, the circumstances are such as to render it inequitable to decree specific performance with compensation against the vendor. The case of *Manser* v. *Back* [5] was cited to me, and I reserved judgment in order to consider that case, because it has been suggested that it had not been followed in any subsequent case. Now, I think that *Manser* v. *Back*,[5] if it be good law, is a clear authority for the vendor to be let off the contract in such a case as this. In that case the printed particulars were altered previously to the sale, and several of the altered copies of the particulars were laid on the table in the auction-room, and before the biddings commenced the auctioneer read aloud a copy as altered, but the party who became the purchaser did not hear or notice the alteration, and the Court held that, in the circumstances, it was not equitable to compel the vendor to specifically perform the contract. That case was cited with approval by Lord Justice Baggallay in *Tamplin* v. *James* [1880],[7] and it is treated by all the text-books as being the law, and, if I may say so, I entirely agree with it. That being so, I am bound to conclude that the vendor cannot be compelled to specifically perform this contract with compensation.

Lett v. *Randall*,[3] which was cited to me, does not affect this case, for all that the Court there held was that the mere fact that the purchaser knew of the misdescription did not prevent him from enforcing the contract. The case of *Edwards to Daniel Sykes & Co., In re*,[4] which was referred to, also does not affect this case, for there there was no evidence that the purchaser did not hear the verbal statement of the auctioneer, and Mr. Justice Chitty held that he must be taken to have heard it. I hold, therefore, that the purchaser cannot have specific performance of this contract with compensation. There must be rescission of the contract and return of the deposit, and I give the purchaser the costs of investigating the title down to the time when the auctioneer's statement was furnished.

(7) 15 Ch. D. 215.

Solicitors—Sharpe, Parker & Co., agents for Lowe & Jolly, Birmingham, for purchaser; Preston, Stow & Preston, agents for Jacob Rowlands & Sons, Birmingham, for vendor.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

Farwell, J. 1900. Nov. 14, 15. } DE VERGES *v.* SANDEMAN, CLARK AND CO.

Mortgage — Shares — Fluctuating Security—Implied Power of Sale after Reasonable Time—Sale of Part of Security—Preservation of Remainder.

A mortgagee of shares in a company has an implied general power, in the absence of express agreement, to sell the shares after the lapse of a reasonable time for the repayment of the mortgage-money.

A mortgagee of shares is justified at any time in selling part of his security in order to make payments necessary for the preservation of the remainder.

Trial of action.

In July, 1897, the plaintiff, who was a Spaniard resident in Spain, instructed the defendants, who were members of the London Stock Exchange, to purchase for him 400 shares in the Central Boulder Gold Mines Co. 200*l.* of the purchase-money for these 400 shares was paid about the time of the purchase by the plaintiff; but the balance of 337*l.* 18*s.* 6*d.* was provided by the defendants out of their own moneys on a verbal agreement with the plaintiff that the 400 shares in question should be transferred into the names of N. S. Stott and T. Sandeman—

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both of them members of the defendants' firm—to be held by them on the defendants' behalf by way of mortgage to secure the balance so due to them from the plaintiff.

On August 31, 1897, the defendants wrote to the plaintiff a letter pressing for payment of the balance of 337*l.* 18*s.* 6*d.*, and stating that, if the money were not paid by September 15, "we shall deem ourselves at liberty to sell, at our discretion as to date, and at the then market price, the shares we hold." To this letter the plaintiff replied on October 12, 1897, apologising for the delay in payment, enclosing a cheque for 50*l.* by way of account, and requesting the defendants to purchase for him 100 further shares. The letter, however, contained no reference to the threat of the defendants to sell the 400 shares first mentioned.

The defendants subsequently purchased for the plaintiff on or about October 20 and 29, 1897, two several blocks of 100 and 200 further shares in the Central Boulder Gold Mines Co., at a total price of 409*l.* 19*s.* 6*d.* On October 22 and November 30, 1897, the plaintiff forwarded to the defendants, by way of payment on account, two several sums of 126*l.* 15*s.* and 12*l.* 3*s.* 10*d.*, thus leaving a balance of 558*l.* 19*s.* 2*d.* due to the defendants on the whole transaction. No further payment on account of this balance of 558*l.* 19*s.* 2*d.* was made on behalf of the plaintiff. The two further blocks of 100 and 200 shares purchased for the plaintiff were transferred into the names of N. S. Stott and T. Sandeman, and were held by them on the defendants' behalf by way of mortgage to secure the balance due to them from the plaintiff.

On or about June 9, 1898, the defendants received a circular from the Central Boulder Gold Mines Co. containing a scheme of reconstruction under which the holders of the 700 shares transferred into the names of N. S. Stott and T. Sandeman would become entitled on application to 1,050 shares of 1*l.* each in a new company to be formed, such shares to be credited with 17*s.* each. On June 13, 1898, the defendants wrote to the plaintiff enclosing this circular, explaining the scheme fully, and enquiring whether or not the plaintiff would participate in it and adopt the liability of 3*s.* per share in respect of the 700 shares. To this the plaintiff returned no answer, and in reply to subsequent letters from the defendants to the same effect and declining to make any further advances to the plaintiff in respect of the 700 shares, the plaintiff professed himself unable to send any further remittance.

In September, 1898, the 700 shares were of little or no value, and the defendants believed that by the plaintiff's refusal to find the money necessary to take them up he had abandoned all interest in them, though he still remained a debtor to them for the sum of 558*l.* 19*s.* 2*d.* Acting on this belief, and acting on the further belief that they were entitled to apply for the shares in the new company in their own names and for their own benefit, the defendants applied, without the knowledge of the plaintiff, for 1,050 1*l.* shares in the new company, and subsequently paid the 3*s.* per share in respect of the said shares. In the February of 1899 the defendants sold 300 of the new shares in order to recoup themselves for this expenditure of 3*s.* per share; and in March they sold the remaining 750 shares.

The present action was commenced by the plaintiff against the defendants on August 3, 1899. The plaintiff claimed redemption of the said 1,050 shares, or, in the alternative, damages for the wrongful sale of the same.

The defendants, by their defence, stated that they had believed in good faith, down to the time of their taking legal advice after the commencement of the action, that they were entitled to the said shares for their own benefit. They now, however, submitted to render an account of the moneys received by them in part payment by the plaintiff and for the sale of the 1,050 shares, and also an account of the moneys advanced by them on the plaintiff's behalf. Such accounts shewed a balance due on the whole transaction from the defendants to the plaintiff of 55*l.* 4*s.* 11*d.*, and this sum the defendants now brought into Court.

The plaintiff alleged that the value of the shares had greatly increased since the

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sale by the defendants in the February and March of 1899.

Robert Wallace, Q.C., and *G. H. Stutfield*, for the plaintiff.

Upjohn, Q.C., and *Stewart-Smith*, for the defendants.—A mortgagee of shares has an implied general power of sale in the absence of express agreement after the lapse of a reasonable time—*Tucker* v. *Wilson* [1714],[1] *Lockwood* v. *Ewer* [1742],[2] *Morritt, In re; Official Receiver, ex parte* [1886],[3] *Robbins's Law of Mortgage* (1897), p. 275, and *Fisher's Law of Mortgage* (5th ed.), p. 446. *France* v. *Clark* [1883][4] shews that a previous demand must be made for payment of the mortgage-money, but we have made such demand here. The right of sale was recognised again by Lord Hardwicke, L.C., in *Kemp* v. *Westbrook* [1749],[5] and by Malins, V.C., in *Langton* v. *Waite* [1868].[6] In this case, moreover, we rely on an implied particular power, for the defendant raised no protest against our threat to sell contained in the letter of August 31, 1897.

Robert Wallace, Q.C., in reply.—There is no authority for saying that a mortgagee of shares in a company—as opposed to chattels that are capable of being taken in actual possession—is justified in going outside his ordinary legal remedy of foreclosure.

FARWELL, J., after stating the facts, continued: With regard to the sale of the block of 300 shares in the February of 1899, and the application of the proceeds in making the payment of 3*s.* a share which was required on taking up the new shares, it is clear that, from whatever point of view I regard this transaction, a mortgagor coming to this Court and asking for redemption must allow the mortgagee the expenditure rendered necessary in order to obtain the shares which the mortgagor seeks to redeem. In my opinion the mortgagee was not bound to put his hand into his pocket and himself find the money for the purpose of this payment, but was justified in realising enough of the shares to make this payment, without which the shares would not have had any existence at all. Therefore, from any point of view, there is, in my opinion, no question of wrongful sale in respect of these 300 shares.

With respect to the remainder of the shares, which were sold by the defendants at a later date, the question arises, Has the mortgagee of a share, who has a legal title by reason of the shares having been transferred into his name, a right, either at law or in equity or in both, to sell those shares, if he cannot get his money paid after the lapse of a reasonable time? And assuming that the general law is against this right on the part of the mortgagee, there still arises the further question, Is there, in this particular case, any implied agreement that the mortgagee shall have such a power of sale? The general principle is stated, in my opinion accurately, in *Robbins' Law of Mortgage*, vol. i., at the bottom of page 275. The writer is there dealing with mortgages of stock, and in my opinion the shares in this company stand on the same footing: "Express powers were not formerly necessary in mortgages of stock, or in the instruments of defeasance executed by the transferee; nor need a mortgagee of stock now rely on his statutory power in order to realise his security by sale. If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself principal and interest, without any authority from the mortgagor, and without commencing an action of foreclosure." The authority cited for that proposition is the case of *Tucker* v. *Wilson*.[1] That was a case of Exchequer annuities; and Lord Harcourt, L.C., there took the view that there was no implied power of sale given by law in that case—there being also no express power—because he thought that such annuities were "like rentcharges out of lands, and not like stocks, which may be thought to be of imaginary value." The decision was reversed by the House of Lords; but I pause for a moment to consider what the Lord

(1) 1 P. Wms. 261; *sub nom. Wilson* v. *Tooker*, 5 Bro. P.C. 193.
(2) 2 Atk. 303.
(3) 56 L. J. Q.B. 139; 18 Q.B. D. 222.
(4) 52 L. J. Ch. 362; 22 Ch. 830. Affirmed, 53 L. J. Ch. 585; 26 Ch. D. 257.
(5) 1 Ves. sen. 278.
(6) 37 L. J. Ch. 345; L. R. 6 Eq. 165.

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Chancellor meant by those words. It is clear to my mind that his likening these Exchequer annuities to rentcharges meant this: "I regard these annuities as though they were land, or rentcharges issuing out of land, to which the ordinary rules apply, and in the case of which you must find an express power of sale." I do not, therefore, understand these words as at all contesting the general proposition that, if you are dealing with stocks which may be taken to be of what the Lord Chancellor calls "imaginary"—I think he meant "fluctuating"—value, there is a general power of sale at law. That that is the true view appears, moreover, from a statement by Lord Justice Fry in the course of the argument in *Morritt, In re; Official Receiver, ex parte.*[3] *Tucker* v. *Wilson*[1] had just been cited by counsel, and Lord Justice Fry says: "Those cases are cases of 'stocks,' not of movable chattels"—the contrast being not between stock and shares, but between *choses in action* and movable chattels—matters capable of manual delivery, and therefore the proper subject-matter of pledges, with which *Morritt, In re*,[3] was concerned—"and the ground taken," continues Lord Justice Fry, "seems to have been that, the value of stocks being subject to fluctuations, the necessity for obtaining a decree of foreclosure before selling would as a matter of business destroy the security." That is the view of Lord Justice Fry on this case of *Tucker* v. *Wilson*[1]; and that that is the true view, and the view adopted by the House of Lords as well as by Lord Harcourt, L.C., appears from the report of *Tucker* v. *Wilson*[1] in the House of Lords. The argument for the defendant, which was, as I infer from that report, adopted by the House, was this: "That annuities in the Exchequer could not be said to differ materially from other stocks, the Parliament having provided a constant interest for all Government securities, as well as for these annuities; there was indeed some difference between them respecting the principal money, but this difference was much to the advantage of the stocks; for there, the principal was to be repaid entirely, whereas the principal of the annuities wore out by time, and consequently decreased in value; and in this case, the funds appropriated for payment of these annuities, being chiefly the remnants or surplusages of other funds, had proved so deficient, and were so uncertain, that the Exchequer annuities had been more fluctuating in value, and had sunk more from their original price, than any other Government security whatever. That if the present decree should stand, great inconveniences must arise to merchants and other traders, whose estates often consisting chiefly of annuities and other Government securities, it had been much to their advantage that on any sudden emergency they could readily borrow money for a short time, near to the full value of such securities; but this would be impracticable for the future, because no person would lend, if after the money became payable, the security must be foreclosed, like a mortgage of land: besides, under the sanction of this decree, many persons might be induced to bring bills in Chancery, to redeem their annuities and other Government securities, which had been previously sold for the full value, at the time of such sale; and by this means an infinite number of suits might be occasioned. That it has always been the known and constant practice, in the case of mortgages of such securities, where the money has been neglected to be paid at the time stipulated, to proceed to a sale on giving eight or ten days' notice; yet these annuities were not sold till above two years after the money became payable; and after all reasonable application had been used in the meantime, to obtain satisfaction of what was due without selling." Now, to my mind, it is plain, both from the judgment of Lord Harcourt, L.C., and from the reasons which induced the House of Lords to reverse, as they did, the actual decision of the Lord Chancellor, that the foundation of the decision in the House of Lords was this—that it was a well-known practice two centuries ago that stocks and other securities of a fluctuating value—there were not at that time many of them—should, if mortgaged, carry with them a power of sale on the part of their holder after the lapse of a reasonable time for the payment of the money and after failure to pay within a reasonable time. No ex-

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press powers of sale were required, and none were given. In my opinion that is still the law. I adopt the statement of the law in *Robbins's Law of Mortgage*, on page 275, and I think that that statement is justified by the decision of Lord Chancellor Harcourt.

These shares are essentially of the character of fluctuating securities, within the meaning of the case of *Tucker* v. *Wilson*.[1] Further, in my opinion, the letter of August 31, 1897, amounts to a statement by the mortgagees that they should deem themselves at liberty to sell at any time they should think fit, and at the then market price of the shares, and that position was not dissented from in any way by the mortgagor. The new shares were bought after that date on the footing of that letter, that letter remaining unchallenged. The shares were then retained for a very considerable period—in fact, many months—and no one can say that a reasonable time has not been given for payment.

If it were necessary—I do not think it is—I should hold that there was also in this case a power of sale by agreement between the parties, and on that ground also the action must fail.

Then, the only question that remains is the question of costs. On the issue already decided, which is the sole issue for trial in the action, the plaintiff has failed, and he must pay the costs of the action to that extent. But the defendants were undoubtedly wrong in the position that they took up at the beginning; but I do not consider that the claim of the defendants, although it cannot be supported, to hold the shares as their own, has put the plaintiff to any costs beyond the costs down to and including the defence to the action. I propose to order that the defendants should pay those costs; I think that they are costs occasioned by the misconduct of the mortgagees within the meaning of the authorities on that subject.

Solicitors—E. F. Weldon, for plaintiff; Morley, Shirreff & Co., for defendants.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

FARWELL, J. 1900. Nov. 13, 14. } BORLAND'S TRUSTEE *v.* STEEL BROTHERS AND CO.

Company — Articles of Association — Compulsory Transfer of Shares on Bankruptcy—Repugnancy—Nature of Share in Limited Company — Rule against Perpetuity — Personal Contract — Fraud on Bankruptcy Law—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 16.

A provision in the articles of association of a company for the compulsory transfer of shares is neither repugnant to the nature of personal property nor obnoxious to the rule against perpetuity.

The fact that the liability to such compulsory transfer is to arise only in the event of the shareholder's bankruptcy, and the fact that the transfer is to be effected at a pre-arranged valuation which may possibly be less than the actual market value of the share at the time of transfer, do not in themselves constitute a fraud upon the bankruptcy law; provided that both these provisions are made without undue preference, and bona fide with a view to the successful working of the company.

A share in a company is not to be regarded as a sum of money settled subject to certain conditions contained in the articles of association; but is to be regarded as an interest in the company, measured, it is true, for the purposes both of liability and interest, by a certain sum of money, but impressed also from its inception with the various rights and liabilities contained in the contract entered into by means of the articles of association by all the shareholders inter se, in accordance with section 16 *of the Companies Act*, 1862.

The rule against perpetuity has no application in the case of personal contracts.

Trial of action.

This action was brought by the trustee in the bankruptcy of J. E. Borland. Between the years 1872 and 1890 the bankrupt was partner in a firm of East India merchants, carrying on business as merchants, commercial agents, and rice millers in London, at Rangoon, and at other places under the style of "Steel Bros. & Co." In 1890 this business was converted into a private limited company,

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with a nominal capital of 400,000*l.* divided into 4,000 shares of 100*l.* each. As an equivalent to his interest in the former partnership, the bankrupt received 250 shares in the new company, with 80*l.* credited as paid up on each share.

In the year 1897 new articles of association were adopted by the company by special resolution confirmed on June 11, and it was agreed that of the 3,200 shares in the company already issued, 1,600 (upon which 100*l.* per share had been paid up) should be treated as preference shares, and the other 1,600 (upon which 80*l.* per share had been paid up) should be treated as ordinary shares. The bankrupt, accordingly, in pursuance of this arrangement, received 160 preference and 80 ordinary shares in exchange for his original holding.

Clause 3 (*d*) of the memorandum of association stated that one of the objects for which the company was established was "to transact and carry on all kinds of agency business."

Article 47 of the new articles of association provided (*inter alia*) that each of the then respective present holders of certain ordinary shares therein specified (among which were the ordinary shares then held by J. E. Borland) should be entitled to continue to hold the shares then held by him, or any of them, till he should die, or voluntarily transfer the same, or should become bankrupt. Article 48 provided that no ordinary share which should for the time being remain entitled (*inter alia*) to the exemption or special right conferred by article 47, should be liable to be compulsorily taken or purchased under any provision of the articles enabling shares to be compulsorily taken or purchased.

Article 49 provided (*inter alia*) that none of Borland's ordinary shares should be transferred to any person not being a "manager or assistant"—these being certain working members of the company—so long as any "manager or assistant" should be willing to purchase the same at its "fair value."

Article 50 provided that, in order to ascertain whether any "manager or assistant" were willing to purchase a share, the proposing transferor should give notice in writing (thereinafter called the transfer notice) to the company that he desired to transfer the same. Such transfer notice was to specify the sum which the transferor fixed as the fair value, and was to constitute the company his agent for the sale of the share to any "manager or assistant" at the price so fixed.

Article 52 provided that if the company should, within fourteen clear days after being served with such transfer notice, find a "manager or assistant" willing to purchase at the price aforesaid any share comprised in the transfer notice, and should give notice thereof to the intending transferor, he should be bound, on payment of the purchase-money, to transfer such share.

Article 53 provided that the sum fixed by a transfer notice as the fair price for a share should in no case exceed the par value of the share; and that the par value of a share should, for the purpose of the article, be deemed to be the amount paid up, or properly credited as paid up, on such share, plus, in the case of an ordinary share, (*a*) a sum bearing the same ratio to the market value of the investments of the reserve fund account of the company as the capital paid up on the share sold should bear to the total paid-up ordinary capital; (*b*) a sum equal to one quarter of a sum bearing the same ratio to the company's "Plant Depreciation Account" as the capital paid upon the share sold should bear to the total paid-up ordinary capital; and (*c*) interest at 5 per cent. per annum on the total sum arrived at after making such additions as aforesaid, computed from such times and in such a manner as were therein more particularly specified. And it was further provided by the same article that a certificate of the auditor of the company should be final and conclusive on all parties as to the par value of any share.

Article 55 provided that, if the company should not within the space of fourteen clear days after being served with the transfer notice find a "manager or assistant" willing to purchase the share and give notice in manner aforesaid (article 52), the intending transferor should, at any time within three calendar months

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afterwards, be at liberty, subject to certain provisions therein specified, to sell and transfer the shares, or those not placed, to any person and at any price, provided that such price should not be, without the consent of the directors, lower than the price fixed by the transferor in the transfer notice as the fair value.

Article 58 provided that in every case in which ordinary shares were held by a person not being a "manager or assistant," the directors might at any time give to such person notice in writing requiring him forthwith to transfer all or any of such shares, and unless within fourteen days afterwards he should give a transfer notice in respect thereof, he should at the end of such period be deemed to have given such notice in accordance with article 50, and to have specified the par value of the shares as defined by article 53 as the sum he fixed as the fair value thereof, and that the subsequent proceedings might be taken on that footing.

Article 58A provided that no notice should be given under the last preceding article requiring the transfer of any ordinary share which was for the time being entitled to any of the exemptions or special rights conferred by articles 47 and 48; and also that no such notice should be given in respect of any ordinary share whatever, except during the one month next after a general meeting of the company at which an annual dividend on the ordinary shares had been either declared, or, profits permitting, would have been declared.

Article 72 provided that general meetings should be held once in every year, at such time and place as might be prescribed by the company in general meeting; and if no other time or place should be prescribed, in the month of April in every year, at such time and place as might be determined by the directors.

It was admitted that the above articles of association were rendered necessary by the circumstances of the company in 1897. Its business at Rangoon and at other foreign places was carried on by "managers" and "assistants," who received very small commissions, and looked to the dividends received by them on the shares they held in the company for the real remuneration of their services. The amount of these dividends fluctuated largely—for example, from 51*l.* per share in 1893 to 2*l.* 12*s.* 6*d.* a share in 1896; and the "managers" and "assistants" were greatly dissatisfied in 1897 that so large a proportion of the profits was received by the non-working members of the company. The new set of articles containing the clauses above set out was accordingly adopted, with a view to meeting this dissatisfaction on the part of persons who practically controlled the fortunes of the company, by holding out to them the prospect of gradually acquiring from time to time a larger interest in the capital of the company. No suggestion of any kind of *mala fides* was brought against any part of the transaction.

A receiving order was made against Borland on November 14, 1899, and on February 22, 1900, he was adjudicated bankrupt, and the plaintiff was appointed trustee of his estate. At the date of his bankruptcy Borland retained only seventy-three of his ordinary shares in the company, and he was not at the time a "manager or assistant."

On March 7, 1900, the plaintiff received notice from the directors of the company, in pursuance of article 58, requiring him forthwith to give to the company a transfer notice within the meaning of article 50 in respect of the seventy-three ordinary shares then held by him; and further notice that, unless, within fourteen days from the receipt thereof, he should give to the company such transfer notice in respect of the said shares, he would, at the expiration of that period, pursuant to the said article 58, be deemed to have given such transfer notice in accordance with the said article 50, and to have specified the par value of the shares as defined by article 53 as the sum he had fixed as the fair value thereof, and that the subsequent proceedings would be taken on that footing.

The par value of the said seventy-three shares, calculated in accordance with the articles, amounted to about 8,000*l.* The dividend paid for the year 1899 in respect of the said seventy-three ordinary shares was 2,190*l.*, which was at the rate of 37½ per cent. upon the amount paid up on each share; and the plaintiff alleged

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that the real value of the said seventy-three shares amounted to 34,000*l.* or thereabouts. The plaintiff accordingly commenced the present action against the defendant company on March 21, 1900, asking—First, for a declaration that the company were not entitled to require the transfer of any of the said seventy-three shares at any price whatever, and that the "transfer articles" were void; and secondly, for an injunction to restrain the company, their officers and agents, from calling for, enforcing, or effecting a transfer of all or any of the said seventy-three ordinary shares at any price whatever, or, alternatively, at any price less than the fair and actual value of such shares.

It appeared from the evidence given at the trial that a general meeting of the company, at which an annual dividend on the ordinary shares had been declared, had been held on February 16, 1900, but that the time and place of such general meeting had not previously been prescribed by the company in general meeting in accordance with article 72.

Jenkins, Q.C., and *Cozens-Hardy*, for the plaintiff.—The restrictions placed on the free transfer of shares by clauses 49, 50, 52, 53, and 55 of the articles of association, and the provision for compulsory sale in clause 58, are all alike—First, repugnant to the legal conception of the nature of personal property; and secondly, obnoxious to the policy of the bankruptcy law. The law does not recognise an absolute right to personal property, coupled with repugnant restrictions such as are here imposed—*Attwater* v. *Attwater* [1853],[1] *Macleay, In re* [1875],[2] *Rosher, In re; Rosher* v. *Rosher* [1884],[3] *Dugdale, In re; Dugdale* v. *Dugdale* [1888],[4] and *Elliott, In re; Kelly* v. *Elliott* [1896].[5] Here it is proposed that shares should be held on such conditions as would prevent their holder from realising them at what might be their real value. Even if no "manager or assistant" should be willing to buy under articles 49, 50, 52, and 53, yet even so the holder is prevented by article 55 from selling at his absolute discretion. Restrictions such as these are legally equivalent to an absolute fetter on alienation—*Billing* v. *Welch* [1871].[6] There is nothing in section 22 of the Companies Act, 1862,[7] or in Table A (8), (9), and (10) of that statute, to graft any exception on to the general principle in the case of shares in a limited company. "Capable of being transferred in manner provided by the regulations of the company" in section 22 means merely "capable of being transferred by such machinery as is therein provided." Table A (8), (9), and (10) merely shew that restrictions may be imposed on the registration of transfers.

[FARWELL, J.—Is not *New London and Brazilian Bank* v. *Brocklebank* [1882][8] opposed to your present contention?]

Again, these restrictions are opposed to the policy of the bankruptcy law, for their practical result is to prevent an asset from being available for creditors—*Wilson* v. *Greenwood* [1818],[9] *Whitmore* v. *Mason* [1861],[10] *Williams, In re; Warden, ex parte* [1872],[11] *Jay, Ex parte; Harrison, in re* [1880],[12] *Dugdale, In re; Dugdale* v. *Dugdale*,[4] and *Collins* v. *Barker* [1893].[13] As to the compulsory clause (article 58), it is either personal, or not, to the registered holder. If it be personal, then it is not binding on a trustee in bankruptcy; if it be not personal, then it transgresses the rule against perpetuity—*London and South-Western Railway* v. *Gomm* [1882].[14]

[FARWELL, J.—Is it not suggestive that in *Witham* v. *Vane* [1883],[15] and still more so that in *Walsh* v. *Secretary of State for India* [1863],[16] the question of perpetuity was not seriously raised?]

(1) 23 L. J. Ch. 692; 18 Beav. 330.
(2) 44 L. J. Ch. 441; L. R. 20 Eq. 186.
(3) 53 L. J. Ch. 722; 26 Ch. D. 801.
(4) 57 L. J. Ch. 634; 38 Ch. D. 176.
(5) 65 L. J. Ch. 753; [1896] 2 Ch. 363.
(6) 6 Ir. Rep. C.L. 88.
(7) By section 22 of the Companies Act, 1862, it is enacted: "The shares or other interest of any member in a company under this Act shall be personal estate capable of being transferred in manner provided by the regulations of the company . . ."
(8) 51 L. J. Ch. 711; 21 Ch. D. 302.
(9) 1 Swanst. 471.
(10) 31 L. J. Ch. 433; 2 J. & H. 204.
(11) 21 W. R. 51.
(12) 14 Ch. D. 19.
(13) 62 L. J. Ch. 316; [1893] 1 Ch. 578.
(14) 51 L. J. Ch. 530; 20 Ch. D. 562.
(15) Challis, Law of Real Property (2nd ed.), Appendix V. p. 401.
(16) 32 L. J. Ch. 585; 10 H L. C. 367

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Those were cases of personal contract. Here we have the same dilemma as arose in *London and South-Western Railway* v. *Gomm* [14]—that is, that an executory estate or interest is liable to arise at any period in the case of these shares quite apart from the will of their owner. The right of pre-emption constitutes something more than a mere personal contract for breach of which an action would lie for damages—it constitutes a kind of equity in the shares themselves, and, as such, attaches to them. *Mackenzie* v. *Childers* [1889] [17] is another instance of a purely personal contract.

It is *ultra vires* for the company to act as an agent for the sale of its own shares. "Agency business" in clause 3 (*d*) of the memorandum of association does not mean unremunerative business.

The notice of March 7, 1900, is invalid, for the general meeting of the company within a month of which such notice was given was neither held in the month of April nor at a date prescribed at a previous general meeting in accordance with the provisions of article 72.

Upjohn, Q.C., and *C. Ashworth James*, for the defendant company.—The plaintiff's argument is based on a misconception as to the bankrupt's position in 1897. At that time the goodwill of this company was practically the property of its working staff, and the bankrupt's only interest was in its "breaking-up" value. Hence the terms on which he now retires are perfectly just, for he gets out every farthing ever contributed to, or left in, the company by him. He loses the adventitious value, if any, given to the shares by the exertions of those who have worked only on the understanding that he should go on these terms if required. There is nothing in this arrangement obnoxious to the bankruptcy laws. In *Wilson* v. *Greenwood* [9] and *Collins* v. *Barker* [13] the complaint was that money actually put into the company could not be recovered; and in either case the Court found, as a fact, that a fraud was designed on the bankruptcy laws. The case is clearly within the *dictum* of Page-Wood, V.C., in *Whitmore* v. *Mason* [10]: "Where there is a *bona fide* intention to secure the going on of the concern, by the other parties handing over to the creditors all that the creditors ought to take, I cannot conceive there is any fraud on the bankruptcy laws." As to the rules against perpetuity and repugnancy, they do not apply to a personal contract such as exists between a company and its members—*Witham* v. *Vane*.[15] The principle of such cases as *Bradford Banking Co.* v. *Briggs* [1886],[18] which is now well settled, could not be upheld if the rule against perpetuity applied in such cases as this.

Jenkins, Q.C., in reply.—The short effect of the articles complained of is that Borland's trustee is to be on a different footing, with respect to these shares, from Borland himself. That is against the policy of the bankruptcy laws. The *dictum* in *Whitmore* v. *Mason* [10] has no bearing on the present case, unless the Court is satisfied that 8,000*l.* is the real value of these shares.

FARWELL, J., after stating the facts and reading the articles of association set out above, continued as follows: It is said that the provisions contained in these articles compel a man, at any time during the continuance of this company, to sell his shares at a particular price to be ascertained in a manner indicated, and to particular persons. Two arguments have been founded on this view of the facts. It is said, first of all, that such provisions are repugnant to absolute ownership. It is said, further, that they tend to perpetuity; and they are likened to the case of a settlor or testator, who settles or bequeaths a sum of money subject to executory limitations, which are to arise in the future, the interpretation of these articles according to the plaintiff being, that, if at any time hereafter during centuries to come the company should desire the shares of a particular person not being a manager or assistant, such person would be bound to sell.

To my mind that is applying to company law a principle which, so far as I know, is wholly inapplicable. It is the first time that any such suggestion has been made; and it rests, to my mind, on

(17) 59 L. J. Ch. 188; 43 Ch. D. 265.

(18) 56 L. J. Ch. 364; 12 App. Cas. 29.

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a misconception as to what a share in a company really is. A share, according to the plaintiff's argument, is a sum of money which is dealt with in a particular manner by way of executory limitations. To my mind a share is nothing of the sort. It is the interest of a shareholder in the company measured by a sum of money for the purposes—first, of liability; and secondly, of interest; but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with section 16 of the Companies Act, 1862. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money, and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount. That seems to me to be the proper view, having regard to the authority of *New London and Brazilian Bank* v. *Brocklebank*.[8] That was a case in which trustees bought shares in a company which were subject to an article of association to the effect that the company should have a first and paramount charge on the shares of any shareholder for all moneys owing to the company from him, either alone or jointly with any other person; and to the further effect that when a share should be held by more persons than one, the company should have a like lien and charge thereon in respect of all moneys owing to them from all or any of the holders thereof, alone or jointly with any other person. One of the trustees was a partner in a firm which afterwards went into liquidation at a time at which it owed the company a debt which had arisen long after the registration of the shares in the names of the trustees. It was held that the shares were subject to the lien mentioned for the benefit of the company, notwithstanding the interest of the *cestuis que trust* which was said to be paramount. Had there been any substance in the suggestion now put forward—that is, that the right to the lien was a right to an executory lien arising from time to time as the necessity for it arose, it might have been advanced in that case; but the decision is based on a ground inconsistent with such a contention—that is, that the shares were subjected to this particular lien in their inception and as one of their incidents. Jessel, M.R., likened it to the case of a lease. Lord Justice Holker said: "It seems to me that the shares having been purchased on those terms and conditions, it is impossible for the *cestuis que trust* to say that those terms and conditions are not to be observed."

Then it is said that this is contrary to the rule against perpetuity. Now, in my opinion, the rule against perpetuity has no application whatever to personal contracts. If authority is necessary for that proposition, *Witham* v. *Vane*[15] is a direct authority of the House of Lords; and to my mind an even stronger case is that of *Walsh* v. *Secretary of State for India*.[16] A stronger instance of the unlimited extent of personal liability could hardly be found; in that case the old East India Company entered into a contract, in 1770, with the first Lord Clive, to the effect—to put it shortly—that in the event of the Company ceasing to be possessors of the Bengal territories, they should repay to Lord Clive, his executors or administrators, several lacs of rupees, which had been transferred to them for certain particular purposes. The actual event did not happen till nearly a century later; and, as Lord Selborne pointed out in *Witham* v. *Vane*,[15] the question of perpetuity was tentatively raised in the House of Lords; but Lord Cairns, who was counsel in that case, refrained, with his usual discretion, from pressing it. I have said that the articles now under consideration are nothing more or less than a personal contract between Mr. Borland and the other shareholders in the company under section 16 of the Companies Act, 1862; Mr. Borland was one of the original shareholders, and he and his trustee in bankruptcy are bound by his own contract. I do not know that I am concerned to consider the case of other shareholders who come in afterwards; but were it so, the answer, so far as they are concerned, is this—that each of them on coming in executes a deed of transfer, which, in the terms in which it is executed, makes him liable to all the provisions of the original articles. Mr. Borland cannot be heard to say that

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there is any repugnancy or perpetuity in the covenant he has entered into; and his trustee in bankruptcy stands in this respect in no better position than Mr. Borland himself. Counsel for the plaintiff attempted to apply the reasoning in *Gomm's Case*[14] to the present, and to argue that if the contract was merely personal it did not affect the trustee in bankruptcy, and that if it was an executory limitation it was void. But this is, in my opinion, unsound; the trustee is as much bound by these personal obligations of the bankrupt as the bankrupt himself, if he were not bankrupt, would be.

There remains the question whether or not these provisions are a fraud on the bankruptcy law. To adopt the words of Lord Justice James in *Jay, ex parte; Harrison, In re*,[12] "a simple stipulation that, upon a man's becoming bankrupt, that which was his property up to the date of the bankruptcy should go over to some one else and be taken away from his creditors, is void as being a violation of the policy of the bankruptcy law." In the present case, however, I find that all the shares are subjected to article 58. There is no idea of preferring any one person to another, except so far as is pointed out by article 47, under which, by contract, the original shareholders at the time of the passing of the special resolution for the new articles retained for themselves the right to refuse the compulsory sale of their shares until they should die, or voluntarily transfer the same, or should become bankrupt. It is said that these last words constitute a fraud on the bankruptcy law, and render that particular provision void. In my opinion, that is not so. If I once arrive at the conclusion that these provisions were inserted *bona fide*—and that is not contested—and if I also come to the conclusion that they constitute a fair agreement for the purpose of the business of the company, and are binding equally on all persons who come in, so that there is no suggestion of fraudulent preference of one over another—there is nothing obnoxious to the bankruptcy law in a clause which provides that if a man become bankrupt he shall sell his shares. That is the first step; and I am not sure that counsel for the plaintiff would have contested that alone. The next step is, At what price is a man to sell? Now I find the price is a fixed sum for all persons alike; no difference in price arises in case of bankruptcy: the effect of bankruptcy it merely to except the bankrupt from the privileges of article 47. The particular benefit reserved to them is by contract abrogated in the case of their becoming bankrupt for the purpose of giving effect to the general object of the articles—that is, that they should have in the company none but managers and workers in Burmah, unless the company desired otherwise. There is nothing repugnant to any bankruptcy law in such a provision as that. Is there, then, anything repugnant in the way in which the value of shares is to be ascertained? If I came to the conclusion that the effect of these provisions was to compel persons to sell in the event of bankruptcy at something less than the price that they would otherwise obtain, the provisions would then be clearly repugnant to the bankruptcy law. But that is not the case. They all stand on the same footing, and the proper value is to be ascertained for all alike. These shares can have no value ascertainable by any ordinary rules, because having held, as I do hold, that the restrictive clauses are good, it is impossible to find a market value. There is no quotation. It is impossible therefore for any one to arrive at any actual price which you can clearly pronounce to be the value or the approximate value. Having regard to the fluctuation in profits that has occurred in the case of this company, it is impossible to say that there is any 10 or 20 per cent. profit, which is the basis of the plaintiff's case. All such calculations must be illusory. If it were necessary—I do not think it is—I should be prepared to hold upon the evidence that the price offered by the company in this particular case is fair value. So far as I can see the terms are reasonable; and, assuming that it is a fair mode of arriving at the value—and I think it is—I do not see that it differs from the ordinary provision for valuation, such as I find in *Whitmore* v. *Mason*,[10] applicable to those cases where assets are capable of valuation. I have to bear in mind that I am

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now dealing with a company whose assets are really, in a sense, incapable of valuation, but in which the parties have agreed on a valuation, which, as it seems to me, is a fair one. I think I should be straining the principle of the cases on fraud on bankruptcy if I were to come to the conclusion that an agreement like this, which was come to between the parties after discussion and discontent on the part of some of them, ought to be set aside on the suggestion that it might result in an unfair price. The particular passage to which counsel for the defendant referred in the case of *Whitmore* v. *Mason*[10] was at the end of the judgment. In that case Vice-Chancellor Page-Wood had before him a partnership deed which contained an article under which, in case of bankruptcy, the partners were to forfeit the whole value of a certain lease. That was held to be bad; and had there been anything of the sort here, I should, of course, have held it bad too. But there was also a provision, which Vice-Chancellor Page-Wood held good, that there was to be a valuation of the share of the bankrupt partner, and the Vice-Chancellor says at the end of his judgment: "Where there is a *bona fide* intention to secure the going on of the concern, by the other parties handing over to the creditors all that the creditors ought to take, I cannot conceive there is any fraud on the bankruptcy laws." In my opinion, that actually expresses the facts of the present case as proved to me, and I think I am following that case when I hold that there is no fraud on the bankruptcy law in the present case.

Then there are one or two other, somewhat minor, points made by counsel for the plaintiff. First, he says that these provisions are *ultra vires*. That, of course, depends upon the provisions of the articles which constitute the machinery by which the compulsory sale is to be carried out. The company is constituted an agent for receiving purchase-money, and I do not think it did more than that; and it is constituted agent for sale to the shareholder who is asked to sell. Counsel for the plaintiff says, in the first place, that that is not within the memorandum of association. In my opinion, it is within the words of sub-section *d* of clause 3 of the memorandum. Then it is said that it is contrary to the Companies Act, 1862, and is, in that sense, *ultra vires*. I cannot myself see that this arrangement is in any sense a trafficking in shares, or that the company is in any way mixed up in anything contrary to the statute. In my opinion, that contention fails.

The last point is a technical one, and turns on article 58A. [His Lordship read the article.] Now it appears that the notice was given on March 7, and that the general meeting at which the dividend was declared was held on February 16. It is said that this latter was not a general meeting properly so-called, for the reason that it was not called in accordance with the conditions laid down by article 72. I am told, however, that a general meeting has never been called in April at all. It was held in February and in March in the preceding years. Under those circumstances I consider that the company has waived article 72; and on the question whether the terms of article 58A have been complied with, and whether the notice has been given during the first month next after a general meeting of the company at which an annual dividend on the ordinary shares has either been declared or, profits permitting, would have been declared—I consider that it is clear that the only dividend was in this instance declared at the meeting on February 16, and that the plaintiff has either accepted or applied for it. That disposes of all the points that have been raised; and the necessary result is that I dismiss the action with costs.

Solicitors—Cox & Lafone, for plaintiff; Waltons, Johnson, Bubb & Whatton, for defendant company.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

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COZENS-HARDY, J. 1900. July 3. } BRIGHT v. RIVER PLATE CONSTRUCTION CO.

Arbitrator—Disqualification—Barrister—Named Arbitrator.

An agreement contained a clause providing that all disputes arising in respect of it should be referred to the arbitration of a certain barrister. In the course of the arbitration a charge of misconduct was made against a firm of solicitors, or their authorised representative, who were clients of the barrister:—Held, *on motion to restrain the continuance of the proceedings before the named arbitrator, that, there being no charge of incompetence or unfitness or bias against the arbitrator, the motion could not succeed.*

Jackson *v.* Barry Railway ([1893] 1 Ch. 238) *and* Eckersley *v.* Mersey Docks and Harbour Board ([1894] 2 Q.B. 667) *followed.*

Motion.

Clause 12 of an agreement made in August, 1899, between the defendant company of the first part, Messrs. James Capel & Co. of the second part, and the plaintiff of the third part, was as follows: "Any dispute or difference that shall arise in respect of this agreement shall be referred to the decision of Mr. A. of the Chancery Bar, or some other person to be nominated by him, and the decision of the said Mr. A. or such person as he may appoint shall be final and binding on the parties hereto, and neither party shall be entitled to take any proceedings in any Court of justice either in England or elsewhere in respect of any matter hereinbefore referred to except with the assent of the said Mr. A. or such person nominated by him as aforesaid, except for the purpose of enforcing the decision of the said Mr. A. or his nominee. In the event of either party refusing to submit any such question as aforesaid to the said Mr. A. or his nominee, the other party may submit same, and the decision of the said Mr. A. or his nominee shall be binding on such defaulting party as if he had so submitted."

Disputes having arisen between the parties to the agreement, the same were referred to arbitration. An action was then brought by the present plaintiff to restrain the proceedings before the arbitrator, and there were cross-motions to stay the action on the one hand, and to stay the arbitration proceedings on the other. Cozens-Hardy, J. (on June 13), decided that the arbitration must proceed, subject only to a question reserved whether a commission to take evidence in South America should be ordered.

Several appointments before the arbitrator had been made and kept, when a writ was issued by the plaintiff against the defendant company, Messrs. Capel & Co., and the arbitrator, claiming an injunction to restrain the defendants from proceeding with the arbitration before Mr. A., on the ground that a charge of misconduct against a firm of solicitors, or their representative, who were clients of Mr. A., had been brought and would have to be decided by Mr. A.

The affidavit in support stated that—First, at the date of the agreement Messrs. Norton, Rose & Co. acted as solicitors for all parties. Secondly, one of the issues to be determined was whether or not the failure of the plaintiff to obtain modifications of certain concessions was not caused by the wrongful interference of Mr. B., the duly authorised representative of Messrs. Norton, Rose & Co., and the defendants James Capel & Co. Grave questions of misconduct on the part of the said Mr. B. were raised by this issue, whilst he was acting as such representative. Mr. B. was and had been for some time past a member of the staff of Messrs. Norton, Rose & Co. Thirdly, "I have recently been informed and believe that Mr. A. has been for many years and still is at the present time in close professional relationship with the said Messrs. Norton, Rose & Co., and pending the arbitration is still rendering professional assistance in various matters. The said Messrs. Norton Rose & Co. are and have been active and lucrative clients of the said Mr. A., who constantly advises and acts on their behalf in relation to matters involving company law. I do not suggest that the said

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BRIGHT v. RIVER PLATE CONSTRUCTION CO.

Mr. A. rendered any services in connection with the defendant company. I respectfully submit that the said Mr. A. cannot properly undertake to determine this issue of the alleged misconduct of the said Messrs. Norton, Rose & Co. The defendant company by its directors, and the defendants James Capel & Co., have adopted the wrongful acts of the said representative in South America, and are seeking to take advantage thereof. Fourthly I make no imputation whatever against the defendant A., but I submit that, under the circumstances, he ought not to act as arbitrator in the matter, and that I ought to be relieved against his nomination."

The motion now came on for hearing.

Sir Edward Clarke, Q.C., and *Coldridge*, for the motion.—If the proceedings continue before the present arbitrator, he will be put in a false position through his personal relations with Messrs. Norton, Rose & Co.

Eve, Q.C., *Hume-Williams, Q.C.*, and *MacSwinney*, for the defendant company and Messrs. Capel & Co.—The Court will not restrain an arbitrator by injunction from acting, unless he is, in the opinion of the Court, unfit or incompetent to act —*Beddow* v. *Beddow* [1878].[1] The ordinary rules governing the selection of arbitrators do not apply in the case of a named arbitrator, and in order to justify the Court in declaring such an arbitrator to be disqualified from acting a probability of bias in favour of one of the parties must at least be shewn—*Jackson* v. *Barry Railway* [1892][2] and *Eckersley* v. *Mersey Docks and Harbour Board* [1894].[3]

Micklem, Q.C., and *T. T. Methold*, for the arbitrator.—The arbitrator has proceeded so far without any knowledge of the charges made against Mr. B.; he was willing to act as the Court should direct, but since a certain letter written by the plaintiff's solicitors has been read and other evidence put in, he declines to act further.

(1) 47 L. J. Ch. 588; 9 Ch. D. 89.
(2) [1893] 1 Ch. 238.
(3) [1894] 2 Q.B. 667.

COZENS-HARDY, J., after stating the facts and reading the affidavit, continued: When one or two appointments had been made before the arbitrator, it was suggested that the arbitration before him ought not to proceed, because he is a gentleman at the Bar with close and intimate professional relations with Messrs. Norton, Rose & Co.'s firm, and is, therefore, not a suitable or proper person to deal with a question involving a charge of misconduct against that firm or its representative.

Now it is important to remember that it is not alleged in the affidavit that Mr. A. is in any way incompetent or unfit, or that he will in fact be in any way biassed by these relations.

As a matter of strict law, I do not think I can accede to this application. I must adopt the principle laid down by the Court of Appeal in *Jackson* v. *Barry Railway*[2] and *Eckersley* v. *Mersey Docks and Harbour Board*,[3] which are binding on me, and clearly draw a distinction between the position of a named arbitrator in an agreement, and another person exercising judicial functions who is not so named in any document. In *Eckersley* v. *Mersey Docks and Harbour Board*,[3] although the question involved a claim by the contractor for damages caused by the improper construction of adjacent works under the control or management of the engineer's son, it was held under the arbitration clause that the engineer was not an improper person to decide that question, he being named in the arbitration clause; and no one could have contemplated at the time that contract was entered into that there would be any dispute between the contractor under the contract and the engineer's son with regard to the adjoining works. At the same time, no one would have thought it reasonable beforehand that the engineer should be the person to decide a matter between the contractor and the engineer's son. The Court of Appeal laid down that in the case of a named arbitrator all those considerations must be set aside, and that unless misconduct, or incompetence, or actual bias can be proved, the Court will not interfere.

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I must, therefore, refuse the motion, with costs.

Solicitors—Bennett & Co. ; Norton, Rose, Norton & Co.; Gedge, Kirby & Millett.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

BUCKLEY, J. 1900. Nov. 15. — BLACKPOOL MOTOR-CAR CO., *In re*; HAMILTON *v.* BLACKPOOL MOTOR-CAR CO.

Company — Fraudulent Preference — Guarantor and Guarantee—Charge in Favour of Guarantor—Right of Proof—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 37, *sub-s.* 3, *and s.* 48.

A guarantor who has not paid anything under his guarantee has a right to prove in respect of his contingent liability under section 37 *of the Bankruptcy Act*, 1883, *and therefore is a "creditor" within the meaning of the fraudulent-preference section (section* 48).

Paine, *In re*; Read, *ex parte* (66 L. J. Q.B. 71 ; [1897] 1 Q.B. 122), *followed.*

Mills, *In re*; Official Receiver, *ex parte* (5 Morrell, 55), *and* Warren, *In re*; Tranter, *ex parte* (69 L. J. Q.B. 425; [1900] 2 Q.B. 138), *distinguished.*

The Blackpool Motor-Car Co. was registered on July 30, 1897, as a company limited by shares under the Companies Acts, 1862 to 1893. There were six directors, of whom the plaintiffs were four.

On August 6, 1897, a meeting of the directors was held, at which it was resolved that two of the plaintiffs be authorised to arrange with the Lancashire and Yorkshire Banking Co. for an overdraft of 500*l.* on the security of the uncalled capital of the company. In the result, the bank declined to allow an overdraft on that security, but agreed to allow one on the terms that the directors should become personally liable for the amount.

On August 20 the four directors who were the plaintiffs executed a guarantee to the bank to secure an overdraft not to exceed 500*l.*

By a deed dated December 7, 1898, and made between the company of the one part, and the four directors who were the plaintiffs of the other part, it was recited (untruly, as below stated) that it was one of the terms on which the plaintiffs signed the guarantee to the bank that the company should execute in their favour a security in the terms thereof. The company thereby covenanted to indemnify the plaintiffs against all liability under the guarantee, and to pay off upon request of the plaintiffs all money secured by the guarantee, and it charged all its undertaking and property, including uncalled capital, with the payment of all moneys which should become due under the covenant of indemnity.

Buckley, J., came to the conclusion of fact that the recital in the deed was untrue, and that prior to December, 1898, there existed no binding engagement between the company and the directors that any such security should be given, and, further, that the directors did not execute the guarantee to the bank upon the faith that any such security should be given.

The deed was executed at a time when the company was in financial difficulties and unable to pay its debts as they became due out of its own moneys.

On December 16, 1898, the company passed a formal resolution for winding up, and the defendant John Barrow was appointed liquidator.

The plaintiffs, having subsequently been compelled under pressure of an action to pay to the bank the amount of the overdraft under their guarantee, now claimed in this action that the deed of December 7, 1898, created a first charge in their favour on the undertaking and property of the company, and should be enforced by foreclosure or sale.

H. Terrell, Q.C., and *Malcolm Macnaghten*, for the plaintiffs.—The only

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question, apart from the questions of fact, is whether the deed of December 7, 1897, constitutes a fraudulent preference within section 48 of the Bankruptcy Act, 1883.[1] It does not.

[BUCKLEY, J.—Is it not *prima facie* a fraudulent preference?]

Section 48 only applies where the person who is said to be preferred is in the strict sense a creditor. The plaintiffs were not that—*Smith, In re; Kelly, ex parte* [1879],[2] which was a case under the corresponding section of the Bankruptcy Act of 1869

[BUCKLEY, J.—Is not a "creditor" any person who at the date of the payment is entitled, if bankruptcy supervenes, to prove in the bankruptcy—*Paine, In re; Read, ex parte* [1896][3]?]

The criterion is not whether or not the person can prove. In *New, Prance & Garrard's Trustee* v. *Hunting* [1897][4] the trust estate could have proved in the bankruptcy of the trustee who had misappropriated the trust fund, but yet was not held to be a creditor of the trustee within section 48, although, no doubt, Lord Halsbury, L.C., expressed his opinion that he was a creditor. The criterion is whether the relationship of debtor and creditor in the strict sense of the term exists. It does not exist between a defaulting trustee and the trust estate—*Wilkinson, In re; Stubbins, ex parte* [1881],[5] and *Goldsmid, In re; Taylor, ex parte* [1886].[6] Nor does it exist between principal and surety—*Mills, In re; Official Receiver, ex parte* [1888].[7] A payment to relieve a surety is not a fraudulent preference within the Act—*Warren, In re; Tranter, ex parte* [1900].[8] *Paine, In re; Read, ex parte*,[3] is the only authority which throws any doubt on the proposition that section 48 is applicable only to the case of persons who are debtor and creditor respectively in the strict sense, and, so far as it does throw any doubt, is inconsistent with earlier authorities. A surety cannot prove unless either he has paid the principal creditor or the creditor has renounced his right of proof, neither of which is the case here. There cannot be double proof. If section 37 stood alone, the plaintiffs would have been in a position to prove, but that section must be read subject to the rule as to double proof.

[BUCKLEY, J.—How does that agree with *Herepath, In re; Delmar, ex parte* [1890][9]? You say that Vaughan Williams, J., was wrong altogether in *Paine, In re; Read, ex parte*.[3]]

[*Parrott, In re; Whittaker, ex parte* [1891],[10] was also mentioned.]

Tindal Atkinson, Q.C., and *Deans*, for the defendants, were not called on to argue the point of law on which alone the case is reported.

BUCKLEY, J.—This is an action in which the plaintiffs sue upon a deed of indemnity dated December 7, 1898, and made between the Blackpool Motor-Car Co. of the one part, and the plaintiffs, who were four of the directors of the company, of the other part. That the deed was duly executed is not contested, but the defence is that the deed was made with a view of giving the plaintiffs a preference over the other creditors of the company at a time when the company was unable to pay its debts as they became due from its own money, and was a fraudulent preference within the meaning of section 164 of the Companies Act, 1862, and the defendants counterclaim that the deed may be declared void. The whole question, there-

(1) The Bankruptcy Act, 1883, s. 48, provides: "(1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

(2) 48 L. J. Bk. 65; 11 Ch. D. 306.

(3) 66 L. J. Q.B. 71; [1897] 1 Q.B. 122.

(4) 66 L. J. Q.B. 554; [1897] 1 Q.B. 607; [1897] 2 Q.B. 19. Affirmed in H.L., *sub nom. Sharp* v. *Jackson*, 68 L. J. Q.B. 866; [1899] A.C. 419.

(5) 50 L. J. Ch. 547; 17 Ch. D. 58.

(6) 56 L. J. Q.B. 195; 18 Q.B. D. 295.

(7) 5 Morrell, 55.

(8) 69 L. J. Q.B. 425; [1900] 2 Q.B. 138.

(9) 7 Morrell, 190.

(10) 63 L. T. 777.

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fore, is whether or not this deed constitutes a fraudulent preference. For the purpose of determining that, I have to determine two questions—one of fact, the other of law. As to the question of fact it is said on behalf of the plaintiffs that, although the deed was executed at a time when the company was unable to pay its debts as they became due from its own money, yet it was executed in pursuance and performance of an antecedent agreement to execute such a deed. [His Lordship here stated the facts, and his conclusion that the deed was not executed in pursuance of any antecedent binding agreement.] On the facts, therefore, I hold that, subject to the question of law, the deed is void as a fraudulent preference.

Then as to the question of law. It is said on behalf of the plaintiffs that section 48 of the Bankruptcy Act, 1883, speaks of any charge in favour of "any creditor," and that these directors were not creditors; that they were persons who had entered into a guarantee to the bank, and who at the date of the deed had not paid anything under the guarantee, and could not have sued the company; and that "creditor" means a person between whom and the prospective bankrupt there exists the relation of debtor and creditor so that the creditor could sue the debtor, and does not mean such a person as, having regard to section 37, has a right to prove in respect of a contingent liability. It seems to me there is a decision of Mr. Justice Vaughan Williams which is directly in point. In *Paine, In re; Read, ex parte*,[8] the facts were these: A bill for 20*l.* had been accepted by one Barnard for the accommodation of a debtor and had been discounted for the debtor by his bankers. The bill fell due. Thereupon the debtor paid in 20*l.* to his bank to meet the bill and so relieve Barnard. A month later a receiving order was made against the debtor, and he was adjudicated a bankrupt. In his examination the debtor admitted that he had paid in the 20*l.* with a view to prefer Barnard, and that he was insolvent at the time he made the payment. The trustee in his bankruptcy claimed payment of 20*l.* from Barnard on the ground that the circumstances under which the 20*l.* was paid into the bank to meet the bill was a fraudulent preference by the bankrupt of Barnard within section 48. Mr. Justice Vaughan Williams, in giving judgment, said: "I have to decide this question merely upon what seems to me to be the true construction of the Act of Parliament, and I need not trouble myself to distinguish between legal and equitable considerations. Now, Mr. Barnard was a creditor of the bankrupt in the sense that, if bankruptcy supervened, he would have had a right to prove and to share in the distribution of the bankrupt's assets. That being so, what is the meaning of the word 'creditor' in section 48? The Act contains no definition of the word, and, therefore, to arrive at the meaning I must look at the history of the section. One knows that the doctrine of fraudulent preference was introduced to prevent payments made by insolvent debtors in contemplation of bankruptcy—that is to say, in contemplation of the administration by the Court of the bankrupt's estate rateably amongst those persons who would be entitled to share in the distribution of that estate. In my judgment, when once I arrive at that I must come to the conclusion that the word 'creditor' in section 48 must mean a person who would be entitled to prove and to share in that distribution. I think the Legislature in enacting the section intended to prevent a payment to anybody who, but for such payment, would share in the administration of the bankrupt's estate. I think, therefore, that the word 'creditor' means any person who, at the date of payment to him, would have had to come in and prove and rank with the other creditors in the bankruptcy. A surety would be such a person. I hold, therefore, that you may make a fraudulent preference by a payment to or for the benefit of a surety who has not yet been called upon to pay as surety. It is not disputed that at the date of the payment into the bank Barnard was a person who had a right of proof under section 37 in respect of his contingent liability as acceptor of the bill. He had a right, therefore, to share in the distribution of the bankrupt's assets; and under the circumstances I hold that the payment into the bank was a fraudulent preference of

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Barnard by the bankrupt." The whole of that judgment of Mr. Justice Vaughan Williams is applicable to the present case, assuming that these directors had a contingent liability provable under section 37, as to which I have a word to say later.

But it is said that *Paine, In re; Read, ex parte*,[3] is inconsistent with other authorities. I cannot find that this is so. First, there is the case of *Mills, In re; Official Receiver, ex parte*,[7] which was a decision of the Court of Appeal. There Mills borrowed from one Whittaker the sum of 260*l.*, for which he gave promissory-notes, one Greenwood being surety. In January, 1887, a writ was issued by Whittaker against Mills and Greenwood for the debt, whereupon Mills handed over 223*l.* to the creditor. In February a bankruptcy petition was presented against Mills, and the official receiver applied to the Court for an order that the payment to Whittaker was a fraudulent preference within section 48. It was proved that the object of the bankrupt in making the payment was not to prefer Whittaker, but to prefer Greenwood. Whittaker got the money. Greenwood did not. The application was to make Whittaker refund. The Court of Appeal said No. Lord Esher, M.R., said: "Was it with the intention of giving the creditor a preference that the payment was made? Under the statute it is not sufficient if the debtor paid one creditor in order to favour another. Still less would it be a fraudulent preference if the payment has been made to benefit himself. That has been decided. Still less is it so if the debtor makes the payment to a creditor with intent to advantage some one else who is not a creditor. Here the findings are that the debtor made the payment in favour of Whittaker. True, but what was his intention? It has been found that he did not intend to prefer Whittaker, but to give an advantage to Greenwood. Now Greenwood is not a creditor at all. The case is therefore not within the words of the section, and to hold otherwise would be directly opposite to what was decided in *Goldsmid, In re; Taylor, Ex parte*.[6]" So the point of *Mills, In re*,[7] was that the person as against whom the application was made was the person who had received the money, but was not the person whom it was intended to prefer. It was intended to prefer another person—namely, the surety. *Mills, In re*,[7] was mentioned in *Paine, In re*,[3] but it will be noticed that, so far as the case is reported, Mr. Justice Vaughan Williams says nothing about it. In *Paine, In re*,[3] the application, as against Barnard, succeeded, although he was not the person who had received the money; and upon this, as I shall show presently, the case has been doubted. But the point which arose in *Mills, In re*[7]—namely, that the respondent must be the person intended to be preferred—did not arise in *Paine, In re*,[3] at all, for the respondent in *Paine, In re*,[3] was that person. The point argued in *Paine, In re*,[3] was whether "creditor" in section 48 includes a person who has a contingent liability, which point did not arise and was not argued in *Mills, In re*.[7]

The other case is *Warren, In re; Tranter, ex parte*,[8] which is like *Mills, In re*.[7] There the application was by the trustee in a bankruptcy against two persons, Warren and Harrison, who had joined with the debtor in giving a joint and several promissory note for 250*l.* to the Union Loan and Discount Co. of Manchester, who had made an advance to the debtor. Warren and Harrison had signed the note as sureties. The debtor, being in a condition of insolvency, paid the 250*l.* to the Discount Co., in discharge of the debt, on June 22, 1899, and on July 24 was adjudicated a bankrupt on her own petition of the same date. The trustee claimed that the payment to the company was a fraudulent preference of Warren and Harrison, and that Warren and Harrison should refund the money. The money had been paid by the debtor to the Discount Co., and not to the sureties. On an appeal to the Divisional Court, Mr. Justice Wright and Mr. Justice Phillimore refused to follow *Paine, In re; Read, ex parte*,[3] in holding that sureties who had not received the money could be made to refund. Mr. Justice Wright said, "(The payment) was made by the debtor in order to discharge her debt to the Discount Co., and the money was kept by them and not applied to any other purpose than the discharge

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of that debt, and the result of that payment was that the makers of the promissory-note were released from all liability upon it. But that does not make the payment a payment to or in favour of the respondents. The only case that appears to be at variance with this view is that of *Paine, In re; Read, ex parte*,[3] where I agree that the Court held that the payment, though nominally a payment to the creditor, must be treated as a payment to or in favour of the acceptor of an accommodation bill drawn by the debtor. But in *Mills, In re; Official Receiver, ex parte*,[7] there are *dicta* of the Court of Appeal which this Court cannot overlook, although the judgment was founded upon the case of *Goldsmid, In re; Taylor, ex parte*,[6] which is not reported as deciding any point of this kind. In *Mills, In re; Official Receiver, ex parte*,[7] the Lords Justices seem clearly to have taken the view that in order to constitute a fraudulent preference the payment must be made to or for the person intended to be preferred. I think, therefore, that this appeal must be dismissed." So *Mills, In re*,[7] and *Warren, In re*,[8] are cases which go to shew that where the payment is made to a person whom it is not sought to prefer you cannot recover by way of fraudulent preference against him because it was not sought to prefer him, nor against the person whom it was sought to prefer, because the payment was not made to him or for his benefit. I do not think there is anything in that inconsistent with the decision in *Paine, In re*,[3] that "creditor" in section 48 means a person who, if bankruptcy supervenes, can prove.

Other cases have been mentioned, but it seems to me they fall under a different head. It must now be taken, after what Lord Halsbury said in *Sharp* v. *Jackson*,[4] that the relation of debtor and creditor does exist between a trustee who has misappropriated trust funds and his *cestuis que trust*. It was argued for the plaintiffs here that, inasmuch as that is so, and inasmuch as the cases to which I am about to refer held that the doctrine of fraudulent preference did not apply to cases of that description, it is not every creditor who falls within section 48. In the cases to which I am going to refer—being all of them cases as between trustee and *cestui que trust*—the position really was this: Take it that there existed the relation of debtor and creditor, still there existed another relation—namely, that of trustee and *cestui que trust*; and these cases only go to shew that by virtue of that you may escape section 48, though, if it were simply a case of debtor and creditor, the section, may be, would apply. *Smith, In re; Kelly, ex parte*,[2] was a case in which money had been remitted by a Glasgow firm to a London firm, who subsequently became bankrupt, for the specific purpose of meeting certain bills drawn by the Glasgow firm and accepted by the London firm and due on October 5. 3,300*l.* of the 5,300*l.*, which was the money remitted, found its proper destination; 2,000*l.*, by an error of a clerk, went in a wrong direction. The persons who received the money for the specific purpose had not the smallest intention of misappropriating it or sending it to a wrong destination—that was purely the fault of a clerk, who paid it into a wrong bank, where the firm had an overdraft, and the bank claimed a lien. What the Court of Appeal held was that, as the London firm had not intended to misappropriate the 2,000*l.*, the relation of trustee and *cestui que trust* was that which subsisted between them and the Glasgow firm, and therefore the London firm could properly have employed, and ought to have employed, the 2,000*l.* in meeting the bills. The Court put it on this — that the bankrupt firm were trustees of the 2,000*l.* for the persons who remitted the money for a specific purpose, and in making good that sum for which they were trustees they were not committing any fraudulent preference within section 48. In *Wilkinson, Ex parte; Stubbins, in re*,[5] a debtor on the eve of bankruptcy voluntarily made good trust-money which he had misappropriated, and it was held that the payment could not be set aside as a fraudulent preference of the trust estate within section 92 of the Bankruptcy Act, 1869. The case of *Goldsmid, In re; Taylor, ex parte*,[6] again,

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is to the like effect. In *Sharp* v. *Jackson*[4] a trustee who had committed breaches of trust and was insolvent had on the eve of his bankruptcy conveyed an estate to make good the breaches of trust without any pressure or request by his *cestuis que trust*. It was held that it was impossible on the facts to say there was a fraudulent intent by the trustee to prefer the trust estate; he was only desirous, for his own protection and because it was honest and honourable so to do, to make good what he had misappropriated. I do not think these cases have any bearing upon the point which I have to decide, which is whether these directors are creditors or not. The present case seems to me to be entirely governed by the decision of Mr. Justice Vaughan Williams in *Paine, In re; Read, ex parte*,[3] and I must follow it.

Then it is also said that the plaintiffs were not persons having a right of proof under section 37 of the Bankruptcy Act, 1883, because they had not paid anything under the guarantee when the deed was executed. But I think that the cases of *Wolmershausen* v. *Gullick* [1893][11] and *Herepath, In re*; *Delmar, ex parte*,[9] shew that their contingent liability would be sufficient to entitle them to prove, notwithstanding what was said by Mr. Justice Cave in *Parrott, In re; Whittaker, ex parte*.[10]

I think, therefore, the action fails.

Solicitors—Barton & Pearman, agents for J. H. Armitage, Leeds, for plaintiffs; Vincent & Vincent, agents for John Bowling & Sons, Leeds, for defendants.

[*Reported by Arthur Lawrence, Esq., Barrister-at-Law.*

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(11) 62 L. J. Ch. 773; [1893] 2 Ch. 514.

WRIGHT, J. 1900. Nov. 14. } ILFRACOMBE PERMANENT MUTUAL BENEFIT BUILDING SOCIETY, *In re*.

Company — Winding-up — Creditor — Previous Proceedings—Unregistered Company — Building Society Certified after 1862 *and not Registered after* 1874—*Unauthorised Association—Jurisdiction to Wind up—Costs—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 4 *and* 199—*Building Societies Act*, 1874 (37 *&* 38 *Vict. c.* 42), *s.* 40—*Building Societies Act*, 1894 (57 *&* 58 *Vict. c.* 47), *s.* 25.

A building society was established in 1868 *under the Building Societies Act*, 1836, *but had never been incorporated under any subsequent Act. In* 1900 *the society was found to be insolvent, and a petition was presented by two creditors to wind it up, and the present petitioner had knowledge of it, but that petition was subsequently withdrawn. All the undisputed creditors except the present petitioner and three others had accepted a composition of* 12*s.* 6*d. in the pound, and the whole of the assets had been sold by the directors, who had contributed out of their own pockets to provide the composition. A petition was now presented by a creditor to wind up the society. The directors had expressed their willingness to pay him a composition of* 12*s.* 6*d. in the pound on his debt, and had retained sufficient funds in their hands for this purpose*:—Held, *upon the merits, that no order ought to be made upon the petition.*

Semble, *that, although in a literal sense the society was, in the words of section* 4 *of the Companies Act*, 1862, "*formed in pursuance of some other Act of Parliament*"—*that is, the repealed Building Societies Act*, 1836—*the word* "*formed*" *in that section means formed and having its existence recognised under the provisions* "*of some other Act*," *and therefore that the society, not having been incorporated under the Building Societies Act*, 1874, *was an illegal society, and consequently the Court had no jurisdiction to make a winding-up order*:—Held, *therefore, that the petition must be dismissed, but that the society, having pleaded its own illegality as a defence, was not entitled to costs.*

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ILFRACOMBE PERMANENT MUTUAL BENEFIT BUILDING SOCIETY, IN RE.

Petition by Joseph Channing, a creditor of the above society, for an order to wind up the society compulsorily.

The society was established in March, 1868, under the Building Societies Act, 1836 (6 & 7 Will. 4. c. 32), and was certified as a building society under that Act on March 3, 1868.

The society commenced and continued business and received subscriptions and made advances to its members, and also received considerable sums of money by way of loan from depositors.

On August 25, 1894, the Building Societies Act, 1894 (57 & 58 Vict. c. 47), received the royal assent. That Act, by section 25, sub-section 2, provided that on the expiration of two years from its passing the Building Societies Act, 1836, should be repealed as to all societies certified thereunder after the year 1856. Notwithstanding this Act, the society was never registered or incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), or any subsequent Act.

The society was for some years supposed to be in flourishing circumstances, but on March 13, 1900, Joseph Braund, the secretary of the society, made a written confession to the directors to the effect that he had felt the time had come for him to make known the real state of the society; that for many years it had been getting into an insolvent state, although he had with the very best intention kept it from the directors and the public; that he had falsified the accounts to hide its real state; and that the auditors had not the slightest idea of what he then disclosed. Immediately after this confession the directors of the society instructed H. Barrett, a member of the firm of Barrett & Perrin, chartered accountants, to investigate the affairs of the society, and they subsequently instituted a prosecution against Braund, who was indicted for mutilating certain ledgers and falsifying a certain balance-sheet of the society, and on various charges of embezzlement. Braund was tried at the Exeter Assizes, when he pleaded guilty to the charges of embezzlement, and was sentenced to three years' penal servitude. As the result of Barrett's investigations it appeared that there were in all forty depositors of the society, to whom the society owed in the aggregate the sum of 8,420*l.* 14*s.* 3*d.*, of which the sum of 1,990*l.* had been deposited since August 25, 1896—that is, two years after the passing of the Building Societies Act, 1894; that there were 291 members to whom there was owing for capital subscribed and interest 10,425*l.* 3*s.* 7*d.*; and that the assets of the society consisted almost entirely of moneys owing to the society by borrowing members on mortgages, which were estimated to produce the sum of 5,044*l.* 17*s.* 7*d.*, which would be sufficient to pay a dividend of about 12*s.* to 12*s.* 6*d.* in the pound on the amount due to the depositors. In these circumstances the directors approached all the depositors, and offered to purchase their deposits at a sum equivalent to 12*s.* 6*d.* in the pound. A form of agreement for sale was prepared, and all the depositors whose claims were undisputed, with the exception of the petitioner, agreed to sell their deposits upon the terms therein mentioned, the date for completion of the sales being in two instances fixed as July 1, and in the remainder on August 1, 1900. All these agreements had been completed and the purchase-money paid except in four cases, which still awaited completion, the purchase-money having in the meantime been deposited in a local bank. As further part of the scheme for winding up the society, a deed of dissolution was prepared, and was executed or assented to by ninety members of the society, by which it was provided that the assets should be applied in paying off the depositors, and that the conduct of the winding-up should be left in the hands of the directors and auditors. All the assets of the society had been sold, and realised the sum of 4,897*l.* 18*s.* The difference between the amount realised and the sum necessary to provide for the purchase of all the deposits at 12*s.* 6*d.* in the pound, amounting to 823*l.*, had been found by the directors and auditors out of their own moneys.

In March, 1900, a petition for winding up the society was presented by two creditors, but before the hearing they agreed to sell their deposits on the terms above mentioned, and obtained leave to

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withdraw their petition. The present petitioner was aware of this petition having been presented, but gave no notice of appearance to support, and did not appear to support it.

The present petitioner was a depositor in the society to the amount of 620*l.*, which he had deposited at irregular intervals between December 5, 1889, and February 4, 1895, on which interest had been paid up to December 31, 1899; and on March 24, 1900, had given six months' notice of withdrawal, which had not been complied with.

The directors had offered him, and were ready and willing to pay him, a composition of 12*s.* 6*d.* in the pound on his debt, but this he had declined to accept.

The petitioner by his petition alleged that an enquiry was desirable into the matters relating to the failure of the society and the conduct of its business by its directors and auditors and other officers; such matters included the loss of capital moneys through alleged negligence and breach of duty, the preparation and publication of alleged false and misleading balance-sheets, and the alleged payment of interest out of capital; he further alleged that it was just and equitable that the society should be wound up by the Court.

In the course of the argument it was stated that out of fifty-eight shares, twenty-seven were held by directors and seventeen by the members of a director's family.

Waggett (*H. Terrell, Q.C.*, with him), for the petition.—The petitioner has made out a *prima facie* case for a compulsory order.

Swinfen Eady, Q.C., and *G. R. Northcote*, for the society and its directors and auditors.—The facts in this case are very special, and upon the merits no winding-up order ought to be made, as no substantial benefit would result from it to any one.

Apart, however, from the merits, there is a technical objection that the Court has no jurisdiction to wind up the society. The society was established under the Building Societies Act, 1836, and was therefore originally a legal society. By the Building Societies Act, 1874, that Act was repealed; but it was provided by section 7 that the repeal should not affect any subsisting society certified under the former Act until such society should have obtained a certificate of incorporation under the Act. Section 9 provided that every society then subsisting or thereafter established should, upon receiving a certificate of incorporation under the Act, become a body corporate by its registered name, having perpetual succession, until terminated or dissolved in manner therein provided, and a common seal. Section 40 required societies under that Act to make certain annual audits and statements as to their funds. The Building Societies Act, 1894, by section 25, sub-section 1, provides that section 40 of the Building Societies Act, 1874, shall apply to every society which has been certified under the Act of 1836 and has not been incorporated under the Act of 1874, and was existing at the date when the Act of 1894 was passed (August 25, 1894), and that if any such society fails to comply with the requirements of section 40 of the Act of 1874, the society and its members shall be subject to certain penalties. Sub-section 2 provides that "On the expiration of two years from the passing of this Act (*i.e.* Aug. 25, 1896), the said Building Societies Act, 1836, shall be repealed as to all societies certified thereunder after the year 1856." As the present society was never registered under the Act of 1874, the effect of section 25, sub-section 2, was that on and after August 25, 1896, the society ceased to be a legal society, and therefore, by reason of section 4 of the Companies Act, 1862,[1] the

(1) The Companies Act, 1862, s. 4, provides that "No company, association, or partnership consisting of more than ten persons shall be formed, after the commencement of this Act, for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent; and no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members

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Court has no jurisdiction under section 199 of that Act to wind it up—*Padstow Total Loss and Collision Assurance Association, In re; Bryant, ex parte* [1882],[2] and *Bowling and Wilby, In re* [1895].[3]

[They also referred to the Building Societies Act, 1874, s. 8, and to the Building Societies Act, 1875, s. 2.]

J. K. Darley, for a shareholder, opposed the petition.

Gore-Browne, for an alleged depositor whose claim was disputed.—As section 25, sub-section 2 of the Act of 1894 says nothing as to the repeal of the Act of 1836 dissolving or rendering illegal the societies therein referred to, the effect is not to render this society illegal. By section 38 of the Interpretation Act, 1889, when any future Act repeals any other enactment, then, unless the contrary intention appears, the repeal is not to affect any right under the repealed enactment.

H. Terrell, Q.C., and *Waggett*, for the petition.—As to the jurisdiction of the Court to wind up the society, there was nothing illegal about the society originally, and up to 1896 it could have been wound up by the Court. In 1894 the Building Societies Act, 1836, was repealed by the Act of 1894, and on expiration of the two years from the date of its passing limited by the Act for registration the society ceased to have the protection of the Act of 1836. But after that date, notwithstanding the society had no authorised existence, it was not an unauthorised association, for, although not registered under the Companies Act, 1862, it was, within the meaning of section 4 of that Act, "formed in pursuance of some other Act of Parliament"—namely, the Act of 1836. The word "formed" must be taken in its popular meaning—that is, originally formed—*Shaw* v. *Simmons* [1883].[4] The society, therefore, having been lawful in its inception, *Padstow Total Loss and Collision Assurance Association, In re*,[2] does not apply so as to oust the jurisdiction of the Court. That was a case which clearly fell within section 4 of the Act of 1862, because the association there consisted of more than twenty persons and was formed after the commencement of the Act. In *Bowling and Wilby, In re*,[3] there were less than seven members of the association. At any rate, it is sufficient in the present case to say that the society existed after August 25, 1896, for the purpose of winding-up; and it is important to notice that all the loans from the petitioner were made before that date.

As to the merits, the petitioner has shewn a *prima facie* case of misfeasance. It is admitted he is a creditor of the society and that the society is insolvent. Under the circumstances he is entitled to a winding-up order unless it can be shewn that there is no possibility of any assets being obtained by a winding-up order, and the onus of shewing this rests upon the person opposing the making of the order — *Krasnapolsky Restaurant and Winter Garden Co., In re* [1892].[5] The petitioner is entitled to have the question tested whether each member of the society is, as he contends, or is not liable to repay to the petitioner the amount of his debt; and there is good ground for contending that the members are liable to contribute beyond the amount of their shares—see *West London and General Permanent Building Society, In re* [1894],[6] which is distinguishable; and *Murray* v. *Scott* [1884].[7]

Further, the directors and auditors are liable by reason of their neglect to secure a proper audit—*Leeds Estate Building and Investment Co.* v. *Shepherd* [1887][8] and *Oxford Building Society, In re; Smith, ex parte* [1886].[9]

W. H. Draper, for two shareholders, supported the petition.

thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries."

(2) 51 L. J. Ch. 344; 20 Ch. D. 137

(3) 64 L. J. Ch. 427; s.c. *nom. Bowling and Welby's Contract, In re*, [1895] 1 Ch. 663.

(4) 53 L. J. Q.B. 29; 12 Q.B. D. 117.

(5) 61 L. J. Ch. 593; [1892] 3 Ch. 174.

(6) 63 L. J. Ch. 506; [1894] 2 Ch. 352.

(7) 53 L. J. Ch. 745; 9 App. Cas. 519.

(8) 57 L. J. Ch. 46; 36 Ch. D. 787.

(9) 56 L. J. Ch. 98; *sub nom. Oxford Benefit Building and Investment Society, In re*, 35 Ch. D. 502.

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ILFRACOMBE PERMANENT MUTUAL BENEFIT BUILDING SOCIETY, IN RE.

Swinfen Eady, Q.C., in reply.—An unpaid creditor of a company is not entitled to a winding-up order unless he can shew that the general body of creditors will be benefited by the order being made —*Greenwood & Co., In re* [1900].[10]

[WRIGHT, J.—Is not that decision inconsistent with several other authorities?]

[He also referred to *Chapel House Colliery Co., In re* [1883],[11] and *Uruguay Central and Hygueritas Railway Co. of Monte Video, In re* [1879].[12]]

WRIGHT, J.—This is a case of very great difficulty, and for a long time I was in doubt as to what conclusion I should come to. I will deal first with what I may call the merits of the case.

The society is an old building society, and for a long time it was supposed to be in a flourishing condition. Whether it was so or not I have not the means of knowing; but a short time ago its secretary misappropriated a large portion of its funds and the society was found to be insolvent. The directors found that by contributing some 800*l.* of their own, and having all the assets of the society sold, they would be in a position to offer 12*s.* 6*d.* in the pound to the creditors of the society, all of whom were in a sense, as I understand, members of the society. All the creditors whose claims were undisputed except one, who is the present petitioner, accepted that offer. The present petitioner thought—and I do not blame him for thinking—that, considering the imputations which he fancied he was in a position to make against the directors, his claim was worth 15*s.* in the pound, and he refused to take less, and now he petitions to wind up the company. The petition contains only very general charges of misconduct or negligence against the directors or officers of the company, and it was supported simply by the ordinary statutory affidavit, which is insufficient to establish charges of that kind. No other affidavit of any kind was produced in support of any charges of the sort until the hearing to-day, and the respondents had never seen those affidavits until by my leave they were used in Court, rather for the purpose of seeing whether an adjournment ought to be granted than for any other purpose. The evidence of misconduct is very weak and vague, and mostly founded on hearsay, and to my mind there is nothing in it. In my judgment, no case on which I ought to act is shewn which would lead me to think that misfeasance proceedings against the directors, at any rate, would have any effect; and, as regards the auditors, I am told that they were a poor schoolmaster and a rate collector without much means, and I cannot think that there would be any substantial result from proceeding against them.

Rowe, the director whose conduct is primarily impugned, has been cross-examined. I accept his evidence, and I think that there is no reason to suppose that there was any grave misconduct on his part, or, so far as I can see, on the part of the other directors, unless it be on one point, and that is, that they seem to have taken on themselves to dispense with the rules of the society as to fines being paid by persons who were in arrear in the repayment of their advances. I am unable to see upon the evidence before me that there is likely to be any substantial asset forthcoming in respect of that matter. There might be something, but I am not in a position to say that there is any likelihood of a substantial asset. That being so, I have come to the conclusion that in all probability there would not be any substantial gain from misfeasance proceedings.

Then how does the matter stand? The funds of the society have been augmented out of the pockets of the directors and have been distributed, except that, as I understand, enough is in hand to answer the claim of the petitioner and will be forthcoming if he chooses to take it. That being so, I must ask, will he gain anything by this petition? I apprehend that the law is pretty clear that, where there is no voluntary winding-up, a creditor is almost *ex debito justitiæ* entitled to have a winding-up order if he can shew that he will gain anything by it

(10) 69 L. J. Q.B. 751; [1900] 2 Q.B. 306.
(11) 52 L. J. Ch. 934; 24 Ch. D. 259.
(12) 48 L. J. Ch. 540; 11 Ch. D. 372.

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—at any rate, unless the great body of the other creditors are against it. Now here I come to the conclusion that the petitioner would gain nothing by it. At any rate I cannot come to the conclusion that there is any possibility that he will gain anything, and all the other admitted creditors are either against him, or, as is the case with two of them, have themselves accepted the composition of 12*s.* 6*d.* Now ought I to re-open the winding-up manifestly contrary to the interest of all the other creditors, and make them refund (because that is what a liquidation would come to) the moneys of the society which they have received through the operation of a tribunal not in any way recognised by law? Am I justified in doing that merely because the petitioner, who cannot get anything more, as I think, than what he has been offered, wishes the machinery of the Court to be used to enable him to test the conduct of directors in proceedings in the nature of misfeasance summonses? I think not, and I think that the authorities which were cited and relied upon in the *Chapel House Colliery Co., In re*,[11] compel me to come to that conclusion. In that case Lord Justice Baggallay, referring to *Uruguay Central and Hygueritas Railway Co. of Monte Video, In re*,[12] says: "The headnote of that case gives the rule, to which I assent, and I need not go into the judgment: 'As a general rule an unpaid creditor of a company is entitled to a winding-up order *ex debito justitiæ*; but that rule is subject to exceptions: *e.g.*, where all the other creditors oppose the petition, and it appears that the petitioning creditor will not be in a better position by obtaining a winding-up order.'" Then Lord Justice Baggallay goes on to say that there may be also other cases in which the Court would dismiss the petition; but that where the circumstances above mentioned exist he thinks the order ought not to be made. I act on that principle in this case.

There are some other considerations which point in the same direction. There has already been a petition for the winding-up of this company. This petitioner must have known of that petition. Yet he did not appear in support of it—at least, he gave no notice of his intention to appear in support of it. He waited till that was got rid of and until all these funds had been distributed and everything settled, and now he comes forward with his own petition. I certainly am the more indisposed to help him because he stood by in that way. Therefore on that ground, and on that ground alone, I should be of opinion that the petition ought to be rejected.

Then comes another question—one of very great difficulty. Counsel for the society says on the authority of *Padstow Total Loss and Collision Assurance Association, In re*[2]: "Here is an illegal society"—he used the word "illegal," but I do not think that is quite the right word to use—"a society not authorised by law, and therefore not existing from the point of view of the Companies Acts as a society at all, and therefore according to the authority of the *Padstow Total Loss and Collision Assurance Association, In re*,[2] it cannot be wound up." I do not think it is necessary to determine that point, and if my decision turned entirely on it I should certainly take further time to consider my judgment; but as it does not turn even mainly on that point, and as the case may perhaps go to another Court, it is right that I should express an opinion on that point also. This society was a legal society when it was constituted in 1868. It had complied with whatever formalities were requisite by the law at the time it was constituted, and it only ceased to have the full protection and recognition of the law by reason of the repeal, which took effect in 1896, of the Act under which the society had been constituted, and probably in consequence of the fault of the secretary in taking no notice of the requisitions sent to him by the Registrar of Friendly Societies, which would have pointed out to him, and no doubt did point out to him, that he ought to take the proper steps to have his society registered under the Act of 1874. He took no such steps. Thereupon, with regard to the only Act under which his society had the recognition of the law, it lapsed and became a society, about the *status* of which there must be the greatest

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ILFRACOMBE PERMANENT MUTUAL BENEFIT BUILDING SOCIETY, IN RE.

possible doubt, and I cannot pretend at present to say what that *status* was. There was, I suppose, property vested in trustees for the society, and the most difficult and complicated questions might arise. What I have to consider is whether by reason of section 4 of the Companies Act, 1862,[1] a winding-up order is excluded. That section says that "no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this Act," for purposes including the purposes of this society, "unless it is registered as a company under this Act," which is not the case, "or is formed in pursuance of some other Act of Parliament." Now, in a literal sense, this society was formed under the provisions of another Act of Parliament—namely, the Building Societies Act, 1836; but can those words "formed under the provisions of some other Act" be limited in that way? I am inclined to think that "formed in pursuance of some other Act of Parliament" must mean formed and having its existence recognised by another Act of Parliament. Therefore, I think that on all these grounds the petition ought to be dismissed. I have not considered the technical point so carefully as I otherwise should have done, because I have a strong opinion on the other part of the case.

H. Terrell, Q.C.—With regard to the costs of the society, the society pleads its own illegality. It says that it is a society which cannot be recognised at law, and therefore it is submitted that it cannot have costs. It could not sue, it could not issue execution, and it cannot give a receipt for the costs if they are directed to be paid to it.

[WRIGHT, J.—The society has resisted the petition on the ground that it is a non-existent society for the purpose of winding-up. Can you ask for costs?]

Swinfen Eady, Q.C.—The society is a respondent to the petition, and is served as an existing society. The petitioner therefore, having failed, is not entitled to say that the society is an illegal one, having regard to the fact that he served it, brought it here, and made allegations against it.

WRIGHT, J.—I cannot give the society its costs. The petition must be dismissed without costs.

Solicitors — Guscotte, Wadham & Bradbury, agents for Sparkes, Pope & Thomas, Exeter, for petitioner; Blount, Lynch & Petre, agents for R. M. Rowe, Ilfracombe, for society and its directors; King, Wigg & Co., agents for Crosse, Day & Crosse, South Molton, and Field, Roscoe & Co., agents for G. Hilton Lewis, Ilfracombe, for creditors.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

FARWELL, J.
1900.
Nov. 3, 6.

MULLER *v.* TRAFFORD.

Landlord and Tenant—Covenant Running with the Land—Underlease—Demise by Underlessee—Covenant by Underlessee if Term Extended to Grant New Lease — Personal Covenant — Rule against Perpetuities — Assign of Reversion — 32 *Hen.* 8. *c.* 34, *s.* 2.

Where a lessor who was himself an underlessee covenanted with his lessee that if he should obtain from the freeholder any extension of his term he would grant a new lease to his lessee, it was held on the construction of the covenant that it was personal only to the lessor, and was not binding on his assign; that the covenant was not one for renewal strictly so called, and therefore did not run with the land; and that according to the statute 32 *Hen.* 8. *c.* 34, *s.* 2, *the covenant was limited to the reversion with which it ran—that is, the reversion which was vested in the covenantor at the time he entered into the covenant.*

Brereton *v.* Tuohey (8 Ir. C. L. R. 190), Kent *v.* Stoney (9 Ir. Ch. R. 249), *and* Coey *v.* Pascoe ([1899] 1 Ir. R. 125) *followed.*

This was an action for the specific performance of a covenant contained in an underlease dated June 25, 1851, and made between Daniel Austin of the first part, Thomas Golding of the second part, and

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Eden Fisher of the third part. Austin held the demised property under a lease from Andrew Reid, who thereby reserved to himself the last ten days of the term for which he held the property under a lease from Sir Charles Morgan, the freeholder. The underlease was for the term of fifty-two years, less twenty days, from September 29, 1850, and contained a covenant in these terms: "In case the said D. Austin shall obtain from the said Sir C. Morgan his heirs or assigns any extension of the term for which the said D. Austin now holds the ground and premises hereby demised and other hereditaments and premises from the said A. Reid under a certain indenture of lease dated the 29th day of December 1840 that then and in that case the said D. Austin his executors administrators or assigns shall and will within three calendar months next after such extension being obtained at the cost in all things of the said E. Fisher his executors administrators and assigns grant unto him the said E. Fisher his executors administrators and assigns a new lease of the said ground and premises hereby demised for such extended term as will include the term then unexpired of the term hereby granted and the further term less ten days which may be granted to the said D. Austin by the said Sir C. Morgan his heirs or assigns. And the said E. Fisher doth hereby for himself his executors administrators and assigns further covenant to and agree with the said D. Austin his executors administrators and assigns that he the said E. Fisher his executors administrators or assigns shall and will accept such new lease and execute a counterpart thereof and that such new lease and counterpart shall be prepared by the solicitor of the said D. Austin and shall contain the same covenants as are herein contained save only that the actual rent to be reserved and made payable shall be 9*l.* a year instead of 7*l.* 10*s.* hereby reserved such further or last mentioned yearly rent to commence and become payable from the quarter day next following that from which the said D. Austin his executors administrators or assigns shall obtain such extension of the term from the said Sir C. Morgan and shall be paid and payable on the days and times and in manner hereinbefore mentioned for payment of the rent hereinbefore reserved and made payable and also shall contain such further and other covenants and provisions as may be required by such further lease from the said Sir C. Morgan to the said D. Austin his heirs executors administrators or assigns."

In 1854 D. Austin died. In October, 1892, the plaintiff took an assignment of the underlease from the executors of E. Fisher, who had died in April, 1892. The defendant, who was the assignee of the lease under which D. Austin had held the property, recently obtained from the present freeholder, Lord Tredegar, a lease of the premises for fifty years from September 29, 1896, but no surrender was made of the leasehold reversion expectant upon the determination of the lease to D. Austin. The defendant refused to grant a new lease to the plaintiff.

Jenkins, Q.C., and *Kerly*, for the plaintiff.—As a matter of construction the covenant in the underlease applied to Austin, or to any of his successors in title who should obtain an extension of the term.

A covenant for renewal *prima facie* runs with the interest in the property and binds assigns although they are not expressly mentioned.

[FARWELL, J.—It is not a covenant for renewal properly so-called.]

The word "extension" must be taken to have been used in a popular sense, and the parties must have intended that, although there was a nominal outstanding reversion, the person in possession who got a renewal, whether Austin or those claiming under him, should be bound. Where there is an ambiguity the tendency of the Courts would be to infer that a benefit, whether it be a proviso for determining a lease or a covenant for renewal, should be attached to and go with the property for the benefit of the person from time to time entitled to the property —*Simpson* v. *Clayton* [1838] [1] and *Roe d. Bamford* v. *Hayley* [1810].[2]

(1) 8 L. J. C.P. 59; 4 Bing. N.C. 758.
(2) 12 East, 464.

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When once it is established that the covenant was intended to run with the land—and we admit that we must make that out—the Court would as a matter of construction find it easy to supply the omission from the covenant of the words "executors administrators and assigns." *White* v. *Southend Hotel Co.* [1897][3] is an illustration of the general principle.

The question then arises whether the liability to perform this covenant runs with the land in such a sense as to bind the assignee of Austin's reversion, assuming that there is an assignee. That depends upon the statute 32 Hen. 8. c. 34, which, by section 1, gave a remedy to the assignees of the reversion. Section 2 enacted that lessees and their assigns should have the like remedies against the assignees of the reversion as the lessees had against their lessors. The generality of the statute was modified by *Spencer's Case* [1583].[4] There it is stated that the Act was resolved to extend to covenants which touch or concern the thing demised and not to collateral covenants. A covenant for renewal has for centuries been held to run with the land because it touches the thing demised—*Isteed* v. *Stoneley* [1580].[5]

As between landlord and tenant "running with the land" means running with the thing demised. The reversion is what the landlord has at the time when he grants the lease, and the covenant running with the land is binding upon the person who has that reversion.

[FARWELL, J.—Yes, to the extent of the reversion.]

The covenant to renew has in some of the cases been given by a lessor who was himself only a lessee, and who had not the estate which would enable him at the time to grant the renewal. There is no case in which a covenant to renew has been held not to run with the land. In a number of cases, including two in the House of Lords, it has been assumed that such a covenant is not bad for perpetuity.

[FARWELL, J.—That is because it runs with the land.]

The first thing to consider is whether the covenant touches the thing demised. If it runs with the reversion it must be determined at the time when the lease is executed. The assign of the reversion became bound here because the condition of the covenant was fulfilled by the grant of the extended term. That comes within the exception to the rule against perpetuities just as a covenant for renewal does. That rule is simply that the limitation of property beyond the period allowed by law is bad—*London and South-Western Railway* v. *Gomm* [1882].[6]

There is no authority which limits the covenant to the particular reversion held at the time of the lease. The lessor must have had some reversion, and therefore the question whether the covenant runs with the land is determined by regarding the thing demised irrespective of the nature or length of the reversion.

Lumley v. *Timms* [1873],[7] which was a case where the lessee covenanted with the underlessee, in case he himself obtained an extension, to give the underlessee a like extension, shews that the Court looks at the substance of the transaction. One suggested reason why covenants for renewal are treated as an exception to the rule against perpetuities is that they are generally obtained by a sitting tenant by virtue of his possession. When a man grants an underlease which is practically the whole of his term, with a covenant, as in this case, it is in substance a transfer to the sub-lessee of the benefit of any renewal, and is part of the original grant. Whatever the real reason for the exception may be, for centuries these covenants have been well known, and objection on the ground of perpetuity has never been taken to them. There are many cases in the books where the covenantor had only a short term, but no distinction has been made between cases in which the covenantor had only a short reversion and those in which he had the freehold, as regards the question of the covenant running with the land.

[They also referred to the following

(3) 66 L. J. Ch. 387; [1897] 1 Ch. 767.
(4) 5 Co. Rep. 16*a*; 1 Sm. L.C. (10th ed.), p. 52.
(5) 1 Anderson, 82.
(6) 51 L. J. Ch. 530; 20 Ch. D. 562.
(7) 28 L. T. 608.

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Irish cases: *Evans* v. *Walshe* [1805] [8] and *Revell* v. *Hussey* [1813],[9] which were both cases between the original covenantor and covenantee; *Pollock* v. *Booth* [1875] [10] and *Hackett* v. *M'Namara* [1836],[11] which latter cases were between assigns of the original covenanting parties; and to *Platt on Leases*, vol. i. pp. 731–2; *Marsden on Perpetuities*, p. 15; and *Challis on the Law of Real Property* (2nd ed.), pp. 173–4.]

Upjohn, *Q.C.*, and *P. F. Wheeler*, for the defendant.—This is a case in which the defendant was not a party to the covenant upon which the plaintiff sues. The plaintiff might succeed—first, if the principle of *Tulk* v. *Moxhay* [1848] [12] applied; but it does not, for the covenant is affirmative, and *Haywood* v. *Brunswick Permanent Benefit Building Society* [1881] [13] would be an answer; or secondly, on the ground that the covenant was also a conveyance in equity, and passed a real right or *jus in rem*, and that the defendant purchased the land with notice of the plaintiff's interest in it; but then the question of remoteness arises at once, and *London and South-Western Railway* v. *Gomm* [6] applies; or thirdly, on the ground that the defendant was an assign of the reversion, and that this covenant runs with the reversion, so as to avoid the rule against perpetuities. The action must fail for three reasons—first, the covenant does not run with the reversion, but is collateral to it; secondly, the defendant never became an assign of the reversion; and thirdly, even if he was an assign, he had parted with the reversion to Lord Tredegar, and there was no breach of the covenant whilst such reversion was in him.

The case is covered by the Irish authorities, which shew that the covenant in question is a merely personal covenant, and does not bind assigns—*Brereton* v. *Tuohey* [1858],[14] *Kent* v. *Stoney* [1859],[15] and *Cosy* v. *Pascoe* [1898].[16]

Jenkins, *Q.C.*, in reply.—In *Cosy* v. *Pascoe* [16] there was no reversion, because it had come to an end by the dropping of the life, and there was consequently no assign.

Brereton v. *Tuohey* [14] was also a case of a lease for lives. The covenant there was in fact to renew—that is, to grant a new lease; but the event on the happening of which the lessor was to be called upon to perform his covenant was also the event that destroyed his reversion. Consequently at the time when the liability arose the defendant had ceased to be a reversioner.

[FARWELL, J., referred to *Rogers* v. *Hosegood* [1900].[17]]

The law of landlord and tenant depends on the statute of Henry 8, subject only to the qualification put upon it by *Spencer's Case*.[4] There is no English authority for the limitation put upon that law by the Irish cases cited on behalf of the defendant.

[FARWELL, J.—If the statute 32 Hen. 8. c. 34 did not apply to Ireland there would be a short answer to all those cases.[18]]

In the present case the defendant, whilst an assign, himself caused by his own act the condition to be fulfilled in substance; whereas in the Irish cases, at the time when the liability was sought to be enforced against the assignee, there was no one who could call upon him to perform the covenant. Those cases are not binding upon the Court. They either overruled the law of landlord and tenant, or else the statute did not apply to Ireland.

FARWELL, J., after stating the facts and reading the covenant in the underlease,

(8) 2 Sch. & Lef. 519.
(9) 2 Ball & B. 280.
(10) 9 Ir. R. Eq. 229.
(11) Ll. & G. t. Plunkett, 283.
(12) 18 L. J. Ch. 83; 2 Ph. 774.
(13) 51 L. J. Q.B. 73; 8 Q.B. D. 403.
(14) 8 Ir. C. L. R. 190.
(15) 9 Ir. Ch. R. 249.
(16) [1899] 1 Ir. R. 125.
(17) 69 L. J. Ch. 652; [1900] 2 Ch. 388, 394, 405.
(18) The Statute of Reversions (10 Car. 1. sess. 2, c. 4 (Irish) was transcribed from the stat. 32 Hen. 8. c. 34, and was repealed by the 23 & 24 Vict. c. 154, which by sections 12 and 13 re-enacts similar provisions. See Furlong on *The Law of Landlord and Tenant*, 2nd ed. p. 545.

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continued: The first question is one of construction. It will be observed that all this depends on the condition precedent that "in case the said Daniel Austin shall obtain," and so on. D. Austin had no privity of contract or estate with Sir Charles Morgan. He was an underlessee and Sir Charles Morgan was the ultimate freeholder, and the proviso is in terms confined to Daniel Austin. There are phrases which have been pointed out to me which shew that D. Austin may possibly have been intended to include his executors, administrators, or assigns. On construction, if it rested on that alone, I should be of opinion that Daniel Austin meant Daniel Austin alone. It is a matter upon which I quite feel other people may very easily come to a different conclusion; but when a lessor or his draftsman draws a lease in this form, and uses the term Daniel Austin in this way—"in case the said Daniel Austin shall obtain from the said Sir Charles Morgan his heirs or assigns," it appears to me he had, in the very sentence with which he commenced, present to his mind the distinction between the one person whom he mentions and the representatives of that person after his death. When he deals with Sir Charles Morgan he mentions the heirs and assigns. When he deals with Daniel Austin he mentions him and him alone, and I do not think I should be justified in adding to the words "Daniel Austin" the words "his executors administrators or assigns," and here I should have to add the word "assigns." The words "executors and administrators" alone would not do. Apart from any question of construction depending merely upon the words, I think the draftsman was well advised, and probably intended to limit the proviso to Daniel Austin himself, because, for the reasons which I am about to give on the other points, I think he could not properly have given this option by way of condition precedent to Daniel Austin, his executors, administrators, and assigns without limiting it in point of time so as to avoid infringing the rule against perpetuity. On construction, therefore, I am in favour of the defendant.

The next point is this: It is said that this is a covenant running with the land. If it be so, no question of perpetuity would arise. A covenant to renew has been held for at least two centuries to be a covenant running with the land. I am not prepared to say that this is a covenant to renew. A covenant to renew is a technical term well understood. This is a covenant that in case the underlessee gets from somebody else—not his landlord and therefore not by way of renewal—if he gets from the freeholder whose estate extends beyond and has no connection with the estate of the underlessee a further term, then he will do certain things. It is argued that the exemption of covenants for renewal from the rules against perpetuity is a mere matter of authority and is founded on no principle: if so, I answer technicality with technicality, and say that this is not a covenant to renew, and I will not extend an anomaly. But I do not think that the exemption is merely technical: all covenants running with the land are free from any taint of perpetuity by reason of the nature of those covenants, because they are annexed to the land. "The accurate expression appears to me to be that the covenants are annexed to the land, and pass with it much the same way as title-deeds" —*Rogers* v. *Hosegood*.[17] That is adopted by the Court of Appeal as correct, and the same phrase, "annexed to the land," is used by Lord Justice Collins in delivering the judgment of the Court. He then goes on to say, after referring to the cases: "These observations, which are just as applicable to the benefit reserved as to the burden imposed, shew that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land." The rule against perpetuity therefore has no application to covenants which run with the land because they are so annexed to the land as to create something in the nature of an interest in the land. As between lessor and lessee the lessee accepts and the lessor grants something which is more or less, according to the point of view from which you look at it, than the

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actual term or interest granted. It is a term granted subject to something and with the benefit of something. It is a reversion reserved subject to something and with the benefit of something; and those two somethings are annexed to and form part of the land in such a sense that the doctrine of perpetuity has no application. I have therefore to ascertain whether this covenant does or does not run with land to any and what extent. Now this depends upon the construction of the statute; because I think I may assume it is settled that at common law covenants run with the land but not with the reversion. The statute is that of 32 Hen. 8. c. 34. The point is—what is the meaning of the section (section 2) which gives the "like action, advantage and remedy against all and every person and persons and bodies politick their heirs successors and assigns, which have or shall have any gift or grant of the king . . . or of any other person or persons, of the reversion of the same manors lands tenements and other hereditaments so letten" for any covenant in their lease as the same lessees might have had against their lessors, &c.? If the doctrine of perpetuity does not apply to covenants running with the land, for the reasons that I have given above, it is obvious that the reversion must mean the reversion which the lessor has in him at the time at which he grants the lease, or, to use Lord Justice Collins's expression, "in the inception" of the dealing between the parties. If that is so, then all I have to see is whether Daniel Austin had at the time he entered into this covenant such an interest as could possibly be bound so as to give effect to the covenant which he entered into. In my opinion he had not; the contract did not even contemplate in its terms any dealing with the reversion then vested in Daniel Austin, so as to give effect to this particular covenant out of it. Moreover, although I have no English authority exactly in point, the Irish cases which have been cited are absolutely on all-fours, and, although they are not binding upon me, the Court of Exchequer Chamber which delivered the judgment in the case to which I was referred—*Brereton* v. *Tuohey*[14] —was an exceedingly strong Court, and I respectfully express my assent to the reasoning in that case. The headnote is this: "A covenant for perpetual renewal, entered into by a person holding a limited interest in lands, does not bind the estate beyond that interest; and, therefore, if his assignee acquires the inheritance, it is not bound by the covenant." It is pointed out by Lord Chief Justice Lefroy that if there was a covenant for perpetual renewal binding the inheritance for the benefit of a lessee-covenantee, then, inasmuch as that covenant for perpetual renewal would be a covenant running with the land for his benefit, and therefore, on the principle I have suggested, inherent in the land and annexed to the land, he would be enabled to assign whatever by that covenant was given to the covenantee—the right to have the full benefit, not merely of the reversion, but of the reversion with the annexed covenant for perpetual renewal. But if he, on the other hand, only got a covenant by a lessee, who had no such right, but merely a reversion of ten days from the freeholder, then such covenant cannot affect anything more than such reversion. It appears to me therefore, on the authority of the Irish cases, to which I express my respectful assent, and also on principle, that to a case of this sort the statute does not apply, because the covenant runs with the reversion—that is to say, with the reversion which is vested in the covenantor at the time he enters into the covenant.

This renders it unnecessary for me to consider the other grounds suggested by counsel for the defendant; the action fails, and is dismissed with costs.

Solicitors—Woollacott & Son, for plaintiff; Carlisle, Unna, Rider & Heaton, for defendant.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

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WRIGHT, J. 1900. Nov. 21, 24. } RADFORD AND BRIGHT, LIM., *In re.*

Company—Winding-up—Committee of Inspection—Constitution—Power of Court to Alter—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 91—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 6, 9, 23, *and* 24, *Sched. I. rule* 6.

A company having been ordered to be wound up, first meetings of the creditors and contributories were held, at which a liquidator and committee of inspection were appointed, and an order was subsequently made giving effect to such appointments. The debts of the creditors represented at the meeting of creditors amounted to 43,000*l. Shortly after the meetings a foreign company recovered judgment against the company, and its proof was admitted for* 45,000*l. On an application by the foreign company that the liquidator might be ordered to summon a general meeting of the company for the purpose of ascertaining their wishes as to whether or not a representative of the foreign company should be appointed a member of the committee of inspection, or, in the alternative, that directions might be given for summoning a fresh first meeting of creditors,*—Held, *that the Court had jurisdiction under section* 23 *of the Companies* (*Winding-up*) *Act*, 1890, *and section* 91 *of the Companies Act*, 1862, *to order the liquidator to summon a meeting of the creditors to consider whether one or more members of the committee of inspection should be removed, and some other person or persons appointed in their place, and that such order ought to be made in the present case.* Semble also, *that the Court had jurisdiction to order fresh first meetings of creditors and contributories to be summoned for the purposes of section* 6 *of the Act of* 1890.

Summons by the Société Anonyme l'Industrielle Russo-Belge (hereinafter called the "Russo-Belge Co.") in the winding-up of the above-named company for an order that the liquidator should summon a general meeting of the creditors of the company for the purpose of ascertaining their wishes as to whether or not a representative or attorney of the Russo-Belge Co. should be appointed a member of the committee of inspection, or, in the alternative, that directions might be given for summoning a fresh first meeting of creditors.

On March 28, 1900, the company was ordered to be wound up compulsorily.

At this date an action by the Russo-Belge Co. for breach of contract to supply coal was pending against the company.

On April 23 the first meetings of the creditors and contributories were held. At the meeting of creditors J. W. Bolton was appointed liquidator, and C. Wilson, T. N. Alexander, W. L. Jones, A. W. Travis, W. E. Williams, and G. C. Locket were appointed a committee of inspection. These appointments were approved by the meeting of contributories, and an order was subsequently made by the Registrar in Companies Winding-up giving effect to such appointments. No notice of the meeting of creditors was given to the Russo-Belge Co., as at that time the company, not having proved its debt, was, under rule 6 of the First Schedule to the Companies (Winding-up) Act, 1890, not entitled to vote as a creditor.

On May 1 an order was made giving leave to the Russo-Belge Co. to proceed with its action against the liquidator notwithstanding the winding-up, and on July 6 judgment was given in favour of the Russo-Belge Co. for 45,000*l.* damages and costs.

On August 9 the proof of the Russo-Belge Co. for 45,000*l.* was admitted by the liquidator, and the Russo-Belge Co. about the same time asked the liquidator to consent to the appointment of a representative on its behalf on the committee of inspection. The request was laid before the committee, and refused. The Russo-Belge Co. then asked the liquidator to summon a meeting of the creditors of the company, to decide whether or not the Russo-Belge Co. should be represented upon the committee, and sent him 20*l.* to pay the expenses of summoning a meeting. The liquidator, having been advised that an additional member of the committee could not be appointed, re-

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fused to summon a meeting, and thereupon the Russo-Belge Co. issued the present summons.

The amount of the debts of the creditors present or represented at the creditors' meeting, excluding that of the Russo-Belge Co., was about 43,000*l.*, and it was stated at the hearing that there were two other foreign creditors for about 20,000*l.* each, the proofs of whose debts had not as yet been admitted.

S. O. Buckmaster, for the summons.—Although there is no special section in the Companies (Winding-up) Act, 1890, enabling the Court to make the order asked for, the Court has under its general jurisdiction power to control the winding-up proceedings, and to take care that the interests of creditors and others are properly safeguarded. A meeting might be ordered to be summoned under section 23, sub-section (2),[1] which empowers the liquidator from time to time to summon general meetings of the creditors and

(1) The Companies (Winding-up) Act, 1890, provides:

Section 6, sub-section 1: "When the Court has made an order for winding up a company the official receiver shall summon separate meetings of the creditors and contributories of the company for the purpose of—(*a*) determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the official receiver; and (*b*) determining whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of such committee if appointed. The Court may make any appointment and order required to give effect to any such determination, and if there is a difference between the determinations of the meetings of creditors and contributories in respect of any of the matters mentioned in the foregoing provisions the Court shall decide the difference and make such order thereon as the Court may think fit." Sub-section 2: "The provisions of the first schedule to this Act shall, subject to such modifications as may be made therein by general rules, apply to any meeting summoned in pursuance of this section." Sub-section 3: "In case a liquidator is not appointed by the Court the official receiver shall be the liquidator of the company."

Section 9, sub-section 1: "A committee of inspection appointed in pursuance of this Act shall consist of persons being creditors or contributories of the company or persons holding general powers of attorney from such persons in such proportions as may be agreed on by the meetings of creditors and contributories or as, in case of difference, may be determined by the Court." Sub-section 2: ". . . the liquidator or any member of the committee may . . . call a meeting of the committee as and when he thinks necessary." Sub-section 4: "Any member of the committee may resign his office by notice in writing signed by him, and delivered to the liquidator." Sub-section 5: "If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members of the committee who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant." Sub-section 6: "Any member of the committee representing creditors may be removed by an ordinary resolution at any meeting of creditors of which seven days' notice has been given, stating the object of the meeting. . . ." Sub-section 7: "On a vacancy occurring in the office of a member of the committee, the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, for the purpose of filling the vacancy, and the meeting may, by resolution, reappoint the same or appoint another creditor or contributory to fill the vacancy."

Section 23, sub-section 1: "Subject to the provisions of the Companies Acts, the liquidator of a company which is being wound up by order of the Court shall, in the administration of the property of the company and in the distribution thereof amongst its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection, and any directions so given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection." Sub-section 2: "The liquidator may from time to time summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, either at the meeting appointing the liquidator or otherwise, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be." Sub-section 3: "The liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the winding up."

Section 24: "If any person is aggrieved by any act or decision of the liquidator of a company which is being wound up by order of the Court, he may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just."

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contributories for the purpose of ascertaining their wishes. And the Russo-Belge Co. is a person "aggrieved" within section 24 (1).[1]

[WRIGHT, J., referred to section 6 of the Act of 1890,[1] and *Charles Reynolds & Co., In re* [1895].[2]]

It may be that the meeting would have no power to add to the number of the committee of inspection. At any rate, an order to call a meeting of creditors may at any time be made under section 91 of the Companies Act, 1862,[3] and the meeting when called can under section 9, sub-section 6 [1] of the Act of 1890 remove one or more of the members of committee from office, and under section 9, sub-section 7,[1] fill up the vacancy. There is no doubt that the applicants would receive the entire support of the foreign creditors. The persons who were entitled to vote at the first meeting represented only a very small fraction of the amount of the debts of the company.

[He also referred to Schedule I. rule 6 of the Act of 1890.]

Kenyon Parker, for the liquidator.—The Court has no jurisdiction to make the order asked. Within the four corners of the Act no power can be found which enables the Court to select any person as a member of the committee.

The scheme of the Act of 1890 is that the committee of inspection created by the Act is a domestic forum for assisting the liquidator, and only exists by virtue of section 6 of the Act.[1] Whether or not there shall be a committee is left entirely in the hands of the creditors. The power to decide as to this is given only to the first meeting. When the Court is asked to sanction the appointment of the committee of inspection, it has no power of selection. The only powers conferred on the committee are those mentioned in section 9,[1] and the only way of getting rid of a member of the committee is under sub-sections 4 and 5 of that section, and for removing a member some specific and definite reason must be assigned. There is nothing in the Act which requires a first meeting to be representative. Section 23, sub-section 2,[1] which enables the liquidator to summon meetings of creditors and contributories for the purpose of ascertaining their wishes, has relation only to the administration and distribution of assets referred to in sub-section 1 of the section. Section 91 of the Act of 1862 [3] cannot affect the committee of inspection, for under that Act there were no such committees.

S. O. Buckmaster replied.

WRIGHT, J.—This is a very peculiar case, and a question of very considerable importance is involved in it. The first meetings of creditors and contributories of the company were duly summoned under the Companies (Winding-up) Act, 1890, and the meeting of creditors resolved upon and nominated a committee of inspection. The meeting of contributories recommended that application should be made to the Court to appoint the persons nominated as members of the committee at the meeting of creditors. At the creditors' meeting, creditors whose debts amounted to about 43,000*l.* were represented, but a foreign company or firm which has now proved against the company in the winding-up for a debt of about 45,000*l.*—that is to say, a larger amount than the aggregate amount of the debts of all the creditors who existed at the time of the meeting—was not in a position to be and was not in fact present or represented at that meeting.

This foreign company or firm now comes forward and complains that, although a creditor for a larger amount than all the other creditors put together, it is not represented upon the committee of inspection as now constituted, and it asks for

(2) 30 L. J. N.C. 116; W. N. (1895) 31.

(3) The Companies Act, 1862, provides: Section 91: "The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the Court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court: In the case of creditors, regard is to be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company."

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an opportunity to be put or represented on the committee.

I entirely agree with counsel for the liquidator that, within what are called the four corners of the Act of 1890—the Act which provided for the appointment of committees of inspection in the winding up of companies—there is no express power enabling the Court to deal directly with this matter. Any power which the Court may have must be derived from the general provisions of section 23 of the Act of 1890,[1] or section 91 of the Companies Act, 1862.[3] But it seems to me very unsatisfactory if such a very large creditor as the applicant is to be excluded from all representation on the committee of inspection, and more especially as that creditor is a foreigner. I cannot help thinking that it is highly undesirable that foreign creditors should be left entirely out in the cold merely because at the time when the meeting was held their debts had not been admitted to proof, and that it is highly desirable that something, if possible, should be done to assist them in this respect.

It seems to me that, under both the sections I have referred to—section 23 of the Act of 1890 [1] and section 91 of the Act of 1862 [3]—there is power in the Court to direct a general meeting of the creditors to be summoned to consider any question arising in the winding-up, and, amongst other questions, whether the creditors should or should not exercise the power which they have, under section 9 of the Act of 1890,[1] of removing one or more members of the committee of inspection; and whether any other person or persons should be appointed in the room of any of those who are removed. If I have that power I think I ought to exercise it, and accordingly I direct a general meeting of the creditors to be summoned to consider those questions. In my judgment the Court probably has jurisdiction, instead of ordering a meeting of creditors to be summoned for the purposes I have indicated, to order fresh first meetings or further meetings to be summoned for the purposes of section 6 of the Act of 1890 [1]; but that would necessitate the summoning of creditors and contributories, and I do not think it right at present to incumber the proceedings by directing that any meeting should be summoned in such a way as would make it a fresh first meeting. I incline to think, however, that there is jurisdiction to summon a fresh first meeting if it turns out, as it has turned out in this case, that that committee is not fairly representative of the creditors. I do not see that anything is to be gained by calling a meeting of both classes of persons interested—that is, the creditors and contributories. I think it better to act under section 23 [1] and section 91,[3] although it seems to me that *Charles Reynolds & Co., In re*,[2] is some authority that the Court has power to follow the other course; for in that case Mr. Justice Vaughan Williams seems to have thought that in a proper case there might be power either to re-summon a first meeting or to summon a fresh meeting.

The point is a very important one, but happily I can be set right if I am wrong without any damage being caused to anybody. The meeting is not to be held until after ten days. It will be summoned by the liquidator, and the official receiver had better be chairman of it. If the meeting of creditors which is to be summoned should resolve that it is desirable, instead of removing any member of the committee, to add another member to that body, I think that anything technically wrong in so doing might be put right by then re-summoning the first meetings of creditors and contributories as a matter of arrangement; and if the creditors then choose to vote for a committee of inspection consisting of seven members, including one representative of the foreign firm, and if the contributories approved that, all would be well. If the two meetings did not come to the same conclusion, then the Court could decide the difference under section 6 of the Act of 1890.[1]

Solicitors—Church, Rendell, Todd & Co., for applicants; Downing, Bolam & Co., agents for Bolam & Co., Sunderland, for liquidator.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

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[IN THE COURT OF APPEAL.]

LORD ALVERSTONE, C.J.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
1900.
Nov. 23, 26.

BANK OF SYRIA, *In re*; OWEN AND ASHWORTH'S CLAIM; WHITWORTH'S CLAIM.

Company—Directors—Power of Reduced Directorate—Quorum of Directors—Assignment by Debtor to Director with Knowledge of Defect.

Where articles of association provide that the number of directors of a company shall not be less than three, and that the directors may act notwithstanding any vacancy, and the directors contract a loan upon security when their number has been reduced to two, the act of the two directors will be binding on the company, notwithstanding their reduction below the number fixed by the articles as necessary to form a quorum.

Scottish Petroleum Co., *In re* (23 Ch. D. 413), *followed.*

One of the two directors who takes an assignment from an outside creditor of a debt contracted by the company under the above-mentioned circumstances, will be entitled to stand in the position of the creditor and will not be debarred from claiming against the company because he was a party to the contracting of the loan when the directorate was below its proper number.

Decision of WRIGHT, J. (69 L. J. Ch. 412; [1900] 2 Ch. 272), *affirmed.*

Appeal from a decision of Wright, J. (69 L. J. Ch. 412; [1900] 2 Ch. 272).

The Bank of Syria, Lim., hereinafter called "the company," was incorporated under the Companies Acts, 1862 to 1890.

The articles of association, so far as material, were as follows: "32. The following persons — viz. Mr. John Robert Pilling, Mr. Henry Hargreaves Bolton, Mr. William Ernest Whitworth, and Mr. William Parker shall form the first council of administration . . . and the said J. R. Pilling shall be the president of the council. . . 34. The council of administration is invested with full power for conducting the affairs of the company either by its own body or by delegation as may be deemed necessary in the interest of the company. 35. Without prejudice to the general powers conferred by the last preceding clause . . . and to any other powers conferred by these presents it is hereby expressly declared that the council shall have the following powers: . . . (*f*) To execute in the name and on behalf of the company . . . . such mortgages of the company's property (present and future) as they think fit. . . . 38. The number of members of the council shall not be less than three nor more than nine. 42. The continuing council may act notwithstanding any vacancy. 53. The council may . . . determine the quorum necessary for the transaction of business. . . 55. The council may delegate any of its powers to committees consisting of such member or members of their body as they think fit. . ."

There was some evidence that a minute was passed in 1893 that the quorum should consist of three directors.

At a time when the members of the council (herein called "the directors") were reduced in number to two—namely, Messrs. Pilling and Whitworth—the following transactions took place: Messrs. Pilling and Whitworth entered into an agreement with Messrs. Owen & Ashworth, bankers, that Owen & Ashworth should lend 4,000*l.* to the company, which was advanced on September 19, 1894. The cheque was made payable to Pilling, but the amount was credited to the account of Owen & Ashworth in the books of the company and in the pass-book delivered to them.

By a memorandum in writing under the common seal of the company (which was stated to be "affixed hereto in the presence of W. E. Whitworth and J. R. Pilling two members of the council of administration") it was witnessed that Owen & Ashworth had "this 19th day of September, 1894, opened a deposit account with" the company "in the sum of 4,000*l.* and upwards," in consideration whereof the company agreed to pay interest thereon at 4 per cent., and charged certain unpaid capital of the company to secure the 4,000*l.*

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BANK OF SYRIA, IN RE, App.

In regard to "Whitworth's claim," the facts were that the company had overdrawn an account with Lloyd's Bank, which held certain securities given by the company, acting only by Pilling and Whitworth. Lloyd's Bank having demanded payment, Whitworth, who had given a promissory-note of his own to secure the debt, being still a director, paid off the amount owing and took a transfer of the securities.

The company having gone into liquidation, Messrs. Owen & Ashworth claimed to prove for the 4,000*l.*, but the liquidator rejected the proof on the grounds—first, that the alleged debt was incurred by the company at a time when there were only two directors, and that they had no power to charge its uncalled capital; secondly, that the 4,000*l.* was not advanced to or for the use of the company; and thirdly, that the lenders had accepted Pilling as their debtor in lieu of any claim they might have had against the company.

He also rejected Whitworth's proof on the same first ground.

Wright, J., rejected Owen & Ashworth's claim on the ground that the real transaction was that they had accepted Pilling as their debtor in lieu of the company; but he allowed Whitworth's claim.

Messrs. Owen & Ashworth appealed from the rejection of their claim, and the liquidator appealed from the allowance of Whitworth's claim.

Jenkins, *Q.C.*, and *Martelli*, for the appellants Owen & Ashworth.—The Judge decided against these appellants on the ground of novation, but the circumstances do not warrant that conclusion.

Herbert Reed, *Q.C.*, and *P. F. Wheeler*, for the official receiver and liquidator.—As regards the number of directors, it is for the person who claims under a deed of a company to prove that it is the deed of the company. He fails to do that if there is a provision that the company must act by not less than a certain number of directors, and a less number than the specified minimum purports to affix the seal—*Kirk* v. *Bell* [1851][1] and *Alma Spinning Co., In re; Bottomley's Case* [1880].[2] *Scottish Petroleum Co., In re* [1883],[3] is distinguishable. The number of directors there was not reduced below the number necessary to form a quorum —*Buckley on the Companies Acts* (7th ed.), p. 542.

Persons who deal with a company are affected with notice of the contents of its memorandum and articles of association—*Mahony* v. *East Holyford Mining Co.* [1875].[4] *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* [1895][5] is not an authority that outside persons dealing with a company can assume that everything has been rightly done. They are not bound to enquire into small matters of indoor management, but they must look at the outside position of the company. The articles of a company must be taken to be open to the whole world—*York Tramways Co.* v. *Willows* [1882].[6]

Jenkins, *Q.C.*, was not called upon to reply.

Herbert Reed, *Q.C.*, and *P. F. Wheeler*, for the liquidator's appeal.—Whitworth was a director, and purported to act with Pilling as the only other director. He was aware of all that had taken place, and, assuming that Lloyd's Bank could have recovered the money advanced, it does not follow, having regard to his knowledge, that he can stand in the place of the bank. If a person in a fiduciary position makes an improper conveyance, although a purchaser without notice may take free from the trust, it becomes subject to the trust again if the property gets back into the hands of the person in a fiduciary position—*Bovey* v. *Smith* [1682][7] and *Kennedy* v. *Daly* [1804].[8] This was Whitworth's position as regards the debt he took over from Lloyd's Bank. He had notice of the original defect in the transaction.

No reply was called for.

(1) 16 Q.B. 290.
(2) 50 L. J. Ch. 167; 16 Ch. D 681.
(3) 23 Ch. D. 413.
(4) L. R. 7 H.L. 869, 893.
(5) 64 L. J. Ch. 451; [1895] 1 Ch. 629.
(6) 51 L. J. Q.B. 257; 8 Q.B. D. 685.
(7) 1 Vern. 60.
(8) 1 Sch. & Lef. 355, 379.

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BANK OF SYRIA, IN RE, App.

LORD ALVERSTONE, C.J.—The first appeal is by Messrs. Owen & Ashworth, whose claim for 4,000*l.* has been disallowed. It appears that on September 9, 1894, Messrs. Owen & Ashworth advanced 4,000*l.* There seems to be some doubt and uncertainty as to what actually was done with the money, but it is not possible in this case to come to the conclusion that the bank was not the debtor of Messrs. Owen & Ashworth in respect of that money subject to a point which arises on a later transaction in the year 1895.

On September 19, 1894, the two directors, Messrs. Whitworth and Pilling, gave to Messrs. Owen & Ashworth a receipt for 4,000*l.* and a charge upon 5,000*l.* unpaid capital. The seal was affixed in the presence of the two directors, and, for reasons which I will express in a moment, it seems to me quite clear that that document was a document binding on the company so far as the innocent creditor was concerned. The memorandum of association gave power to carry on a banking business, to lend money with or without security, to receive deposits from members to borrow, raise, or secure a payment of money in such manner as the company should think fit, and in particular to issue debentures or debenture stock. [His Lordship read the material parts of articles 34, 38, and 42.] There was, in addition, a minute passed some time in the year 1893 that the quorum should consist of three members. I do not think it makes any difference, but I gather that Mr. Justice Wright did not think the evidence with regard to that resolution was at all satisfactory. Certainly for a great many years, or for several years, the business of the company was conducted by two directors notwithstanding any such resolution, if it ever was passed But, as I have said, that matter seems to me not really to be important.

I think this part of the case is covered by the decision of this Court in *Scottish Petroleum Co., In re.*[3] The articles in that case were quite as stringent as in this, there being a clause in the articles that the directors might act notwithstanding the vacancy. Lord Justice Baggallay said: "It is contended, and perhaps rightly, on behalf of Mr. Wallace that two of these four directors had ceased to be directors before the allotment was made, and it is also contended that though by the articles two directors form a quorum when the board is duly constituted, there could not be a quorum capable of transacting business when the Board of Directors was not filled up to the minimum number I assume that the retiring directors had ceased to be directors, and if that be so, the board was not made up to the minimum number." That is a point which counsel for the liquidator pressed on us in this case. The Lord Justice continues, "Still I think that having regard to article 83, the objection cannot be maintained. It is urged that this article can only apply when the number of directors is more than four, but I see no reason for adopting that view. The number of directors never exceeded four, and there might be a vacancy, in which case, according to the terms of article 83, the continuing directors could act." I wish to add with reference to this point, that I think the authorities which Mr. Justice Wright referred to in his judgment, that such an objection would not be good against third parties, truly represent the law.

It is then said that by an arrangement made in the year 1895 Messrs. Owen & Ashworth agreed to accept Mr. Pilling as the debtor, and to discharge the bank. That point was decided in favour of the respondent by Mr. Justice Wright. [His Lordship dealt with the evidence on this point, and came to the conclusion that there was not any discharge or intended to be any discharge of the bank.] I am therefore of opinion that Owen & Ashworth's appeal should be allowed.

In Whitworth's case it appears that the bank had borrowed money from Lloyd's Banking Co., and had given them security, which is open to the same criticism or objection that it had been either sealed by two directors or, at any rate, that there was not a sufficient number of directors of the company at the time the security was given. Now, does that affect Mr. Whitworth, who was responsible to Lloyd's Banking Co., and had given his promissory-note? I have already expressed

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my opinion that the objection as to the absence of the two directors could not be set up against Lloyd's Bank. I am of opinion that Whitworth had the right when he, to save his own credit, paid off Lloyd's Bank and took up the security, to stand in their shoes. Counsel for the liquidator has urged that he was in the position of a trustee, and that if a trustee sells the trust property to a person who may obtain a good title to it, subsequently gets it back into his own possession, he cannot be allowed to claim it for his own. Without in any way questioning that doctrine, which seems to me sound and good sense, it does not seem to me to have any application in this case. In this case Whitworth was not a trustee in that sense. Undoubtedly he was a party to the security. If he had not been in a position to set up the rights which he acquired from Lloyd's Bank, I think it is possible there might be more difficulty in establishing a claim against the company, but I can see no reason why he should not have the same right as his assignor, for the purpose of proof against the bank, whose debt he has paid in pursuance of an obligation to pay by reason of his having given a promissory-note.

I am of opinion, therefore, that the appeal of Messrs. Owen & Ashworth should be allowed, and that the liquidator's appeal should be dismissed.

RIGBY, L.J., and VAUGHAN WILLIAMS, L.J., concurred.

Solicitors — R. H. Bentley, for claimants; Carlisle, Unna, Rider & Heaton, for liquidator.

[*Reported by A. J. Spencer, Esq., Barrister-at-Law.*

KEKEWICH, J. 1900. Nov. 28, 29. } BERRY *v.* HALIFAX COMMERCIAL BANKING CO.

Banker—Mortgage—Current Account—Closing of Account—Power of Sale.

Where a mortgage to secure an account current with a bank contains a power of sale, to arise on the closing of the account, the account is closed by a letter from the mortgagor to the bank stating that he has agreed to assign all his assets to a trustee for creditors. The fact that an account is in debit does not prevent its being closed by the customer.

By an indenture of mortgage dated 1898, David Smithies assigned a policy, on his own life, in the Royal Insurance Co., for 1,000*l.*, to the Halifax Commercial Banking Co., Lim., to secure his banking account with the Brighouse branch of that company. He covenanted to pay all moneys due upon his current account "when thereunto required by the company or their secretary or manager or any branch manager thereof, and if at the time when the said account current shall be closed by the death of the mortgagor or otherwise, a balance thereon shall be owing to the company." The mortgage contained the following power of sale:

"Provided always that the statutory power of sale shall be exercisable by the company if default shall be made in payment of the balance owing on the said account current, or other the moneys due from the mortgagor, or some part thereof, for the space of one calendar month after the said account current has been closed, or after a notice in writing demanding such payment shall have been given by or on behalf of the company to the mortgagor or left for him at his usual or last known place of abode in England or Wales."

In the early part of 1899 the account was overdrawn more than the bank approved, and Mr. Fowler, the manager of the Brighouse branch, wrote constantly pressing for a reduction of the account. Some of the letters in this correspondenc were relied on in argument as closing th account; but the Judge held that the amounted to pressure only.

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BERRY *v.* HALIFAX COMMERCIAL BANKING CO.

On November 9, 1899, Smithies wrote to the bank a letter containing the following passages: "There was a meeting of creditors yesterday at Mr. Rawlins' office. . . . They agreed to accept all the assets I had. I gave them to understand that I was insured in the Royal, and that you held the policy and 300*l.* worth of shares, as security for your account. . . . There was a trustee appointed, but I do not remember his name. . . . Hoping that every one will get 20*s.* in the pound. I am, &c."

On November 17, 1899, Smithies executed a deed of arrangement assigning all his assets to the plaintiff as trustee for his creditors. This deed was duly registered under the Deeds of Arrangement Act, 1887.

On December 5, 1899, the plaintiff wrote to the bank giving notice of the deed and enquiring as to the value of the bank's securities. On December 5 the bank answered that it was impossible then to put a value on the securities, but as soon as they could ascertain anything like the precise value they would reply fully.

The plaintiff had never made any offer to redeem except such as was implied by his letter of enquiry.

On December 18 the bank sold the policy.

On January 6, 1900, Smithies died.

This was an action by the trustee of the deed of arrangement for redemption and damages, on the footing that the sale of the policy was improper.

Warrington, Q.C., and *H. Greenwood*, for the plaintiff.—The power of sale only arose on payment being demanded or the account closed. There was no demand, and we submit there was no closing of the account. The only reported case on the subject is *Buckingham* v. *London and Midland Banking Co.* [1895].[1] There the circumstances were different from this case, but it decides that a banking account can only be closed by an act of one party communicated to the other. Here there was no such act on either side. The bank never closed the account. It could not be closed by Smithies because it was overdrawn. His letter of November 9 at most amounted to a statement that he intended to commit an act of bankruptcy.

Renshaw, Q.C., and *O. L. Clare*, for the defendants.—The account was closed by the bank by the correspondence. But if not it was certainly closed by Smithies' letter of November 9. That letter communicated to the bank that Smithies was insolvent and did not intend to pay the moneys due to them. That was a closing of the account, or at least a recognition of the fact that it must be closed The remarks of Lord Esher (then Brett, J.) in *Morgan* v. *Bain* [1874][2] shew the effect of a communication of insolvency. He is dealing with a contract, not a banking account, but the principle is the same.

Warrington, Q.C., replied.

KEKEWICH, J.—There is a substantial sum in dispute, and the case is of some importance to bankers and their customers. It will be convenient first to examine the mortgage-deed. [His Lordship read the power of sale.] The power is to arise in two events—if default shall be made in payment of the balance owing on the said account after the account current has been closed, or a notice in writing has been given demanding payment. There is no question about the meaning of the second event; but we have to consider whether within the meaning of the deed the account current has been closed. I think we find some light thrown on the subject by the covenant to pay. It is to pay on demand or "at any time when the said account current shall be closed by the death of the mortgagor or otherwise." That, I think, disposes of the argument which was first addressed to me on the part of the plaintiff, that the closing must be by some act communicated by the mortgagee to the mortgagor. Evidently the necessity of communication by the mortgagee to the mortgagor cannot come into contemplation when an account is said to be closed by the death of the mortgagor. I am far from intending to hold that in a large number of cases of closing the account—probably the large majority—it would not

(1) 12 Times L. R. 70.

(2) 44 L. J. C.P. 47, 52; L. R. 10 C.P. 15, 26.

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be necessary to give some notice; but I think that that phrase goes to shew that the parties contemplated and intended that an account might be closed in other ways than by the bank closing the account in their books and communicating that fact to the mortgagor. [His Lordship then went through the correspondence, and expressed his opinion that it did not shew that the bank had ever closed the account.]

Then we come to the mortgagor's letter of November 9. I may say that shortly afterwards, on November 17, Smithies executed a deed, which has been properly registered, assigning all his assets to his creditors. It is said that the execution of that deed alone was a closing of the account. Now if no notice had been given of it within the time limited exercising the power of sale, I do not see how the deed itself could operate as a closing of the account. There must be some communication between the parties. But I think the letter of November 9 was a closing of the account. [His Lordship read the letter as set out above.] He ends by saying, "Trusting every one will get 20*s.* in the pound." Now, every one that he expected to get 20*s.* in the pound, of course, included the bank; they were creditors, but they were secured creditors, and he refers to the security which they held. He addresses them as secured creditors. He knows that the bank are creditors; and as regards that I really do not see the importance of the fact that the account was in debit and was not in credit. The bank held security, and that security had passed to Smithies' trustee Now if that letter means anything, it surely means "there is an end of our transactions. Up to the present time I have been drawing on my current account in excess of the moneys which I have from time to time paid in, but you have held security and you hold security still: those are the relative positions: now that has come to an end. I have now assigned everything, including the security subject to your charge, to a gentleman whose name I forget. The creditors have accepted what I can give them, as a discharge of my debts to them, and the result is that you and I have severed our connection of banker and customer." I cannot conceive that this letter, if it was not intended to mean that, was intended to mean anything at all.

Counsel for the defendants has called my attention to some remarks of the late Lord Esher, when Mr. Justice Brett, in *Morgan* v. *Bain*,[2] quoting with approval some other observations of Lord Justice Mellish. I agree that those observations were not made in a case which directly bears upon this; but they are useful as illustrating what a person must be taken to have intended by a letter announcing his insolvency. Clearly, as I said before, the relation of banker and customer is at an end.

The relation in this case was not that of banker and customer in the common sense of an unsecured account, where the customer paid in money and drew it out by cheques. It was a peculiar relation constituted by the mortgage-deed, and that obviously had come to an end. It seems to me that Smithies closed the account himself, or, if he did not actually close it, he recognised that it must be closed. There was nothing more to be done. It was said that the bank after that might honour his cheques. Well, they might, of course; but one must not suppose such a foolish thing as that. It is absurd to suppose that after that letter they would honour his cheques; and that is really the only way in which the account could be kept open. It seems to me there is really an end of the whole thing. That was on November 9, and the power of sale arose, or was exercisable, at the end of a month from that date, but the bank did not exercise it until December 18. I think that on that day they were justified in realising their securities, and that the plaintiff, as representing their customer, the mortgagor, has no case against them.

The result is that there will be judgment for the defendants with costs.

Solicitors—E. C. Rawlings & Butt, for plaintiff; Jaques & Co., agents for Godfrey, Rhodes & Evans, Halifax, for defendants.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

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COZENS-HARDY, J.
1900.
Nov. 21, 28.

COWLEY, *In re.*

Infant—Management of Lands—Appointment of Trustees—Infant Taking by Descent—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 42 *and* 43.

The power given to the Court by section 42 *of the Conveyancing and Law of Property Act*, 1881, *to appoint trustees for the management of an infant's land during minority, on the application of his next friend, extends to the case of an infant taking by descent.*

This was an application made *ex parte* by originating summons taken out by the mother and guardian of an infant. She asked for the appointment under section 42 of the Conveyancing Act, 1881,[1] of trustees to manage lands to which the infant was entitled for an estate in fee-simple in possession, as heir-at-law of a great-uncle who had died intestate. The mother was administratrix of the great-uncle's estate. It was proved that she had paid all the debts and fully administered the estate.

She had executed a disclaimer of the office of trustee vested in her by virtue of the Land Transfer Act, 1897, or otherwise. Part of the estate was building land.

(1) The Conveyancing and Law of Property Act, 1881, s. 42, sub-s. 1, provides: "If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any person appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply."

The subsequent provisions of the section give the trustees full powers to manage the property and apply the income for the maintenance, education, or benefit of the infant.

Henry 'Fellows, for the application.—The question is whether section 42 of the Conveyancing Act, 1881, applies to descended lands. The text-books upon the Act differ. *Hood and Challis on the Conveyancing and Settled Land Acts* (5th ed.), pp. 112, 113, says that it cannot apply; *Wolstenholme and Brinton on the Conveyancing Acts* (8th ed.), p. 98, says that it does.

There is no reported decision in England, but the order asked for was made in the Irish case of *Glover, In re* [1899].[2]

Under the Land Transfer Act, 1897, the legal estate in the land is vested in the mother as administratrix, and, as she has cleared the estate, she is a trustee for the infant heir. Possibly, as such trustee, she has powers of maintenance under section 43 of the Conveyancing Act, 1881, but that section gives no power of management. In order to avoid any confusion, the mother has disclaimed any trusteeship she may have.

Cur. adv. vult.

Nov. 28.—COZENS-HARDY, J.—I have looked at *Glover, In re*,[2] and I agree with the Vice-Chancellor of Ireland that on the true construction of section 42 of the Conveyancing Act, 1881, it extends to the case of lands to which an infant is entitled by descent. I should have hesitated to make any order adversely to the rights of the mother of the infant, whether as trustee by virtue of the Land Transfer Act, 1897, or otherwise; but, as she has disclaimed, that difficulty is removed. I will make the order appointing the trustees named in the summons.

Solicitors—E. Carleton Holmes & Son.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

(2) [1899] 1 Ir. R. 337.

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COZENS-HARDY, J. 1900. Nov. 20. } LEEDS GRAMMAR SCHOOL, *In re.*

Compulsory Purchase — Charity — Real Estate—Official Trustee of Charity Lands —Costs of Re-investment—Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 69, 76, 80—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 142), *s.* 15.

Where the legal estate in lands belonging to a charity, taken by a corporation under the Lands Clauses Act, 1845, *is vested in the official trustee of charity lands, he is not bound to receive the purchase-money if tendered. His refusal to receive such purchase-money is not "wilful refusal to receive" within the meaning of section* 80, *so as to relieve the corporation from the costs of re-investment.*

This was a petition, presented by the governors of the Leeds Grammar School, for the interim investment, in certain railway preference stocks, of a sum of 37,000*l.* paid into Court by the corporation of Leeds as the purchase-money for certain lands, belonging to the school, taken by them under compulsory powers The corporation had given the usual notice to treat to the governors on November 15, 1898. Arbitrators had been appointed on each side, and the amount of the purchase-money was determined by their award.

The lands taken were vested in the official trustee of charity lands in trust for the governors, and on June 1, 1900, the Charity Commissioners made an order under the Charitable Trusts Acts, that upon payment of the purchase-money into Court the trustees should convey, and the official trustee (if required) should concur in the conveyance, to the corporation. The corporation paid the money into Court, purporting to make the payment under section 76 of the Lands Clauses Consolidation Act, 1845,[1] upon the owner's refusal to accept the purchase-money. In the case of payment in under that section "by reason of the wilful refusal of any party entitled thereto to receive" the money the promoters are relieved by section 80 from payment of the costs of re-investment of the purchase-money.

The petition asked that the payment into Court might be treated as made in the ordinary way under section 69, which directs such payment in in the case of owners under disability.

The petition came on for hearing on August 4, and the order for re-investment was made, but the petition stood over for argument on the question of costs.

Vernon Smith, *Q.C.*, and *Austen-Cartmell*, for the petition.—The corporation purported to pay this money into Court under section 76 of the Lands Clauses Act, 1845, but that section does not apply. There is no absolute owner in this case, and no refusal to convey. The trustees were limited owners conveying under powers given them by the Act. The corporation were bound to pay the purchase-money into Court under section 69, and they must be treated as having paid it in under that section. It follows that they must pay the costs of investment.

Leigh Clare, for the corporation.—The corporation ought not to have to pay the costs of this petition. An absolute owner, who, by refusing to accept his purchase-money, compels its payment into Court, cannot get any costs of investment.

[COZENS-HARDY, J.—You were proceeding under section 7 of the Act.]

We gave notice to treat to the governors of the charity. They could not sell without the consent of the Charity Commissioners, but with that consent they had full power to sell. We got the price fixed by arbitration. We went to the Charity Commissioners for a conveyance because the legal estate was vested in the official trustee of charity lands. The Commissioners could have directed the conveyance to be executed on payment to the trustees, or to the official trustee of charity funds, and they ought to have done so. Instead of that they insisted, without any cause, on the money being paid into Court. That is a refusal to convey within the meaning of section 76.

(1) The Lands Clauses Consolidation Act, 1845, provides by section 76: "If the owner of any such lands purchased or taken by the promoters . . . on tender of the purchase-money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, . . . or if he refuse to convey or release such lands as directed by the promoters . . . it shall be lawful for the promoters of the undertaking to deposit the purchase-money or compensation payable in respect of such lands . . . in the Bank."

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LEEDS GRAMMAR SCHOOL, IN RE.

COZENS-HARDY, J.—In this case the governors of Leeds Grammar School were trustees of property which the Leeds Corporation had power to acquire. The governors were persons who could sell under the powers given them by section 7 of the Lands Clauses Act, 1845, but the price must be fixed by arbitration, or otherwise, as provided by section 9. In this case there was an arbitration and an award. The bare legal estate was outstanding in the official trustee of charity lands. The land has been conveyed to the corporation by a conveyance, to which the governors, the official trustee, and the corporation were parties. It recites an order of the Charity Commissioners that the official trustee should concur if required. It recites that the money has been paid into Court to the account which describes the governors as trustees without power of sale. The governors join in the conveyance; it is not made by the official trustee alone.

Under those circumstances it seems to me that it is an ordinary case of persons under disability conveying, with the concurrence of the person having the legal estate, at a price not less than that fixed by two arbitrators, as required by section 9. But the corporation say it is not so. They say: "We tendered the purchase-money to the vendors, the governors, and the official trustee, and paid it into Court under section 76 because they refused to accept it." [His Lordship read section 76.] But no one has refused to accept the purchase-money. The trustees certainly have not, for they had no power to receive it. I cannot see that the official trustee was under any obligation to receive it, and I see no reason for throwing upon him the burden of a duty to receive the purchase-money. The corporation must pay the costs of the application in the usual way.

Solicitors—Patersons, Snow, Bloxam & Kinder, agents for J. C. Atkinson, Leeds, for applicants; Vincent & Vincent, agents for the Town Clerk of Leeds, for respondents.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

KEKEWICH, J. 1900. Nov. 9.

RANDT GOLD-MINING CO. *v.* WAINWRIGHT.

Company — Voting Power — Forfeited Shares—"Call or other sum due."

Where the articles of association of a company provide that after forfeiture of shares for non-payment of calls the company shall be entitled to recover the calls from the original holder, and also that no member shall have a vote so long as any calls, or other sums, are due and payable in respect of any share, the calls upon a forfeited share are "sums due in respect thereof," and the purchaser from the company of forfeited shares cannot vote so long as the calls have not been recovered from the former shareholder.

The plaintiff company was incorporated in 1895 with a capital of 80,000*l.* originally in 1*l.* shares, but shortly afterwards divided into 320,000 shares of 5*s.* each. Of these shares 41,300 were issued to the African Gold Properties, Lim. All the moneys payable on these shares were duly called up. The African company paid calls to the amount of 6,933*l.* 1*s.* upon the shares, but failed to pay further calls, and went into liquidation. A sum of 3,391*l.* 19*s.* was then due for calls. The plaintiff company forfeited the shares and sold and issued them to the New Balkis Eersteling, Lim. (in the arguments and judgment called the Balkis Co.), for 150*l.* The plaintiff company issued a certificate in the following form: "The New Balkis Eersteling, Lim., is the holder of the shares in question, upon which the sum of 3*s.* 4*d.* per share has been paid the remaining 1*s.* 8*d.* per share has been called up and is payable by the African Gold Properties Ld. who were the holders of the said shares prior to the same being forfeited and the New Balkis Eersteling Limd. is to be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof."

At a general meeting of the company held on August 8, 1900, a resolution was put to the meeting that the company should be wound up voluntarily, and the defendant Wainwright appointed liquidator. This was declared to be carried. A

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poll was demanded, and at an adjourned meeting the poll was reported as 90,077 votes for and 71,080 votes against the resolution, and the resolution was declared carried as an ordinary resolution.

Another meeting was held on October 17 to consider a resolution in the same terms. This was declared carried, and, a poll being demanded, was carried by 82,228 for, to 58,560 against the resolution.

In each case the Balkis Co. voted in respect of their 41,300 shares, and in the absence of their votes the majority would have been against the resolution. This was an action by the company against Wainwright and the directors for an injunction to restrain his acting as liquidator, on the ground that the resolutions for voluntary winding-up and his appointment were not validly passed.

An important question was raised whether the resolutions were sufficient even if all the votes were valid, but in the view taken by the Court it became unnecessary to decide the point.

The articles of association, after the usual clauses for giving notice requiring payment of overdue calls and expenses, contained the following:

"15. If the requisitions of any such notice as aforesaid are not complied with, any shares in respect of which such notice has been given may at any time thereafter before payment of all calls or instalments interest and expenses due in respect thereof be forfeited by a resolution of the directors to that effect.

"16. Any shares so forfeited shall be deemed to be the property of the company, and the directors may sell reallot or otherwise dispose of the same in such manner as they think fit.

"17. Any member whose shares have been forfeited shall notwithstanding be liable to pay, and shall forthwith pay, to the company all calls instalments interest and expenses owing upon or in respect of such shares at the time of the forfeiture with interest thereon until payment at the rate of 10*l.* per cent. per annum and the directors may enforce the payment of such money or any part thereof if they think fit but shall not be under any obligation so to do."

"67. No member shall be entitled to be present or to vote on any question either personally, or by proxy, or as proxy for another member, at any general meeting or upon a poll, or be reckoned in a quorum, whilst any call or other sum shall be due and payable to the company in respect of any of the shares of such member."

Renshaw, *Q.C.*, and *Clauson*, for the company.—The case is clearly within article 67. There were at the time of the issue of these shares to the Balkis Co., and are now, sums due and payable to the company in respect of the shares. Indeed, part of these sums have been recovered by this company from the African Co. since the sale to the Balkis Co. The directors had no power to relieve the purchaser of the forfeited shares from liability to pay calls. That would be a reduction of capital in a manner not authorised.

Sheldon, for the defendants.—There are no sums due or payable to the company in respect of these shares. The liability for calls is gone; it is extinguished by the forfeiture—*Blakely Ordnance Co., In re; Stocken's Case* [1868].[1] It is true that case turns upon the construction of special articles of association, but the articles are in effect the same as in this case. The company have a claim against the African Gold Properties, but that is a new liability created by article 17. The liability for calls, as calls, is gone. The Balkis Co. could not in any case be compelled to pay calls, and therefore there is no sum due in respect of the shares.

KEKEWICH, J.—I think the point suggested by counsel for the plaintiffs, that the forfeiture of shares and their reissue free from liability for calls is an unauthorised reduction of capital, is one which would require careful further consideration. But I pass that over, because there is a further point upon which I can decide the case. Articles 15 and 16 provide for the forfeiture of shares and their sale when forfeited. It seems that the shares in question were properly forfeited, the directors had power to sell them, and

(1) 37 L. J. Ch. 230; L. R. 3 Ch. 412.

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I assume that the price for which they sold them was a proper one.

It seems that a forfeiture so carried out extinguishes all the rights and liabilities of the original shareholder. In *Stocken's Case*[1] Lord Justice Cairns held that no action for calls could be brought after forfeiture. He held that all rights were extinguished because the holder of the forfeited shares had ceased to be a shareholder. If therefore the articles stopped with article 16, calls could not be sued for, and there would be no moneys payable in respect of these shares. But article 17 provides that the calls shall still be payable. It is quite true that the liability imposed by that article is a new one. The company can no longer sue for calls as calls, but must sue in respect of the new liability imposed by article 17. But the result is that there is still something due. I cannot see any reason why the words "any call or other sum . . . . due and payable to the Co. in respect of any share" should not include the sums payable under article 17 The sums originally due as calls are still due under the new liability, and they are certainly due in respect of the shares held by the Balkis Co. as transferees of the forfeited shares. I am of opinion therefore that the votes of the Balkis Co. were wrongly counted. If that is so, it is admitted that the resolutions were not carried. I must therefore restrain the company and the liquidator from acting upon them.

Solicitors—Hollams, Sons, Coward & Hawksley, for plaintiffs; Sanderson, Adkin & Lee, for defendants.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

COZENS-HARDY, J.
1900.
Dec. 8, 19.

KNIGHT *v.* WILLIAMS.

Landlord and Tenant — Lease — Surrender by Operation of Law—Possession of Surrendered Lease.

A lessee, notwithstanding a surrender of his term by operation of law, retains an interest in the lease, and on the granting of a new lease to him by the lessor is entitled to retain the old lease.

The surrender of an old lease, implied from the acceptance of a new lease, is subject to an implied condition that the new lease is valid.

The plaintiff James Stevens Knight was the lessee of premises in Little Sutton Street, Clerkenwell, for the residue of a term of sixty-one years from September 29, 1859, subject to an underlease to the defendant John Clark Williams for twenty-one years from September 29, 1880.

Negotiations proceeded for a surrender of that underlease and the granting of a new underlease to the defendant for a further term of twenty-one years less the last ten days thereof from September 29, 1899, at an increased rental. Ultimately, a draft lease having been prepared and approved by both parties, the lease and counterpart were engrossed and signed; and an appointment was made for July 9, 1900, for completion and exchange of the lease and counterpart. At the appointment the defendant's solicitors refused to hand over the underlease (which was about to be surrendered) unless the plaintiff handed over the counterpart thereof.

This action was afterwards commenced for specific performance of the contract to take the underlease.

The defendant in his defence pleaded that he was willing to complete and to hand over the old lease in exchange for the counterpart, or to complete and to retain the old lease, the plaintiff retaining the counterpart; but the plaintiff would not adopt either of these courses.

The action now came on on motion for judgment on admissions in the pleadings.

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KNIGHT *v.* WILLIAMS.

Eve, Q.C., and *St. John Clerke*, for the plaintiff.—On the determination of the lease by effluxion of time the lease belongs to the lessee, and the counterpart to the lessor—*Co. Lit.* vol. 2, ch. 5, s. 370; *Dixon on Title-Deeds*, p. 82; *Copinger on Title-Deeds*, pp. 34 and 35; *Platt on Leases*, vol. 2, p. 541; *Doe d. Egremont (Earl)* v. *Pulman* [1842][1]; but this is not a determination by effluxion of time. On principle the plaintiff is a purchaser, and as such entitled to the lease. If the lessee surrenders his lease on one day, it is clear the lessor can insist on having the lease handed over to him; if he takes a new lease the next day, he cannot ask for the old document back again.

Stewart-Smith, for the defendant.—If the lease has expired by effluxion of time, the lessor cannot claim the lease—*Hall* v. *Ball* [1841][2] and *Elworthy* v. *Sandford* [1864].[3] If the lessee destroyed the lease, he could be sued in detinue. There is no distinction in its consequences between expiry by effluxion of time, by surrender, or by forfeiture. The plaintiff is not a purchaser of the lease; he merely accepts a surrender. Nor can he claim this title-deed; if it were in his possession and he sued the lessee for breaches of covenant, the lessee would have to go to him to learn what his rights and liabilities were.

Eve, Q.C., in reply.—This is clearly a case of the purchase of the lessee's interest in the lease by the plaintiff, and the granting of a new lease to him.

Cur. adv. vult.

Dec. 19.—COZENS-HARDY, J., stated the facts, and continued: It was stated by counsel that the new lease prepared and executed by the plaintiff was not expressed to be made in consideration (*inter alia*) of the surrender of the former lease, but in the view which I take the insertion or omission of these words would make no difference. See *Doe d. Egremont (Earl)* v. *Courteney* [1848].[4] The acceptance of a new lease operates as an implied surrender "by operation of law" of the old lease within the meaning of section 3 of the Statute of Frauds, but such surrender differs from an actual surrender by deed; it is not absolute; it is subject to an implied condition that the new lease is valid; and if this is not so the old lease remains in force. The authorities on this point are clear—see *Woodfall's Landlord and Tenant* (16th ed.), p. 318. This being so, I think the plaintiff is wrong in contending that he is in the position of an ordinary purchaser of a lease who can on completion demand the handing over of the lease, and is at liberty to burn it if he thinks fit. The lessee, notwithstanding a surrender by operation of law, retains an interest in the lease. Moreover, when a lease is determined by re-entry, or has expired by lapse of time, the lessor is not entitled to recover the lease—see *Hall* v. *Ball*[2] and *Elworthy* v *Sandford*.[3] It would, I think, be wrong to put it out of the power of the defendant to take advantage of the old lease should the new lease prove to be invalid, and he is therefore entitled to retain the old lease. On the other hand, the defendant cannot require the handing over of the counterpart lease, and he does not assert this as a right; though he was willing on completion to hand over the lease if he got the counterpart. The result is that in my opinion the defendant was not bound on completion to hand over the old lease, and I therefore make no order, except that the plaintiff do pay the costs of the action.

Solicitors—W. T. Boydell, for plaintiff; Morley, Shirreff & Co., for defendant.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

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(1) 11 L. J. Q.B. 319; 3 Q.B. 622.
(2) 10 L. J. C.P. 285; 3 Man. & G. 242.
(3) 34 L. J. Ex. 42; 3 H. & C. 330.
(4) 17 L. J. Q.B. 151; 11 Q B. 702.

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COZENS-HARDY, J. 1900. Dec. 5, 12.

STENOTYPER, LIM., *In re*; HASTINGS BROTHERS *v.* STENOTYPER, LIM.

Company — Winding-up — Fraudulent Preference—Debentures—Issue to Creditors to Relieve Surety—"Undue or fraudulent preference"—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

Section 164 *of the Companies Act*, 1862, *although it uses the words "undue or fraudulent preference," does not intend the operation of section* 48 *of the Bankruptcy Act*, 1883.

H. & Co. were creditors of a joint-stock company for a debt, part of which was secured by an acceptance of the company, upon which R., the chairman of the company, was liable. The company was known by its directors to be, if not absolutely insolvent, at least unable to pay its debts as they became due from its own money. Under these circumstances the company issued debentures to H. & Co. as collateral security for the payment of their debt:—Held, *that, the main motive of the company in issuing the debentures being to relieve R. from his liability on the acceptance, the debentures were not given with a view of preferring H. & Co., although incidentally they would obtain a benefit by them, and that they were therefore valid.*

Mills, *In re*; Official Receiver, *ex parte* (5 Morrell, 55), *followed.*

Summons by the plaintiffs in the above action on behalf of debenture-holders for a declaration that seven debentures dated February 20, 1900, issued by the defendant company to the plaintiffs, Messrs. Hastings Brothers, were valid and subsisting, and that they were entitled to the benefit of the charge on the company's property created thereby.

The company was incorporated on February 8, 1897.

By its articles of association (article 13) the directors were empowered to raise or borrow money by the issue of debentures charged on the undertaking and property of the company, present and future, including its uncalled capital.

In February, 1900, the company found itself in pecuniary difficulties. It owed its employees for salaries 877*l.* 16*s.* 2*d.*, and other creditors about 3,500*l.*, some of whom had commenced proceedings against the company to obtain payment of their debts.

Hastings Brothers, who were a firm of advertising agents, were creditors of the company for 650*l.* 5*s.* 8*d.*, in respect of which they held a bill of exchange for 371*l.* 17*s.* 8*d.*, dated December 15, 1899, accepted by the company and indorsed by N. E. Reed, the chairman of the company, which would fall due on February 18, 1900.

On February 16, 1900, the company notified to Hastings Brothers that it would be unable to pay the bill at maturity, and an interview took place on that day between them and Reed with reference to the matter, the result of which is stated in the minute of the meeting of February 17, 1900, referred to below.

In these circumstances a meeting of the directors was, on February 17, 1900, held for the purpose of considering the position of the company, at which the following directors were present: N. E. Reed (in the chair), C. C. Hore, and C. C. H. Millar. The proceedings at the meeting, as detailed in the minutes, were as follows:

"The chairman reported that himself and the secretary had an interview yesterday, the 16th inst., with Messrs. Hastings Brothers in reference to the company's acceptance in their favour for 371*l.* 17*s.* 8*d.* due this day, and notified to them the inability of the company to meet the same.

"Messrs. Hastings Brothers refused to refrain from taking legal proceedings at once to recover that amount and the additional amount of 278*l.* 8*s.* 0*d.* which had not been drawn for (making a total of 640*l.* 5*s.* 8*d.* (*sic*)), except on the following conditions:

"1. That two bills—one at one month and one at two months in equal parts—for the whole amount of their claim be forthwith given to them.

"2. That these bills be personally indorsed by Mr. N. E. Reed.

"3. That Mr. N. E. Reed should personally give them a bonus for thus extending the time of payment for the amount due to them from the company.

"4. That first mortgage debentures for a sum of 700*l.* be likewise issued to them forthwith by the company as collateral security for the payment of their debt.

"An approximate statement of the present liabilities of the company was presented, shew-

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ing the position of the company to be as follows:

	£	s.	d.
"Amount due for salaries (including a sum of 96*l.* 17*s.* 6*d.* due to Mr. F. G. Burton and 93*l.* 5*s.* 6*d.* due to Mr. C. N. Stewart respectively)	877	16	2
"Pressing liabilities on account of which proceedings have been taken or threatened	876	11	3
"Mr. C. C. Hore (for which Mr. Reed is personally liable to Mr. Hore)	416	14	10
Mr. N. E. Reed. £870 8 11			
Do. for rent. 159 10 0			
	1029	18	11
Other trade liabilities for which no proceedings have been taken or threatened	1234	16	10
	£4435	18	0

"The company requiring Mr. N. E. Reed to guarantee the bills of Messrs. Hastings Brothers, as aforesaid, and to personally advance the amount of bonus desired by them for the extension of time (which was agreed to be 300 fully paid shares of five dollars each in the Stenotyper of America at the total face value of, in English money, 300*l.*), also desiring that he advance a further sum of money not exceeding 500*l.*, and the foregoing facts having been laid before and duly considered by the solicitor to the company present, and he having expressed his opinion that the issue of these debentures would not be an undue preference, it is and is hereby resolved: 1. That first mortgage debentures to the amount of 700*l.* be issued forthwith to Messrs. Hastings Brothers (Limited) as collateral security for the payment of their debt. 2. That first mortgage debentures be issued to the said Mr. N. E. Reed for (*a*) the amount of moneys now due to him from the company for previous advances and his liability on the company's account for rent; (*b*) to cover all such further advances made by him as and when made; (*c*) first mortgage debenture bonds to the amount of 400*l.* to cover his personal liability to Mr. C. C. Hore for moneys advanced to the company. Mr. N. E. Reed having declared his interest in the above resolution, he did not vote upon the same."

The statement in the minutes that Messrs. Hastings Brothers refused to refrain from taking legal proceedings at once to recover the 640*l.* 5*s.* 8*d.* was, as the Court held, false. At the date of the meeting the company had only a cash balance in hand of 1*l.* 2*s.* 3*d.*

In pursuance of the resolutions of February 17 two bills were given to Hastings Brothers by the company for 320*l.* and 324*l.* 5*s.* 8*d.* respectively, drawn by Hastings Brothers, accepted by the company, and indorsed by Reed.

On February 20, 1900, a meeting of the directors was held, at which first mortgage debentures were issued to Hastings Brothers, Hore, and Reed, in pursuance of the resolution passed at the previous meeting.

On February 23, 1900, a receiver was appointed under the power in the debentures.

On March 12, 1900, the writ in the present action was issued; and on April 18, 1900, an order was made appointing a receiver, and directing the usual accounts and enquiries.

On March 21, 1900, an order was made to wind up the company on a petition presented, on March 5, 1900, by three of the company's employees.

The statutory meeting of creditors and contributories was held on April 27, 1900, when it was resolved that the official receiver should continue to act as the liquidator.

A. F. Hastings, one of the directors of the firm of Hastings Brothers, had been examined on the winding-up under section 115 of the Companies Act, 1862, as to the circumstances under which the debentures were given to Hastings Brothers, and in the course of his examination had stated that, although at that time his firm were anxious and were pressing for payment of their debt, they did not threaten legal proceedings, and that proceedings had been taken against Reed on one of the bills personally, and judgment obtained against him, but that they had not proceeded further with the matter.

The official receiver and liquidator opposed the summons on the ground that the issue by the company of the debentures to Hastings Brothers was a fraudulent preference within section 48 of the Bankruptcy Act, 1883.[1]

(1) The Bankruptcy Act, 1883, s. 48, sub-s. 1, provides that "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the

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C. T. Mitchell, for Hastings Brothers.—There was sufficient pressure here to take the case out of section 48 of the Bankruptcy Act, 1883.[1] It is quite sufficient for a creditor to state that he will put pressure upon the debtor; it is not necessary that he should threaten him with legal proceedings. Even assuming there was here no sufficient pressure, it is submitted that there was no fraudulent preference of Hastings Brothers. A payment to constitute a fraudulent preference must be made with a view to prefer the creditor to whom it is made. It is not sufficient that the creditor is in fact preferred—*Goldsmid, In re; Taylor, ex parte* [1886],[2] *Sharp* v. *Jackson* [1899],[3] *Mills, In re; Official Receiver, ex parte* [1888],[4] and *Warren, In re; Tranter, ex parte* [1900].[5] Payment to a bank by directors of a company in reduction of an over-draft of which they were guarantors has been held not to be a fraudulent preference of the bank—*Wincham Shipbuilding, Boiler, and Salt Co., In re; Poole, Jackson & Whyte's Case* [1878][6]

Here the dominant motive of the company in issuing the debentures to Hastings Brothers was not to prefer them, but Reed, who was liable as indorser on the bills given by the company to them.

[He also referred to *Topham, Ex parte; Walker, in re* [1873].[7]]

Herbert Reed, Q.C., and *Stewart-Smith*, for the official receiver and liquidator.—In cases of this kind the Court has only to look at the motive actuating the person who makes the payment. It is immaterial what the person receiving the payment thought. The question in each case is, Was the substantial view of the debtor in making the payment to prefer the particular creditor, or had he some other motive in so doing? There is no provision in the Bankruptcy Act, 1883, as there was in the Bankruptcy Act, 1869, s. 92, which protects a payment received by a creditor in good faith. Here the view of the company was to prefer Hastings Brothers, and the result was to assist Reed. And it has been held that a payment to a creditor with a view to relieve a surety may be a fraudulent preference—*Paine, In re; Read, ex parte* [1896].[8]

The Companies Act, 1862, contains no statutory definition of the words "fraudulent preference." The words "undue or fraudulent preference" in section 164 of that Act have a wider application than the use of the word "fraudulent" in section 48 of the Act of 1883, and apply to an act which could not be avoided as a fraudulent preference under the latter section—*Skegg, In re; Skegg, ex parte* [1890].[9]

Further, there was no such pressure here as would operate on the minds of any reasonable body of directors. The pressure, to take the case out of section 48,[1] must be a real *bona fide* pressure—*Hall, Ex parte; Cooper, in re* [1882].[10]

C. T. Mitchell, in reply.—*Hall, Ex parte; Cooper, in re*,[10] is distinguishable. In that case the pressure was invited by the debtor. The words "undue or fraudulent preference" in section 164 must be construed according to the sense they bore when the Act of 1862 was passed. At that time there was no such thing known to the law as "undue preference" as distinguished from "fraudulent preference." It is submitted that the word "undue" in the section is redundant. *Paine, In re; Read, ex parte*,[8] was overruled by *Warren, In re; Tranter, ex parte*.[5]

[*Frank Evans, amicus Curiæ*, referred to *Washington Diamond-Mining Co., In re* [1893].[11]]

Cur. adv. vult.

Dec. 12.—COZENS-HARDY, J.—This is a summons seeking a declaration that seven debentures dated February 20, 1900, issued by the defendant company to the

person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy."

(2) 56 L. J. Q.B. 195; 18 Q.B. D. 295.
(3) 68 L. J. Q.B. 866; [1899] A.C. 419.
(4) 5 Morrell, 55.
(5) 69 L. J. Q.B. 425; [1900] 2 Q.B. 138.
(6) 9 Ch. D. 322.
(7) 42 L. J. Bk. 57; L. R. 8 Ch. 614.
(8) 66 L. J. Q.B. 71; [1897] 1 Q.B. 122.
(9) 59 L. J. Q.B. 546; 25 Q.B. D. 505.
(10) 51 L. J. Ch. 556; 19 Ch. D. 580, 583.
(11) 62 L. J. Ch. 895; [1893] 3 Ch. 95.

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STENOTYPER, LIM., IN RE.

plaintiffs, are valid. The official receiver and liquidator opposes on the ground that the debentures are void under section 48 of the Bankruptcy Act, 1883. [His Lordship read the material parts of the section.] This section is made applicable to companies by section 164 of the Companies Act, 1862. I think it is plain that that section, although it uses the words "undue or fraudulent preference," does not extend the operation of section 48.

Now it has been decided by authorities which are binding upon me that a transaction is not void under section 48 if it is entered into to protect the debtor himself, or for the benefit of some third person, such as a surety. The view of giving the particular creditor a preference must be the guiding and main motive operating upon the mind of the debtor. The material facts are these: The plaintiffs, who are advertising agents, became creditors of the company for a total amount of 640*l.*, part of which was secured by an acceptance of the company upon which Reed, the chairman, was liable. At this date the balance at the company's bank was practically nothing. The company was known by the directors to be, if not absolutely insolvent, at least unable to pay its debts as they became due from its own money. The debentures in question were issued by the company pursuant to resolutions passed at a board meeting on February 17, 1900. [His Lordship referred to the minutes of the meeting, and said that the entry, so far it stated that Messrs. Hastings Brothers had refused to refrain from taking legal proceedings, was false. He continued:] It is impossible to read those resolutions without seeing that a scheme was resolved upon by the directors for the very object of relieving Reed from his liability. That I am convinced was the main motive of the transaction. Although, incidentally, Messrs. Hastings, the plaintiffs, would get the benefit of the charge, the charge was not given with a view to give them a preference. The Court is bound to look at the motive and not at the result. The case seems to me to be governed by the decision of the Court of Appeal in *Mills, In re*.[4] I therefore hold that there is nothing to impeach the validity of the debentures. In the view which I take it is not necessary for me to consider whether there was any such pressure on the part of the plaintiffs as would suffice to take the case out of section 48. The applicants must add their costs of this summons to their security. The costs of the respondent will be costs in the winding-up.

Solicitors—S. J. R. Stammers, for plaintiffs; Everett & Hodgkinson, for official receiver and liquidator.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

COZENS-HARDY, J. 1900. Dec. 7. } PULMAN *v.* MEADOWS.

Administrator — Right of Retainer — Creditor's Administration Action—Payment out of Court.

An executor's or administrator's right of retainer is only applicable to a fund which he has actually or constructively got into his possession. Money paid into Court on his application does not come constructively into his possession.

It is not usually the practice of the Court to pay out funds in Court to the legal personal representative of a creditor, but to direct an enquiry as to who are the persons beneficially entitled thereto.

Summons.

The action was a creditor's action, commenced in 1852 by the plaintiff, William Thrush Pulman, a creditor of the testator, James Mills, who died on December 11, 1851.

In May, 1854, letters of administration with the will annexed were granted to the plaintiff, the residuary legatee having been cited, but not having appeared.

The chief clerk's certificate, dated December 12, 1855, found that a sum of 1,471*l.* 18*s.* 7*d.* was due to the estate of Margaret Mellish Mills, a lunatic, and the committee of her estate, and that other debts were due to other creditors, and the testator's estate was insolvent.

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PULMAN *v.* MEADOWS.

On the death of M. M. Mills the estate of James Mills became entitled to sums of 495*l.* 6*s.* New Consols and 6*l.* 11*s.* 8*d.* cash in Court to the credit of the cause *Dowding* v. *Mellish* (a suit instituted before the year 1851 to administer the estate of Richard Bradshaw, deceased), which sums were carried over in the said cause to the credit of "the share of James Mills in the residuary estate of Richard Bradshaw, deceased."

The plaintiff having died in the meantime, on October 6, 1899, letters of administration with the will and codicil annexed *de bonis non* of James Mills were granted to the applicant, who was administrator with the will annexed of M. M. Mills, the residuary legatee having first been cited and not having appeared.

On the application of the present applicant, in the suit of *Dowding* v. *Mellish*, an order was made transferring the New Consols and cash to the credit of the cause *Pulman* v. *Meadows*.

In February, 1900, an order was made for payment of certain costs in the cause of *Pulman* v. *Meadows* out of the Consols and cash, after which there remained the sum of 181*l.* 5*s.* 6*d.* New Consols in Court. The present application was for the transfer of the Consols and dividends to the applicant upon the ground that he was entitled to retain the same as legal personal representative of James Mills towards satisfaction of the debt due to M. M. Mills.

The respondents to the summons were Messrs. Cox & Co., bankers and creditors of the testator James Mills.

S. O. Buckmaster, for the applicant.—Although the money did not actually pass through the applicant's hands, it was paid into Court on his application, and therefore constructively passed through his hands, and so his right as a creditor to retainer cannot be defeated—*Davies* v. *Parry* [1899][1] and *Richmond* v. *White* [1879].[2]

Austen-Cartmell, for the respondents.—The Court will not direct money to be paid out of Court in order that an executor may exercise his right of retainer —*Trevor* v. *Hutchins* [1895].[3] His right to retain does not extend to assets which he has not got in and which are not in his possession—*Rhoades, In re; Rhoades, ex parte* [1899].[4] In every case where retainer has been allowed there has been actual physical possession, and in no case has the money been in Court.

S. O. Buckmaster, in reply.—The argument amounts to this—that if a right of retainer is established, it may be defeated by lapse of time.

COZENS-HARDY, J.—This is a case of some difficulty, but, on the whole, I think the right of retainer cannot be made good. The right is only applicable to a fund which the legal personal representative has got into his possession. Lindley, M.R., said so in terms in *Rhoades, In re; Rhoades, ex parte*.[4] That statement must be qualified in some degree. The fund may have been actually—as money in his own pocket—or constructively in his possession; but if neither the one nor the other, then the right of retainer clearly has no existence.

In the present case we are dealing with very peculiar circumstances. There were two very old suits—*Dowding* v. *Mellish* and *Pulman* v. *Meadows*. The decrees made in both suits are nearly fifty years old. In the suit before me the estate is insolvent, and it was found out forty-five years ago that there was not enough to pay the debts. About eighteen months ago, by reason of the death of Miss M. M. Mills, two-eighths of the fund in Court to the credit of *Dowding* v. *Mellish* was released, and became assets in the suit of *Pulman* v. *Meadows*, and was carried over by the order of Mr. Justice Byrne to the separate account of James Mills. The applicant then took out letters of administration *de bonis non* in the old form, and also was constituted legal personal representative to the largest creditor. He applied for an order dealing with the fund standing to the credit of *Dowding* v. *Mellish* to the separate account of his testator James Mills. There was a good reason why no order for the transfer of

(1) 68 L. J. Ch. 346; [1899] 1 Ch. 602.
(2) 48 L. J. Ch. 798; 12 Ch. D. 361.
(3) 65 L. J. Ch. 175; and on app. *ibid.* 738; [1896] 1 Ch. 844.
(4) 68 L. J. Q.B. 804; [1899] 2 Q.B. 347.

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the sum should be made because of the death of James Mills so long ago. It is not the practice of the Court to pay out funds over which it has seisin to the legal personal representative, but enquiries are usually made as to the persons beneficially entitled. Finding there was a suit to administer the estate of Richard Bradshaw, Mr. Justice Byrne, instead of directing any enquiry, transferred the fund to the credit of the administration action in my Court. That having been done, I made an order inconsistent with this right of retainer. The applicant now asks me to say that he has had constructive possession of this fund since 1899. That is carrying the doctrine of constructive possession too far, and I will not be the first so to extend it. The true view is that the applicant has not established his right of retainer. The fund must be divided rateably amongst all the creditors.

Solicitors—Lewin & Co., for applicant; Fladgate & Co., for respondents.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

BUCKLEY, J. 1900. July 24. — BLACKBURNE *v.* HOPE-EDWARDES.

Settlement — Rentcharge — Secured by Term—Arrears of Rentcharge—How Enforced—Mortgage or Sale of Term—Sale of Inheritance.

Where a rentcharge is secured by a term of years the owner of such rentcharge is not entitled to have arrears thereof raised by sale or mortgage of the inheritance; his remedy is confined to having the arrears raised by means of the term.

Hall *v.* Hurt (2 J. & H. 76) *followed.*

By a settlement dated July 22, 1867, and made prior to and in contemplation of the marriage of William John Hope-Edwardes and Emily Blackburne, after reciting that a marriage had been agreed upon and that upon treaty for the marriage it was agreed that Thomas Henry Hope-Edwardes, the father of the intended husband, should provide for W. J. Hope-Edwardes in case the marriage should take place, and for Emily Blackburne by way of jointure in the event of her becoming his widow, a yearly rentcharge of 500*l.*, and that the same should be charged upon certain lands in manner thereinafter expressed, it was witnessed that in consideration of the intended marriage T. H. Hope-Edwardes granted and confirmed unto the defendants St. Leger Frederick Hope-Edwardes and Foster Grey Blackburne certain farms and lands in the parish of Stapleton, in the county of Salop, known as the Netley Hall Farm, the Upper Netley Farm, and the Lower Netley Farm, together with certain woods and plantations in the neighbourhood of the farms, to hold the same unto them and their heirs to the use of T. H. Hope-Edwardes, his heirs and assigns, until the marriage, and thereafter to the use that W. J. Hope-Edwardes and his assigns should during the joint lives of himself, Emily Blackburne, his wife, and T. H. Hope-Edwardes receive a yearly rentcharge of 500*l.*, and to the further use that after his death Emily Blackburne, in case she should become his widow, and her assigns might receive during her life the like rentcharge of 500*l.* to be charged upon and issuing and payable out of the lands. And to the further use that in case either of the yearly rentcharges or any part thereof should at any time be in arrear and unpaid for twenty-one days, it should be lawful for W. J. Hope-Edwardes and his assigns, and for Emily Blackburne and her assigns, as the case might be, to enter into and distrain upon all or any part of the lands and to dispose of the distress and distresses then and there found according to law as landlords might for rents reserved upon leases for years, to the intent that thereby or otherwise the yearly rentcharges and every part thereof so in arrear and unpaid, and all costs, charges, and expenses occasioned by reason of the non-payment thereof, should be fully paid and satisfied. And to the further use that in case either of the yearly rentcharges or any part thereof should at any time or times be in arrear and unpaid for

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the space of forty days, it should be lawful for W. J. Hope-Edwardes and his assigns, or for Emily Blackburne and her assigns, as the case might be, to enter into or upon and to hold all or any part of the premises thereby assured, and to receive and take the rents and profits thereof, the possession to be without impeachment of waste. And it was declared that subject to and charged with the rentcharges and the powers and remedies for enforcing payment thereof, the lands should be held to the use of St. L. F. Hope-Edwardes and F. G. Blackburne, their executors, administrators, and assigns, for the term of ninety-nine years from the solemnisation of the marriage without impeachment of waste, upon the trusts thereinafter declared concerning the same, and subject to the term to the use of T. H. Hope-Edwardes, his heirs and assigns. And it was declared that the lands were thereby limited to St. L. F. Hope-Edwardes and F. G. Blackburne for the term of ninety-nine years, upon trust that if either of the rentcharges should be in arrear for sixty days, then and so often as the same should happen St. L. F. Hope-Edwardes and F. G. Blackburne should by and out of the rents and profits, or by mortgaging or demising the lands, for all or any part of the term, or by bringing actions against the tenants or occupiers of the lands for the recovery of the rents and profits thereof, or by other reasonable ways or means raise and pay the rentcharges.

The marriage between W. J. Hope-Edwardes and Emily Blackburne took place on July 23, 1867. He died on September 30 of the same year.

By deed dated August 1, 1873, Emily Hope-Edwardes assigned the rentcharge of 500*l.* to the plaintiff and H. L. Antrobus upon certain trusts. H. L. Antrobus died on March 18, 1899.

T. H. Hope-Edwardes died on April 6, 1871, having by his will dated April 1, 1870, devised his real estate situated in the county of Salop, which included the farms and lands charged by the deed of July 22, 1867, to his children in strict settlement.

The rentcharge had fallen into arrear, and the rents of the property, after payment of necessary outgoings, were insufficient to pay it. The amount due in respect of the arrears of rentcharge was 1,257*l.* 6*s.* 5*d.*

The present action was brought by the plaintiff, the surviving trustee of the deed of August 1, 1873, against the defendants, who were the whole of the persons interested under the will of T. H. Hope-Edwardes, and F. G. Blackburne, the surviving trustee of the deed of July 22, 1867, for payment of the 1,257*l.* 6*s.* 5*d.*, and for an order that this sum might be raised by a sale of the lands, or some competent part thereof.

The defendants other than the defendant F. G. Blackburne by their defence submitted that the plaintiff was not entitled to have the arrears, or any part thereof, raised by sale or mortgage of the hereditaments and premises charged with the payment of the rentcharge, or of any part of the hereditaments and premises otherwise than under the trusts of the term of ninety-nine years, or to have the arrears, or any part thereof, raised otherwise than in accordance with the powers, trusts, and terms of the settlement. They raised no objection to the plaintiff's resorting to the trusts of the term.

The widow of W. J. Hope-Edwardes, the annuitant, was stated to be of the age of fifty-four years.

It was admitted by all parties that it was not convenient that such arrears should be charged upon the lands by way of mortgage owing to the small rental thereof and the outgoings.

H. Terrell, Q.C., and *J. Rutherford*, for the plaintiff. — The only question is whether the arrears of rentcharge should be made good by the sale of a competent part of the property charged, or by a mortgage of the term of ninety-nine years. The plaintiff has a legal rentcharge, and is therefore entitled to sell the property charged to realise it. It was never intended that the term of ninety-nine years should destroy the right of the person entitled to the rentcharge to resort to the *corpus* of the estate. It would depreciate the interest of the annuitant if the arrears were raised by a mortgage of the term.

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[They referred to *Tucker, In re; Tucker* v. *Tucker* [1893],[1] and *Hambro* v. *Hambro* [1894].[2]

Astbury, Q.C., and *W. Brinton*, for the defendants other than F. G. Blackburne.—There is very little authority as to whether the inheritance can be sold where a term is expressly created for the purpose of protecting a rentcharge, but it is submitted that where there is such a term it prevents resort to the inheritance. Both on principle and authority there is no reason shewn for ordering a sale of the inheritance. Where a deed prescribes particular remedies for recovering a rentcharge the Court cannot go beyond them. The only direct authority on the point is *Hall* v. *Hurt* [1861].[3] That, however, was not, as here, the case of a devise in strict settlement. Even where there is no term the Court has a discretion as to whether it will order a sale of the land for the purpose of raising arrears of a rentcharge—*Hambro* v. *Hambro*.[2] In *Taylor* v. *Taylor* [1874][4] Hall, V.C., refused to apply *Cupit* v. *Jackson* [1824][5] because the land charged with the annuities was in strict settlement. It is difficult to see why the term should have been inserted in the deed if there was power to sell the inheritance.

[They also referred to *Horton* v. *Hall* [1874],[6] *Champernoon* v. *Gubbs* [1700],[7] *Doe d. Butler* v. *Kensington* (*Lord*) [1846],[8] and *Davidson's Conveyancing* (3rd ed.), vol. 3, pp. 315, 447.]

[BUCKLEY, J., referred to *Scottish Widows' Fund* v. *Craig* [1882].[9]]

E. Ford, for the defendant F. G. Blackburne, the surviving trustee of the ninety-nine years term.

H. Terrell, Q.C., in reply, referred to *Graves* v. *Hicks* [1841][10] and *Hooper* v. *Cooke* [1855].[11]

(1) 62 L. J. Ch. 442; [1893] 2 Ch. 323.
(2) 63 L. J. Ch. 627; [1894] 2 Ch. 564.
(3) 2 J. & H. 76.
(4) 43 L. J. Ch. 314; L. R. 17 Eq. 324.
(5) 13 Price, 721.
(6) L. R. 17 Eq. 437.
(7) 2 Vern. 382.
(8) 15 L. J. Q.B. 153; 8 Q.B. 429, 450.
(9) 51 L. J. Ch. 363; 20 Ch. D. 208.
(10) 10 L. J. Ch. 185, 189; 11 Sim. 536, 551.
(11) 25 L. J. Ch. 62; 20 Beav. 639. On app. [1856], 25 L. J. Ch. 467.

BUCKLEY, J.—In this case I think I ought to follow the decision in *Hall* v. *Hurt*.[3] [His Lordship referred to the creation of the rentcharge by the deed of July, 1867, and to the will of T. H. Hope-Edwardes, and continued:]

The property subject to the rentcharge of 500*l.* consists of the central portion of the settlor's property. The rentcharge was kept down until 1895, but owing to the depreciation in the value of land it has since fallen into arrear. The parties to the action have endeavoured to arrive at some arrangement, but have failed. Under the deed a term of ninety-nine years is created to secure the rentcharge, but it is admitted by all parties that to raise and keep down the arrears of the annual charge by a sale or mortgage of the term would not be a convenient course. It is not disputed that there are arrears, and that they ought to be paid. [His Lordship then referred to the provisions of the deed, and continued:] The question I have to decide is whether, under the deed, payment of the rentcharge is to be enforced by a sale of the inheritance. There are cases in which, when rentcharges have been created, although there was no express power of sale, the Court has given its assistance by ordering a sale. The earliest of those cases is *Cupit* v. *Jackson*,[5] and the result of the cases is that, subject to the discretion of the Court, the owner of a rentcharge is entitled to an order for sale of the inheritance, but that the Court will refuse to make the order in certain cases; for instance, where it is advisable to wait for a time—*Graves* v. *Hicks*[10]—or in the case instanced by Mr. Justice North in *Tucker, In re*,[1] the amount of the arrears being small. That shews the sort of discretion which the Court exercises where there is no term. But what is the effect of vesting a term in trustees, as in the present case? In *Hall* v. *Hurt*[3] Vice-Chancellor Wood thought that the existence of a term altered the rights of the parties. The Vice-Chancellor was asked to make an order for sale of the fee-simple for payment of the arrears of a rentcharge of 300*l.* and a sum of 5,000*l.*, and he made an order for sale based on the rentcharge, and not on the 5,000*l.* His reasons were thus stated

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in the judgment: "This case involves a very short point. I think it turns entirely on the question, whether a sale can be directed for the arrears of the annuity; for I do not feel, that I can safely rest it upon the construction contended for, in argument, of the words creating the charge of 5,000*l.* Looking at the whole contents and scope of the will, my impression is, that the freehold was not intended to be sold to raise the charge of 5,000*l.*, but that the term was created for that purpose, with the view of avoiding a sale of the fee." Although that was a decision on the construction of a particular will, it is of assistance to me in the present case, and shews that the Court ought to see whether the existence of the term is consistent with the right to have a sale ordered by a Court of equity. Here I find a rentcharge issuing out of land which is secured by a term. There is express power to raise the arrears of the rentcharge by a mortgage of the term. Having regard to the term and to what was said in *Hall* v. *Hurt*,[3] I do not see how I can make the order which is asked for. I must therefore only order that an account be taken of the arrears, and declare that they are not to be raised by a sale or mortgage of the inheritance.[12]

Solicitors—Field, Roscoe & Co., agents for Greenall & Buckton, Warrington, for plaintiff; Chester, Broome & Griffithes, agents for Peele & Peele, Shrewsbury, for defendants other than defendant F. G. Blackburne; Rowcliffes, Rawle & Co., agents for P. & J. Watson, Bury, for defendant F. G. Blackburne.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

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(12) An appeal was presented against this decision, but it was abandoned.

[IN THE HOUSE OF LORDS.]

1900.
May 8, 10. Aug. 10.
Dec. 10.

BEDFORD (DUKE) *v.* ELLIS.*

Practice—Parties—Plaintiffs—Joinder of Causes of Action—Representative Action—Class—Public Right—Attorney-General—Rules of Supreme Court, 1883, *Order XVI. rules* 1 *and* 9.

Where there is a common interest and a common grievance a representative action is in order if the relief sought is in its nature beneficial to all whom the plaintiffs propose to represent; and the rule is not limited to persons having a beneficial proprietary interest. And if the alleged rights of the class represented are being denied or ignored, it is of no moment whether or not the nominal plaintiffs have been wronged in their individual capacity. The Attorney-General is not a necessary party to such an action.

Growers of produce alleging statutory rights in a market, claiming a declaration on the construction of the statute, and an injunction and account, held entitled to be joined as co-plaintiffs.

Observations by LORD MACNAGHTEN *on* Temperton *v.* Russell (62 L. J. Q.B. 300; [1893] 1 Q.B. 435).

Decision of the COURT OF APPEAL (68 L. J. Ch. 289; [1899] 1 Ch. 494) [THE LORD CHANCELLOR (EARL OF HALSBURY) *and* LORD BRAMPTON *dissenting*] *affirmed.*

Appeal from a decision of the Court of Appeal (Lindley, M.R., and Rigby, L.J.; Vaughan Williams, L.J., dissenting) dated February 14, 1899, which reversed an order of Romer, J., dated December 7, 1898, on the respondent's undertaking to amend the writ and statement of claim by making the Attorney-General a defendant in the action (reported 68 L. J. Ch. 289; [1899] 1 Ch. 494).

The action related to the right of accommodation in Covent Garden Market, which belongs to the appellant, but is regulated by the provisions of an Act of

* *Coram*, The Lord Chancellor (Earl of Halsbury), Lord Macnaghten, Lord Morris, Lord Shand, and Lord Brampton.

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BEDFORD (DUKE) *v.* ELLIS, H.L.

Parliament passed in 1828 (9 Geo. 4. c. cxiii.)

The plaintiffs sued on behalf of themselves and all others the growers of fruit, flowers, vegetables, roots, or herbs within the meaning of the Act, and alleged infringement of their statutory rights by the appellant, against whom they asked for an injunction and other relief. The sole question was whether they were entitled to be joined as plaintiffs. The facts sufficiently appear in the judgments of Lord Macnaghten and Lord Brampton.

Levett, *Q.C.*, and *Danckwerts*, *Q.C.*, for the appellant.—The action is wrongly constituted, as the rules do not permit the joinder of plaintiffs suing as representatives of themselves and other growers, and also seeking to enforce personal and individual causes of action. In such a representative action there must be common proprietary rights—Order XVI. rule 9—*Temperton* v. *Russell* [1893].[1] One inhabitant of a district cannot sue on behalf of himself and other inhabitants—*Weale* v. *West Middlesex Waterworks Co.* [1820].[2] So holders of scrip or shares of a loan could not join in filing a bill to have their subscriptions returned—*Jones* v. *Garcia del Rio* [1823].[3] No rights at all are conferred by the Act on growers; there is a power, but no obligation on the part of the appellant to confer privileges on the growers. But everybody has a right to resort to a public market. The rights, if any, are only public rights to be enforced by the Attorney-General, and no special damage is proved. A representative action cannot be joined with an action by an individual—*Stroud* v. *Lawson* [1898].[4] The rule was altered in consequence of *Smurthwaite* v. *Hannay* [1894],[5] but the amended form does not help the respondents. Nor do *Beeching* v. *Lloyd* [1855],[6] or *Warrick* v. *Queen's College, Oxford* [1871],[7] or the other cases cited in the judgments below, apply, as if there be any right of action it is in tort, for which Chancery proceedings cannot be applied.

Asquith, *Q.C.*, and *J. T. Prior*, for the respondents.—Representative actions are not confined to cases in which persons have a common beneficial proprietary right. The words of Order XVI. rule 1 are comprehensive: "All persons . . . . in whom any right to relief in respect of or arising out of the same transaction or series of transactions." The possession of a common interest is sufficient, and such interest exists in the respondents by virtue of the Act of Parliament. The appellant is charged with a breach of a statutory obligation towards the respondents and other growers. The fact that growers are a fluctuating body does not impair their right, for it is easy to ascertain whether a particular person is or is not a grower. There is here, to use the language of Lord Hatherley in *Warrick* v. *Queen's College, Oxford*,[7] "a common right, which is invaded by a common enemy," and the respondents, "although they may have different rights *inter se*, are entitled to join in attacking that common enemy in respect of that common right."

Levett, *Q.C.*, in reply.—There are here six individual grievances alleged by members of an unascertainable class. The case is widely different from that of shareholders, copyholders, creditors, and the like. There are thousands of growers, some of whose interests may not be identical with those of the respondents. Such persons ought to be made defendants. If the class, as here, is too numerous, there can be no remedy unless the Attorney-General sues. The only remedy is a personal action. Until they get leases these persons have no right, preferential or other. Moreover, the action asks for such an interference with the internal management of the market as the Court will not undertake—*Mozley* v. *Alston* [1847].[8]

The House took time for consideration.

Aug. 10.—THE LORD CHANCELLOR (EARL OF HALSBURY).—In this case I feel some difficulty about the judgment that I ought to pronounce. It is not a judgment upon the merits of the cause, but it

(1) 62 L. J. Q.B. 300; [1893] 1 Q.B. 435.
(2) 1 J. & W. 358.
(3) Turn. & R. 297.
(4) 67 L. J. Q.B. 718; [1898] 2 Q.B. 44.
(5) 63 L. J. Q.B. 737; [1894] A.C. 494.
(6) 24 L. J. Ch. 679; 3 Drew. 227.
(7) 40 L. J. Ch. 780; L. R. 6 Ch. 716.
(8) 1 Ph. 790.

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is in an interlocutory proceeding claiming that the action is improperly constituted, and insisting upon the necessity of selecting some one or more plaintiffs who shall represent the same rights. I have read the judgment proposed to be delivered by Lord Brampton, and I agree with it, but I have great difficulty in arguing the question upon an interlocutory proceeding, for this reason: it appears to me that one of the questions which undoubtedly will arise in the course of the cause will be the question of what rights, if any, exist among the different members of the class—those persons who are put together here as plaintiffs. I have found myself in this difficulty, that if I gave all the reasons for which I agree with Lord Brampton, it appears to me it would be impossible for me afterwards to take a different view when the question comes to be tried at the hearing of the cause. I think it might prejudice some of the questions that are to be argued which have not yet been argued, and I might find it extremely difficult myself in saying what I should say now to avoid prejudicing those questions which have not been argued yet. The result is, while I content myself with saying I agree with Lord Brampton in differing from what has been done in the Court below, I do not propose at present to give any reasons for my adherence to his view.

LORD MACNAGHTEN.—The action in which this application was made relates to the right of accommodation in Covent Garden Market. The market belongs to the Duke of Bedford, but it is regulated by the provisions of an Act of Parliament passed in the year 1828 (9 Geo. 4. c. cxiii.). The Act is concerned with the persons who come to the market to buy or to sell. No toll is payable by those who buy, unless the articles bought are again sold within the market or exposed for sale there. The persons who come to sell have to pay rent and toll. They are divided into two classes—those who sell their own produce and those who are ordinary dealers in the market, or middlemen. For some reason or other the Act purports to confer certain advantages and certain preferential rights on the persons who come to sell their own produce. It may be that at the time when the Act was passed market gardeners in the county of Middlesex were not without influence in the electorate. It may be that in those days protection was not such an odious thing as it is now in the eyes of some people who worship political economy. Whatever the reason may have been, it cannot be denied that the Act apparently does give a preference to those who are described as growers of fruit, flowers, vegetables, roots, or herbs. Now several people come forward as plaintiffs. They allege that they are growers within the meaning of the Act. They claim that under the Act they are entitled to certain advantages and preferential rights. They say that the Duke, who is lord of the market, persistently ignores their rights and favours the middlemen, from whom he is authorised to exact higher tolls. And they sue on behalf of themselves and all other the growers of fruit, flowers, vegetables, roots, or herbs within the meaning of the Act. They seek a declaration as to the true construction of the Act, an injunction to restrain the infringement of their alleged statutory rights, and an account of the moneys by which, as they allege, they have been severally overcharged.

The Duke has applied by summons to stay the action on two grounds, which were mixed up in the argument, but which ought, I think, to be kept separate and distinct. The principal ground is that the plaintiffs are not entitled to sue in a representative character in defence of their alleged statutory rights. The other ground, which is a matter of very slight moment, is that they cannot join as co-plaintiffs in respect of their several grievances. The whole dispute in the present case has arisen from confusing these two matters. They have really nothing to do with each other. If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity. They are none the better for that and none the worse. They would be competent representatives

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of the class if they had never been near the Duke; they are not incompetent because they have been turned out of the market. In considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members. Mr. Justice Romer acceded to the defendant's application, influenced, or rather I should say compelled, by an expression in the judgment of the Court of Appeal in the case of *Temperton* v. *Russell*,[1] which has found its way into recent books of practice as a compendious and authoritative statement of the law. In *Temperton* v. *Russell*[1] the Court was composed of Lord Esher, M.R., and Lords Justices Lindley and Bowen. The judgment of the Court was delivered by Lord Justice Lindley. His Lordship is represented as saying that Order XVI. rule 9, which provides for persons suing or being sued as representing a class, "only extends to persons who have or claim some beneficial proprietary right, which they are asserting or defending." Now it cannot be said that the plaintiffs in this case are asserting any beneficial proprietary right. If that be a condition of suing in a representative character, the plaintiffs are out of Court. But it seems to me that there is no reason whatever for so restricting the rule, which was only meant to apply the practice of the Court of Chancery to all divisions of the High Court. The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit in order that a final end might be made of the controversy. But when the parties were so numerous that you never could "come at justice," to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent. To limit the rule to persons having a beneficial proprietary interest would be opposed to precedent and not, I think, in accordance with common sense. Take the case of a creditor's suit, which, perhaps, was the earliest instance of plaintiffs being allowed to sue in a representative character. It can hardly be suggested that a creditor has a proprietary interest in the real or personal estate of his deceased debtor. Take another case, which was common enough in former times—*Chaytor* v. *Trinity College, Cambridge* [1796].[9] One parishioner would sue on behalf of himself and all the other parishioners to establish a *modus* in lieu of tithes. There was no beneficial proprietary interest there. The choice lay between two evils; and the plaintiff, suing in a representative character, insisted on choosing the lesser evil of the two. Again, in *Gray* v. *Chaplin* [1825],[10] two shareholders of a navigation were held justified in suing on behalf of themselves and all other the shareholders except the defendants in order to enforce their alleged statutory rights under an Act of Parliament. The equity in that particular case happened to be very shadowy, and the receiver appointed by the Vice-Chancellor was afterwards discharged by Lord Eldon [1826][11]; but it was not suggested in the argument before his Lordship that the Vice-Chancellor had been in error in holding the suit as regards the plaintiffs properly constituted. There are plenty of other cases which shew that, in order to justify a person suing in a representative character, it is quite enough that he has a common interest with those whom he claims to represent. In *Warrick* v. *Queen's College, Oxford*,[7] the question was whether persons with titles diverse in origin, and rights in some respects distinct, could be combined as plaintiffs in a suit to redress a grievance common to all. No such question can arise here. All growers have the same rights. They all rely on one and the same Act of Parliament as their common charter.

I do not think it is necessary to say anything more upon this point. I have only said so much because I find that the

(9) 3 Anst. 841.
(10) 3 L. J. (O.S.) Ch. 161; 2 Sim. & S. 267.
(11) 2 Russ. 126.

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learned Lord Justice who dissented from his colleagues still maintains a position which Lord Justice Lindley abandoned —if, indeed, he ever took it up, which for my part I very much doubt. Lord Justice Vaughan Williams puts the successful argument, or the argument intended to be successful, in the mouth of the defendant. It seems to rest on two main grounds—first, that the special rights apparently conferred upon the growers are public rights, a proposition which I confess I do not understand; and secondly, that those special rights confer on the growers no right of property whatever, a proposition which I suppose everybody would concede. It is rather a pity when a case like *Temperton* v. *Russell*[1] finds its way into the Reports. The attempt made there to invest the defendants with a representative character was absurd on the face of it. Now, when a Judge comes to deal with a case of that sort, and tries to deal with it seriously as if there was something in it, he is very apt, I think, to express himself unguardedly; and so it happens sometimes, as it happened, I suppose, in *Temperton* v. *Russell*,[1] that what was only meant for an illustration is taken for a definite and exhaustive statement of law.

There is one point—a point of no practical importance—on which I venture respectfully to differ from the Court of Appeal. I doubt whether it is accurate to say that in the case of representative suits we have advanced a long way since the days of Lord Eldon. It is, of course, not necessary nowadays to go to a Court of law in order to establish legal rights. But in all other respects I think the rule as to representative suits remains very much as it was a hundred years ago. From the time it was first established it has been recognised as a simple rule resting merely upon convenience. It is impossible, I think, to read such judgments as those delivered by Lord Eldon in *Adair* v. *New River Co.* [1805][12] and in *Cockburn* v. *Thompson* [1809][13] without seeing that Lord Eldon took as broad and liberal a view on this subject as anybody could desire. "The strict rule," he said in the latter case, "is, that all persons, materially interested in the subject of the suit, however numerous, ought to be parties . . . . but that, being a general rule, established for the convenient administration of justice, must not be adhered to in cases, to which consistently with practical convenience it is incapable of application." "It was better," he added, "to go as far as possible towards justice than to deny it altogether." He laid out of consideration the case of persons suing on behalf of themselves and all others, "for in a sense," he said, "they are before the Court." As regards defendants, if you cannot make everybody interested a party, you must bring so many that it can be said they will fairly and honestly try the right. I do not think that we have advanced much beyond that in the last hundred years, and I do not think that it is necessary to go further at any rate for the purposes of this suit.

It would be highly improper at this stage of the proceedings to say anything which might prejudge the construction of the Act. That is a matter for the hearing. But out of respect for the arguments of counsel, I will venture to make one or two general observations. It was said that the growers are so fluctuating and indefinite a body that it is impossible to tell who is or who is not a grower, especially in these modern times when there are such improved facilities for carriage of goods. I cannot say that I am much impressed with that difficulty. It seems to me that the description of the persons apparently intended to be favoured by the Act is sufficient for all practical purposes. It may be difficult or impossible to compile a catalogue of growers. But there cannot, I think, be much difficulty in determining whether a particular person who claims a preferential right to a vacant stand in the market is a grower or not.

Then it was urged that after all it is for the Duke to regulate his own market. The Act, it was said, is merely an enabling Act; the growers have no rights whatever. Well, that is the very question to be determined at the hearing. And how can it be determined if the growers are not allowed to sue in a body? The learned

(12) 11 Ves. 429.
(13) 16 Ves. 321.

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counsel for the Duke of Bedford asserted that the Duke was master of the situation, and might do what he liked with his own. It may be so. All I would say is that I am not at present convinced by the able and earnest arguments of counsel for the Duke that the expectations apparently held out to growers by this Act of Parliament are wholly illusory, and that the Duke, who is empowered by the Act to make rules, orders, and by-laws "not being repugnant," as the Act says, "to the laws of this realm or to the provisions of this Act," is at liberty to disregard and ignore those provisions at his own will and pleasure.

One word as to the Attorney-General, without whose presence the learned Judges of the Court of Appeal thought the action ought not to proceed. The Attorney-General has been or will be made a party in obedience to the order of the Court of Appeal. From that part of the order there is no appeal. Speaking, however, for myself, I cannot see what the Attorney-General has to do with the matter. The plaintiffs do not want him; still less does the defendant. The learned counsel on both sides professed to be unable to explain this part of the order of the Court of Appeal. What is the Attorney-General to do when he comes? Is he to support the growers, or is he to take part with the Duke, who is alleged to favour the middlemen, or is he merely to look on and see fair play? And who is to pay his costs? That may be an interesting question some day. No one has suggested that the people who come to buy will be injured by competition between the growers and the middlemen, or that the rights of the public are in any way imperilled by this action. It might have been proper to have had the middlemen represented if the Duke himself had not espoused their cause.

So much for the principal question. The other point put forward is one of very small importance. If the main point goes against the defendant, I do not suppose that he would care to succeed on the other and minor point. He would gain nothing by success. He would only lose to some extent security for his costs. The joinder of the individual plaintiffs in one action cannot embarrass or delay the trial. The language of Order XVI. rule 1 is very wide. It must cover the case of several creditors joining as co-plaintiffs in a creditor's action. Their debts are separate, and just as much or just as little "a series of transactions" as the separate grievances of which the growers in this action complain. Assuming that the defendant has rejected the claims of the several plaintiffs on the ground that, according to the true construction of the Act, growers have no preferential claims to which he is bound to give effect, it appears to me that you have a series of transactions where, if the plaintiffs sued separately, a common question of law would arise. Whether I am right in this or not, it seems to me that the question, if it be a question, ought not to be disposed of adversely to the plaintiffs at this stage of the action.

On these grounds I think the appeal ought to be dismissed with costs.

[Lord Macnaghten was proceeding to read the judgment of Lord Morris, who was absent, when he was interrupted by the Lord Chancellor, who observed that, a difference of opinion among their Lordships having been disclosed, the appeal might be decided by a minority of the Law Peers who had heard the arguments. The consideration, therefore, must stand over until after the Long Vacation.]

Dec. 10.—Lord Morris.—I am of opinion that this appeal should be dismissed.

The action is brought by the plaintiffs asserting a common right as growers of fruit, &c., within the meaning of the Act 9 Geo. 4. c. cxiii. The action is a representative one alleging a common interest—namely, the assertion of a right alleged to be created in the class by Act of Parliament. The appellant succeeded in obtaining an order from Mr. Justice Romer that the action should be stayed. Mr. Justice Romer was unable to come to the conclusion that the growers as a class had any proprietary rights in respect of the market. What they alleged they had was a preferential right over the rest of the public; that should in my opinion

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have been enquired into at a hearing in the ordinary way, when if they cannot establish such preferential right as a class they would be defeated—if they have such a right some of the class are entitled to sue on behalf of themselves and others. I entirely concur in the judgment of Lord Macnaghten, which deals so fully and conclusively with the right to sue in that character.

I do not at all mean to prejudge the question whether the plaintiffs may not fail on the hearing of the cause on a fuller consideration of the Act considered in relation to the evidence that may be adduced. I conceive and foresee considerable difficulty in the plaintiffs being able to define what was the status or class of a "grower" in the year 1829, and in applying such a description to present times, and also whether the preference conferred was not given to sales of the articles specified and not to growers of them, and whether there is anything granted beyond a permission to the Duke of Bedford and his heirs to let. These and other questions will be dealt with on the hearing. I merely decide that in my opinion the appellant cannot get rid of the action by the short cut resorted to.

LORD SHAND. — The rule of Court (Order XVI. rule 9), the effect of which is the subject of controversy between the parties in this case, is in these terms: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued . . . . in such cause or matter, on behalf or for the benefit of all persons so interested." I am of opinion, with the majority of the Court of Appeal, that the rule applies to this case, and that the appeal should therefore be dismissed.

The rule has been framed and adopted for a useful and important object—the saving of the multiplication of actions, with the attendant costs, in cases where one action would serve to determine the rights of a number of persons in a question with another party called as defendant. A series of different actions one after another by different plaintiffs is to be no longer necessary in cases where numerous persons have "the same interest in one cause or matter," for in such cases "one or more of such persons may sue on behalf or for the benefit of all persons so interested." The rule is obviously one of advantage not only to plaintiffs but to defendants also, in the way of saving multiplication of suits, and it is of much importance to note, as observed by Lord Macnaghten, that it only applies the practice of the Court of Chancery, of which he gives many instances, to all divisions of the High Court.

Have not, then, the plaintiffs stated a Case in which they have all "the same interest" in the cause or matter or in each of the different matters which are the subject of this action? It seems to me, on examination of the claims and the plaintiffs' statements in support of these claims, that they have stated such a Case. In order to shew that this is so I do not think it necessary to go into much detail.

The original right to the market was conferred by letters patent to the Earl of Bedford a great many years ago, and was the subject of an Act of the fifty-third year of his Majesty King George 3. In 1828 the 9 Geo. 4. c. cxiii., the provisions of which are founded on by the plaintiffs, was passed. That statute recognises and specifies various classes of permanent stands of the market under the different heads of "Casual cart stands," "Yearly cart stands," and "Yearly pitching stands," and by its enactments confers important and valuable privileges as to the use of such stands on a class of persons designated as "the growers of fruit, flowers, vegetables, roots, or herbs," at certain rates scheduled in the Act. These privileges, which are not said to have been abrogated, appear to entitle such growers to rights of priority in the occupation of the stands for the purposes of their business, and that at the rates there specified.

Now, it is alleged in the record by the plaintiffs—first, that they are the growers of fruit, flowers, vegetables, roots, and herbs within the meaning of the statute; secondly, that the defendant, the present Duke of Bedford, refuses to give them and other "growers" the privileges of the occupation of the various classes of

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stalls to which they have right under the statute; and thirdly, that when they do get such occupation the rates charged exceed those allowed by the statute. For the purpose of the present preliminary point, of procedure only, these statements must be taken to be true, and on this assumption the question raised is, Does the rule of Court apply to the action? In the trial questions may arise as to whether the plaintiffs are, within the meaning of the statute, "growers of fruit, flowers, vegetables, roots, or herbs" as they allege. The statute was passed long before railways were used, and when the carriage of flowers, fruit, and vegetable produce in quantities to market was made by carts and waggons; but the plaintiffs, who allege they are such "growers" as the statute describes, are each, according to the statement, in the occupation of land in the county of Middlesex, and have been frequenters of the market for business purposes, and there is no reason to doubt the title of each to sue on his own account. Then, all of the plaintiffs make the same claims—claims to the exercise of the same rights and privileges which the appellant refuses to recognise—and all of them rest their claims on the same grounds —namely, the statutory provisions of privileges in their favour as such growers as they describe themselves to be.

This is, I think, apparent from the plaintiffs' statements 8 and 9, in regard to the "casual cart stands," the "yearly cart stands," and the "yearly pitching stands," and the tolls exacted by the defendant for the use of these. The plaintiffs in their character of "growers" claim statutory preferential rights to the occupation and use of these, and allege that the defendant refuses to give them such preferential use, and "makes it a practice either to refuse to growers the use of such stands, or by filling such stands, with others than growers, to prevent growers having the use of such stands, with the result that growers have to go to other parts of the market or to places outside the market, or to the public streets, where the restrictions contained in the said Act not being applicable the defendant charges higher rates than would have to be paid under the Act, and with the further result of injury to growers in their trade." These statements seem to me to amount clearly to an averment not only of the existence of preferential rights, and of the same or substantially the same preferential rights in all the plaintiffs, but to a charge against the appellant that he violates these rights, or refuses to give effect to them; and it follows that the plaintiffs have the same interest in the cause or matter of the complaint. There is no difference in their claims. They all ask the same remedy, which it is unnecessary to specify further than to say they all claim to have a declaratory decree by the Court which shall give effect to their statutory privileges, the same in the case of each of them, as growers of fruit, flowers, and vegetables, and an injunction to restrain the appellant from doing any act contrary to such declaratory decree. There is thus one cause or matter only in which all of the plaintiffs have an interest, and in which other "growers" have the same interest, as disclosed in the record, that matter being the disregard by the defendant of their statutory privileges, for which accordingly one and the same remedy in the form of the different heads of claim is asked. To that case the rule in question seems to me in its terms directly to apply, and accordingly the objection to the competency of the action is, I think, unfounded.

There is one head of the claim (the 7th) as to which there was not much said in the appellant's argument, which is no doubt in a different position: I mean a claim by each of the plaintiffs for repayment to him of alleged excess charges for six years for market accommodation. This is a subsidiary matter, and it is not a claim made "on behalf of all other the growers of fruit, flowers," &c., to which alone the appellant's objection to the representative character of the action applies. The real cause or matter in dispute and raised by the statement and claims is the nature and extent of the privileges of the plaintiffs to the use of the market stands, and to the effect of determining this the action is competent. This being so, it will be found convenient to both parties to have the subsidiary

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matter of excessive charges made against each plaintiff determined in the same cause; and I do not see any ground for holding that it is incompetent to do so.

The judgment of Lord Justice Romer proceeds on the view that the plaintiffs in any action seeking the benefit of the rule in question must allege and possess some "proprietary" right which it is their joint object to vindicate. This is clear throughout his Lordship's judgment, which is founded on what was said by Lord Lindley, as Master of the Rolls, in the case of *Temperton* v. *Russell*.[1] At the beginning of his judgment Lord Justice Romer says expressly that, as pointed out in *Temperton* v. *Russell*,[1] the rule "only extends to cases where the class have or claim some beneficial proprietary right which is being asserted or defended. I have, therefore, to consider whether the growers in question as a class have or claim a beneficial proprietary right under the above Act which is being asserted in this action." He immediately adds: "I am unable to come to the conclusions that the growers, as a class, have any proprietary rights in respect of the market," and his judgment proceeds on the ground that the absence of "proprietary" rights excludes the application of the rule. In effect it appears to me that the judgment of Lord Justice Vaughan Williams is founded on the same view, for he observes that the plaintiffs allege that the Act gives them "certain preferential rights constituting some sort of proprietary interest in them," and holds that this is not given by the statute. But if his Lordship proceeded on the view of the absence of an interest in common in the plaintiffs I cannot agree with him; and the judgment of Lord Hatherley in the case of *Warrick* v. *Queen's College, Oxford*,[7] quoted by Lord Lindley, is, I think, a direct authority on the point, contrary to the view of the Lord Justice.

The case of *Temperton* v. *Russell*[1] was not an action founded on any alleged right claimed by the plaintiff such as the plaintiffs here allege. The action was one of tort, and a number of trades unions or societies called as defendants by one plaintiff were charged with maliciously procuring workmen to break their contracts with the plaintiff, with enticing workmen from his employment, and with intimidating workmen in his service, while the defendants were sued "not only on their own behalf," "but as representing all the members" of their various societies. The Court refused to allow these last words to remain in the complaint, which would have had the effect of making the action a representative one as regards the defence. It is true that in that case Lord Lindley used the expression on which Lord Justice Romer proceeded in his judgment in this case, that the rule in question only extends to cases where the class have or claim some beneficial "proprietary" right which is being asserted or defended. In my judgment, this expression unduly limits the application of the rule, and was unnecessary for the decision of the case of tort then under the consideration of the Court; and Lord Lindley evidently did not contemplate that the rule should not include such a case as the present, for his Lordship has held, in his judgment, that the rule does apply in this case. There is no such word as "proprietary" in the rule, and no good reason, in my opinion, for holding that word by implication to be a part of the rule. The sole test to be applied is that of "the same interest" in one cause or matter. The order, in my opinion, applies equally to the case such as occurs here, where the plaintiffs seek to enforce a disputed personal right or rights common to all of them by gaining or vindicating possession of a valuable privilege, as it does when, being in possession of a privilege, the plaintiffs seek to enforce a possessory right in a question with a trespasser or a third party in some way injuring their possession itself by opposition to its exercise.

LORD BRAMPTON.—Under the Covent Garden Improvement and Regulation Act, 1828, the area of Covent Garden Market, as described in the preamble of the Act, was rearranged according to a plan therein referred to, and the several portions thereof were appropriated as directed by the Act, and sets of stands were marked out or erected for the accom-

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modation of carts, &c., bringing fruit, flowers, vegetables, roots, or herbs to the market, and for the reception, exposure for sale, and sale of such fruit, &c.

For the purposes of the present question it will not be necessary to refer in detail to more than three of such sets of stands —namely, those described in the Act and indicated on the plan respectively by the letters B, C, F, and G. B signifies what are in the Act called "the Casual Cart Stands," C "the Yearly Cart Stands," and F and G "the Yearly Pitching Stands." The uses to which each set of stands was exclusively appropriated are mentioned and described in section 7 of the Act. B was exclusively appropriated to the reception of waggons and carts in which fruit, &c., shall be brought to the market for sale, and for the exposing to sale and selling such fruit, &c., on the stand to which it shall be brought; it being further enacted that the growers of fruit, &c., shall be deemed to be the persons having the preferable right to resort to such stands. C shall be exclusively appropriated to the reception of waggons and carts of or belonging to growers of fruits, &c., and to the exposing for sale and selling the fruit, &c., grown or raised by such growers, and be let by the owners of the market, by the year or for any shorter period at such yearly or other rents, &c., as are mentioned in the schedule; and the person to whom any such stand shall be let shall be deemed to be the holder thereof and the person having the preferable right to resort thereto. F and G shall be exclusively appropriated to exposing to sell and selling fruit, &c., and may be let by the owners of the market exclusively to growers of fruit, &c., by the year, or for any shorter period; and the person to whom any such stand shall be let shall be deemed to be the holder thereof and the person having the preferable right to resort thereto. The use of each of these stands is subject to the rents, tolls, or sums of money mentioned in the schedule to the Act.

Each of the respondents, who are the plaintiffs in the action, claims to be a grower of fruit, flowers, vegetables, roots, and herbs within the meaning of the Act, and a frequenter of the market for the sale thereof, and as such they sue in this action on behalf of themselves severally and all others the growers of fruit, &c. It is essential to the right understanding of the question—namely, whether, as the record now stands, all the six plaintiffs are according to the practice and procedure of the Courts entitled to sue in one action, not only in respect of their own separate and several alleged causes of action, but also on behalf of all other growers of fruit, &c., by reason of the alleged illegal conduct of the defendant in non-compliance with any of the provisions of the Act—that I should state what are the several grievances complained of in the claim. I shall then be in a condition to point out—first, the objections which I think exist to allowing all these six plaintiffs to sue together and join in this action, and then the reasons why I think that the representative right of the six plaintiffs to sue on behalf of other growers not parties to the record ought to be limited, and to what extent.

The first seven clauses of the statement of claim are merely introductory averments. The charging part of the claim commences with paragraph 8, which is nothing more than a general complaint that the defendant does not in his management of the market comply with the provisions of the Act, and in particular with reference to the Casual Cart Stands B, the Yearly Cart Stands C, and the Yearly Pitching Stands F and G, and the tolls exacted by the defendant for the use of those stands. Paragraph 9 submits that the defendant has not the right to admit others to the use of the casual cart stands so long as growers present themselves and require the use thereof; but that he makes it a practice either to refuse the use of such stands, or, by filling them with others than growers, prevents growers from having the use of them, with the result that they have to go to other places where they have to pay higher rates. In neither of these two paragraphs 8 and 9 is any cause of action stated to exist in either of the plaintiffs in respect of the casual cart stands, nor is it alleged that the plaintiffs jointly, or either of them individually, ever sustained any damage by such alleged misconduct.

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Paragraph 10 complains that each of the four plaintiffs, Ellis, Gray, Miller, and Ashby, has applied to the defendant for a tenancy of a yearly cart stand, and in each case a tenancy has been refused, no objection being made to either as a proper tenant. It then alleges habitual misconduct of a similar character towards growers generally, naming none, with similar resulting damages, and avers that the defendant has stated his practice to be not to let such stands. I will assume for the purposes of this case that this paragraph does state a cause of action in each of these four respondents; but, as I read the paragraph, it is in each a separate cause of action, and not a joint cause of action in the four. Paragraph 11 sets forth a similar character of grievance with reference to applications by the remaining two of the plaintiffs, Pullinger and Peacock, for tenancies of yearly pitching stands, averring that it is the practice of the defendant to refuse such tenancies, and by such refusals, and filling up the stands with others than growers, he interferes with the preferential right of growers with similar prejudicial results. In the case of these last two plaintiffs also the causes of action are several and not joint. Then follow seven paragraphs (12, 13, 14, 15, 16, 17, 18), the 12th stating generally that unlawful and excessive tolls beyond those in the schedule have been charged—and to each of the plaintiffs—but it is not alleged that such excesses have been made in respect of their positions as growers. Each of the remaining six clauses of the set is devoted to a separate series of alleged illegal overcharges made on each of the six plaintiffs, and claims for repayment; but those are purely separate charges not affecting anybody except the individual overcharged, and with which none of the other plaintiffs nor the other growers have anything to do. Paragraph 19, the last, discloses no cause of action in either of the plaintiffs, but alleges general misconduct and mismanagement when the market is full, and traders are compelled to expose their goods on places where charges are not so reasonable. The claims in the first five paragraphs are for declarations as to what the defendant is not entitled to do in respect of each of the matters above referred to, in the sixth for injunctions, and in the seventh for an account of the sums alleged to have been charged to and paid by each of the plaintiffs for six years past, in excess of, or other than the sums the appellant was entitled to charge, and for repayment thereof to each of the plaintiffs.

I cannot bring my mind to doubt that if the plaintiffs are entitled to prosecute this claim in its entirety, the defence will be fraught with a great deal of undesirable embarrassment. On the other hand, I think that to set it aside altogether would be to defeat the well-established procedure of the Court of Chancery under which plaintiffs suing to uphold a legal right by a suit in equity might sue on behalf not only of themselves, but also of all others having a community of interests in the upholding of that right, and would defeat also the objects contemplated by the rules referred to made since the Judicature Act with a view to harmonise the proceedings and allow of representative actions in both divisions of the High Court of Justice. For this reason it is that I find myself unable altogether to agree in the judgment either of Mr. Justice Romer or of the Court of Appeal.

Before proceeding to deal with more debatable matters, I will at once express my opinion that the right of the plaintiffs to sue on behalf of other growers, as well as for themselves, does not depend upon the question whether such other growers have proprietary rights in respect of the market, for if they have as a class any beneficial rights or interests in the market, though not strictly of a proprietary character, they may well be represented by those suing to obtain redress in respect of their individual grievances, provided there is community of interest in one right.

I would here observe that I fail to see the utility or necessity of making the Attorney-General a party to the proceedings; for the growers, although no doubt they form an important class of traders attending the market, do not represent the public.

I come now to the serious question whether all these plaintiffs are rightly joined in this action. As a fundamental

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rule of practice and of pleading, two or more different plaintiffs, each having a separate and different cause of action, cannot be joined in the same action. To cite authority for this proposition seems superfluous. I may, however, mention the case of *Sandes* v. *Wildsmith* [1893] [14] as an illustration. Under this rule no two of the plaintiffs in this case could have been joined in this action; for the grievance of each as claimed is separate and distinct, and no joint cause of action is disclosed.

Another rule of practice and pleading would, before the Judicature Act, have prevented a plaintiff from suing in the common-law Courts as representing anybody except himself, unless he were already a legal representative of another—for example, an executor, public officer of a bank, &c.—having special authority by law to sue on behalf of another or others. It was otherwise, however, in the Court of Chancery as stated by the Master of the Rolls in giving judgment in this case in the Court of Appeal. Since the Judicature Act, however, two Rules of the Supreme Court, Order XVI. rules 1 and 9, have been made, apparently with a view to assimilate the practice of the common law with the rules of equity. The rules are as follows: Rule 1. "All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transactions or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise." Rule 9 says: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." But it must be observed, according to my view, that neither the rule of equity nor the rules I have just mentioned authorise the joinder in the same action of two or more plaintiffs suing in respect of different causes of action, nor the suing by any plaintiff on behalf of another person as well as himself, except in respect of the one and the same interest in the cause or matter for which he is himself suing. Let me now apply what I have said to the several plaintiffs and matters of complaint in the present case.

As regards the first claim for a declaration as to the casual cart stands, though general non-compliance with the Act is alleged, no specific cause of action is stated or suggested in either of the plaintiffs in respect of them.

As regards claim No. 2 relating to the yearly cart stands, the four plaintiffs, Ellis, Gray, Miller, and Ashby, have undoubtedly stated separate causes of action in respect of which they have jointly claimed a declaration; they have also claimed injunctions and separate accounts, and repayment of excessive charges. They clearly are rightly joined. The same common question would have arisen if they had brought separate actions. They are also entitled to sue on behalf of all other growers having the same interest in one cause or matter—that is to say, the preferential rights they claim to be accepted as tenants of yearly cart stands as described in section 7 of the Act.

As regards the claim (3) to a declaration touching the yearly pitching stands, I think the plaintiffs Pullinger and Peacock stand with regard to those stands precisely in the same position as the other four plaintiffs stand with regard to the yearly cart stands. Their claims, and the cause of action they are suing on, are not the same as those of the other four plaintiffs; and had they brought separate actions the same common questions would not arise, for the two sets of plaintiffs sue, not in respect of the same but of different claims—that is, preferential rights to the occupation of different stands, and the obligations upon the defendant as to the letting of which are not couched in the same language. As to the "yearly cart stands," the words relied on as making it obligatory to let are "shall be let"; but there are no words expressive of any obligation to let to a grower, and the preferable right to resort to the stand is given not "to growers" but to "the holder of

(14) 62 L. J. Q.B. 404; [1893] 1 Q.B. 771.

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BEDFORD (DUKE) *v.* ELLIS, H.L.

the stand"; while as to the yearly pitching stand the words are "may be let," and it is expressly directed that if let, it shall be "to growers." As a test whether these several claims are substantially different, I would ask, Assuming a judgment to be recovered by any of the plaintiffs against the defendant in respect of the "yearly cart stands," and subsequently an action to be brought by the same plaintiffs against the defendant in respect of the "casual cart stands," could the defendant plead judgment recovered? I do not think any one could be found who would answer in the affirmative. This seems to me to prove to demonstration that the rights and causes of action are different. I think, for the reasons I have expressed, that the rights of Ellis, Gray, Miller, and Ashby are different, and relate to other stands than those to which Pullinger and Peacock claim to be entitled to tenancies, and that they ought not to be joined in one action, and that the claim ought to be amended by striking out all relating to one of these two sets of plaintiffs, and also to the casual cart stands; but the claim ought not to be set aside altogether. I think, moreover, that the interests of the growers would be equally well settled by leaving as plaintiffs only one set as I have suggested, and certainly the embarrassment would be reduced to a minimum.

Unless such an amendment is made, I think the judgment of the Court of Appeal should be reversed.

THE LORD CHANCELLOR (EARL OF HALSBURY).—I have nothing to add to what I said when this case was last before the House, and I therefore proceed to ask your Lordships to pronounce judgment.

Appeal dismissed.

Solicitors—R. S. Taylor, Son & Humbert, for appellant; H. B. Bell, for respondents.

[*Reported by J. Eyre Thompson, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

LORD ALVERSTONE, C.J.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
1900.
Dec. 6, 7.

HANCOCK, *In re*; WATSON *v.* WATSON.

Will—Construction — Remoteness—Gift Over — Splitting up — Absolute Gift — Cutting down—Void Limitations.

Testator gave his residuary estate, which consisted of personalty, upon trust for his wife for life, and after her decease upon trust to be divided into five equal portions, "which I allot in the manner following—to S. D. I give two such portions to my brother W. one such portion to my brother C. one such portion and to the son or sons of my late brother S. the remaining one such portion. But it is my will and mind that the two fifth portions allotted to the said S. D. shall remain in trust," and that she should be entitled to take only the interest of the shares bequeathed to her during her life, and after her decease "in trust for the benefit of any child or children born to her . . . . upon his or their attaining the age of 25 *years if a son or sons, or if a daughter or daughters, upon her or their attaining the age of* 21 *years, or upon her or their marriage . . . . but in default of any such issue then and in that case the two fifths . . . . shall go and be divided among the children of my brother C.," to be equally divided between them, payable to sons at twenty-five, and to daughters at twenty-one or marriage. S. D. died without ever having had any children*:—Held, *first, that the gift over was not upon the happening of two alternative events so as to be a valid gift in the event which had happened, but was upon the happening of one compound contingency, and might in a possible event have taken effect at a time too remote within the rule against perpetuities, and it was therefore void for remoteness; secondly, that the gift to S. D. was an absolute gift in the first instance, and the settlement by which it was sought to restrict it failing the absolute gift remained, and her shares belonged to her personal representatives.*

Evers *v.* Challis (29 L. J. Q.B. 121; 7 H.L. C. 531) *and* Lassence *v.* Tierney (1 Mac. & G. 551) *distinguished.*

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HANCOCK, IN RE, App.

Appeal from a decision of Byrne, J.

The testator, Richard Hancock, who died on January 23, 1852, by his will dated June 17, 1850, gave the residue of his real and personal property, after payment of his debts, funeral and testamentary expenses, and legacies, to trustees upon trust to pay the income to his wife during her life, and after her decease "upon trust to be divided into five equal portions which I allot in the manner following—to . . . . Susan Drake I give two such portions to my brother William one such portion to my brother Charles one such portion and to the son or sons of my late brother Sampson the remaining one such portion. But it is my will and mind that the two fifth portions allotted to the said Susan Drake shall remain in trust and that she shall be entitled to take only the interest and annual proceeds of the shares so bequeathed to her during her natural life, and for her sole and separate use independent of her present or any future husband but without power of anticipation, and from and after her decease in trust for the benefit of any child or children born to her the said Susan Drake by her present or any future husband upon his or their attaining the age of 25 years if a son or sons, or if a daughter or daughters upon her or their attaining the age of 21 years, or upon her or their marriage, whichever of these events may first happen, but in default of any such issue then and in that case the two fifths of my residuary estate, and any accumulations of interest thereon shall go and be divided among the children of my brother Charles," to be equally divided between them, payable to sons at twenty-five, and to daughters at twenty-one or marriage.

Susan Drake died on June 26, 1899, without ever having had any issue. Her two fifth shares in the testator's residuary estate were represented by a sum of 12,539*l.* 10*s.* 7*d.* India Three per cent. Stock. The trustees of the will took out a summons for the determination of the questions—first, whether the gift in favour of the children of Susan Drake was void for remoteness; secondly, whether, if so, the subsequent trusts of her two fifth shares had failed; and, thirdly, whether, if so, the two fifth shares belonged to the personal representatives of Susan Drake; or, fourthly, whether the two-fifths went as on an intestacy of the original testator. The question was, in substance, whether the gift over could take effect.

Byrne, J., said the question was whether the testator had made alternative gifts over in the happening of two events, or a gift over on the happening of one event involving two things. In his opinion the gift was on the happening of one event, and could not be separated into alternative gifts on two contingencies so as to make it good in the event which had happened, and it was therefore void for remoteness. And, further, that the gift to Susan Drake was an absolute gift in the first instance, and, there being a failure of the trusts which sought to put a limit upon it, the original absolute gift remained, and the two fifth shares belonged to the legal personal representatives of Susan Drake.

The children of Charles Hancock appealed.

Levett, Q.C., *Swinfen Eady, Q.C.*, and *Quin*, for the appellants.—According to the true construction of the will there is a gift over in either of two events—first, the event of there being no child; and secondly, the event of there being a child, and such child not attaining a vested interest. The first event, being severable from the second, is not affected by the invalidity of the gift over in the second event, which in this case is admittedly void for remoteness. *Evers* v. *Challis* [1859][1] is an authority in our favour. The good alternative limitation in that case was, it is true, held to take effect as a contingent remainder, but the authority is equally applicable to an alternative executory limitation—*Watson* v. *Young* [1885].[2]

[They also cited and distinguished *Harvey, In re; Peek* v. *Savory* [1888],[3] and *Bence, In re; Smith* v. *Bence* [1891].[4]]

Haldane, Q.C., *Mulligan, Q.C.*, and

(1) 29 L. J. Q.B. 121; 7 H.L. C. 531 (where the headnote in 7 H.L. C. is inaccurate).
(2) 54 L. J. Ch. 502; 28 Ch. D. 436.
(3) 39 Ch. D. 289.
(4) 60 L. J. Ch. 636; [1891] 3 Ch. 242.

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Fawcus, for the representatives of Susan Drake, were not called upon.

A. E. Russell, for the next-of-kin.

P. F. S. Stokes, for the trustees.

LORD ALVERSTONE, C.J. — We will state our opinion on this point first. Mr. Justice Byrne has in his judgment expressed the true grounds upon which I think our decision in this case should be founded. Speaking for myself, I think that *Evers* v. *Challis*[1] went upon the substantial distinction between a contingent remainder and an executory devise. In the case of a contingent remainder one has to look at the facts, and see what has happened, and decide whether the gift takes effect or not, whereas in the case of an executory devise one has to determine the class from the will and see what the class is, and if you can only determine the class by including something which is contrary to the law against perpetuities, then the bequest fails. To get over that difficulty, counsel for the appellants endeavoured to argue that there was here a statement by the testator of two alternative events, and, speaking for myself, I think if we could construe this will in that way, the one event of there never having been any children born, and the other event of no children attaining the ages mentioned, then, although the one alternative would be bad, yet still in the event which has happened the good alternative would prevail. I do not, however, think that we can fairly construe the will as a statement of two alternatives, and I will say why I come to that conclusion. The two shares of Susan Drake are to go to her children who attain twenty-five in the case of sons, and who attain twenty-one or marry in the case of daughters. The gift over is "in default of any such issue." It might be perfectly true, as counsel suggested, that the intention of the testator was that if there was a child the property should pass, but it seems to me that the discussion which took place in *Evers* v. *Challis*[1] shews that we cannot construe the words "in default of any such issue" as stating two alternatives. I think the test was very well put by my brother Rigby during the argument, that, if that was so, the clause might have been broken up into three alternatives—namely, a gift over in the event of Susan Drake having no child, or no daughters who attained twenty-one, or no sons who attained twenty-five—and it might have been said that as to the first two gifts there was no objection, and therefore the clause must be construed as including three alternatives. I think the natural meaning of the words "in default of any such issue" is in default of any such issue as named. That being so, the class cannot be ascertained except by looking at the whole clause, and the whole clause includes individuals, or a class of individuals, whose inclusion would be contrary to the law against perpetuities. In my opinion, the decision of Mr. Justice Byrne was perfectly right.

RIGBY, L.J.—I am of the same opinion. I agree that the decision in *Evers* v. *Challis*[1] depends upon the essential, not the accidental difference between a contingent remainder and an executory gift. In the case of a contingent remainder, no one looking at the will can have the remotest idea whether the gift will take effect or not. One must wait and see whether the contingency happens. I am not dealing now with any modern changes in the law, but the original doctrine of contingent remainders. A contingent remainder must depend upon a particular estate. During the whole of the duration of that particular estate, it may remain uncertain whether the contingent remainder will take effect or not. It is upon the determination of the particular estate that the enquiry comes—has the contingency happened, or does it now happen? It is quite sufficient that it should happen *eo instanti* that the particular estate determines. I consider that *Evers* v. *Challis*[1] has absolutely nothing to do with the law of perpetuities.

I will illustrate what I say in this way. Suppose a perfectly good gift were made so far as the law of perpetuities is concerned—for instance, a gift to a third person after the death of A, if A shall have no child who attains twenty-one. As a contingent remainder, if there were a child born who had not attained twenty-one at the determination of the particular estate, the remainder would.

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fail because it was not ready to take effect *eo instanti* that the particular estate determined. But, supposing that there were no child, then, without going through the formality of splitting up the clause, you enquire, "Has the contingency happened?" and the only answer would be "Yes; there is no child, and therefore there can be no child that attains twenty-one."

Let us now consider the case of executory gifts. As I have understood the law, it was not questioned, and I do not think it can be questioned, that one must be able to tell at once, when the will comes into operation, whether the gift is void as a perpetuity or not. A competent adviser would say: "In a possible case the gift may sin against the law of perpetuities. We cannot wait to see how the facts may turn out. It might be void, and therefore it is void." We have here the words "in default of any such issue." It is very attractive to say that, if the clause is split up into its component parts, one of those component parts will be right though the other may be wrong, but that seems to me to be absolutely illegitimate. It may be right to take such a view in dealing with the case of contingent remainders, but in a case like this one has to consider possible future events, not actual events, and a possible future event would be that there might be a son, for instance, alive as to the time of whose death nothing could be said. It might take place after the son attained twenty-one, and it is no answer to that to say, "Well, if there were no children, that is to say in another and different possible event, it would have been right." That is not the consideration at all. The question is, does the limitation contain the vice that, if events turn out unfortunately, the gift would be outside the rule against perpetuities? If it does, whatever the result may be thereafter, that is a void gift. Undoubtedly, if the testator had said that if Susan Drake had no children the gift over was to take effect, that would be a perfectly good gift, and then it would be immaterial to enquire whether the other alternative which the testator mentioned took place or not, or could take place, within the limit of perpetuity. But if he happened—for these things are done mostly by accident—so to frame his gift that in possible circumstances it would be void, then it must be void under the rule against perpetuities.

It seems to me, therefore, that the gift in this case, which is a gift of personalty, is altogether, not accidentally, or because there are words here and words there, but necessarily and fundamentally outside the decision in *Evers* v. *Challis*.[1] I am not aware of any cases, except perhaps a case which must be treated as overruled by the Court of Appeal,[5] which is an authority for saying that, because a gift is obnoxious to the rule against perpetuities, we must split it up and make it what it is not, and what the testator never dreamt of making—separate gifts in separate cases and on separate events.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. As to the general rule of law, as I understand it, it is this: when there is a gift, and the testator has not divided it into two gifts, really alternative gifts, the law generally will not do it for him; and it will not do it for him, merely because the contingency on which the gift is to take effect is a compound contingency which is capable of being divided into two portions, depending upon two events. If the testator has neither divided the gifts nor the compound contingency into two himself, the law will not do it for him. Then, as I understand, to this general rule the case of *Evers* v. *Challis* [1] was an admitted exception But when one sees what were the conditions of this exception, it is perfectly plain that *Evers* v. *Challis* [1] has no application whatsoever here, and therefore one has to see whether there was any principle which was involved in the decision in that case which ought to make us here divide these gifts, or divide up this compound contingency. As far as I can see, there is nothing in principle, and nothing in the authorities, which should make us do so; and the result here is that we have one gift over to take effect upon the happening of one compound contingency, and in a possible event that gift would have had to take effect at a time

(5) *Watson* v. *Young*,[2] observed upon in *Bence, In re*.[4]

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too remote within the rule against perpetuities.

Levett, Q.C., Swinfen Eady, Q.C., and *Quin*.—The result of that decision is that there is an intestacy. There was no absolute gift to Susan Drake, but a settlement was made which cannot take effect. Therefore the whole gift fails—*Lassence* v. *Tierney* [1849].[6]

A. E. Russell supported the contention of an intestacy.

Haldane, Q.C., Mulligan, Q.C., and *Favocus*.—The gift to Susan Drake was an absolute gift, with an attempted restriction on the mode of enjoyment, and as the restriction does not take effect the absolute gift remains—*Cooke* v. *Cooke* [1887],[7] *Ring* v. *Hardwick* [1840],[8] and *Whittell* v. *Dudin* [1820].[9]

Lassence v. *Tierney*[6] is distinguishable. There, except in so far as the measure of enjoyment was prescribed, there was no gift at all. The gift to Susan Drake is put with other absolute gifts in the will, and the presumption is that it was intended to be absolute, and the presumption also is that the testator did not intend to die intestate as to this share.

Levett, Q.C., in reply.—The only question is whether or no there is an absolute gift. If there is, the appellants cannot succeed. It is a question of intention to be gathered from the will—*Theobald on Wills* (5th ed.), p. 430; and *Gompertz* v. *Gompertz* [1846].[10]

LORD ALVERSTONE, C.J.—The second question that arises on this will is whether the two fifths which were the subject of the bequest to Mrs. Susan Drake in consequence of the previous decision belong to her representatives, or form part of the residue. The rule as laid down by Mr. Justice North in *Cooke* v. *Cooke*[7] is, as I understand it, that where there is an absolute gift followed by an attempt to limit the effect of that gift, and the limitation for some reason cannot take effect, then the original gift will take effect. Counsel for the appellants admitted that that was the rule, but they argued that on the true construction of this will there was no absolute gift in the first instance. With regard to the authorities, *Lassence* v. *Tierney*[6] is clearly an instance of the cases in which there had been no absolute gift; *Ring* v. *Hardwick*[8] is an instance of the cases in which there had been an absolute gift, and that shews that the mere general intention to divide up, or dispose of, the whole of the property in certain particular ways, one of which has failed, cannot be conclusive of the case.

I come to the conclusion that the effect of the first words would give the two fifth shares to Susan Drake, and that the effect of the subsequent words was to provide for her shares being dealt with in a particular way if certain events occurred; and applying the rule applied by Mr. Justice North in *Cooke* v. *Cooke*,[7] those ultimate destinations either being illegal or having failed, the original gift takes effect, and I think this appeal must be dismissed.

RIGBY, L.J.—I am of the same opinion. I think there is to be gathered from the general line of authority one clear principle—that if a gift is absolute in the first instance, and the provisions that follow are a mere settlement of that gift, then the settlement, if it is given effect to, would have the operation of reducing what would appear to be an absolute gift to a life estate only. But, if the settlement for any reason fails, then, in so far as it fails, there is no intestacy, but a sort of reversion—it is not a reversion strictly—but a sort of reversion to the person who is the object of the previous absolute gift. I have no doubt, as was pointed out, that we can see that the testator's intention was that Susan Drake should not have an absolute interest, but that her interest should be cut down for certain objects. Those objects have not taken effect, and I consider that there was a plain gift to her in the first instance—as good a gift to her as to her brother William and her brother Charles. It seems to me that if she had filed her bill while she was alive, and had pointed out

(6) 1 Mac. & G. 551.
(7) 38 Ch. D. 202.
(8) 2 Beav. 352.
(9) 2 Jac. & W. 279.
(10) 16 L. J. Ch. 23; 2 Ph. 107.

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that the only trust that there was, was a trust for herself, and that the other trusts must disappear because they were invalid, she would have had a right to have the fund, and her representatives have the same right.

VAUGHAN WILLIAMS, L.J.—I agree. [His Lordship referred to the will, saying that in his opinion there was not sufficient to cut down the absolute gift of the two fifths to Susan Drake, and continued:] I only wish to say a word or two as to two cases. In *Lassence* v. *Tierney*[6] there was no gift excepting the gift which was constituted by the description of the mode of enjoyment under the terms of the will. That was the ground of the decision. In *Gompertz* v. *Gompertz*,[10] it is quite true, there were words which were amply strong enough to constitute an absolute gift, and I do not know, so far as the provisions in the subsequent directions were concerned, that they were any more antagonistic to an absolute gift than the provisions are in the present case. But the ground of the decision there was, not that the absolute gift was negatived, or cut down by the provisions which followed, but that the words in which those provisions were embodied made it clear that the intention of the testator was that his daughters should take only for their lives, and therefore *Gompertz* v. *Gompertz*[10] is not a case in which there was a gift absolute in the first instance, but cut down by a direction as to the mode of enjoyment.

In the present case, it seems to me that there is nothing which can cut down the absolute gift which was given in the first instance.

Appeal dismissed.

Solicitors—Wadeson & Malleson, for appellants; Bone & Heppell; and Thorowgood, Tabor & Hardcastle, for respondents.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

LORD ALVERSTONE, C.J.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
1900
Dec 4.

WRIGHT'S TRUSTS, *In re*; WRIGHT *v.* SANDERSON.

Solicitor—Costs—Common-law Lien—Infant Clients—Compromise of Action—Payment of Money out of Court—Sanction of Compromise by Court on Behalf of Infants.

The effect of the sanction of the Court on behalf of infants to a compromise of an action is, as regards their solicitor's lien for the costs of the action, only to place the infants in the same position as parties sui juris, and the sanction does not in itself prejudice the lien.

In an action brought by infant cestuis que trust against trustees in respect of alleged breaches of trust, a compromise was arrived at and sanctioned by the Court on behalf of the infants, and an order was made in pursuance thereof directing certain of the trust funds which had been brought into Court to be paid out to new trustees. The defaulting trustee was ordered to pay to the next friend of the infants their party and party costs, and the difference between those costs and the solicitor and client costs was ordered to be raised by the new trustees out of the trust funds and paid to the next friend. There was no mention in the order of the right to costs of the solicitor who had acted for the infants:—Held, *that there was nothing in the order to interfere with the solicitor's common-law lien for his costs.*

Appeal from a decision of Kekewich, J.

There were in this case two actions brought by infant *cestuis que trust*, entitled under certain settlements, by their next friend against the trustees of the settlements charging them with breaches of trust. In the course of the action certain sums, part of the trust funds, were brought into Court, and were represented by two sums of 3,899*l.* 14*s.* 9*d.* and 1,169*l.* 16*s.* 3*d.* Consols.

On the day of the trial the parties agreed to terms, which were sanctioned by the Court on behalf of the infants, and ultimately on May 6, 1892, an order was

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made embodying those terms. By that order the defendant trustees were directed to appoint new trustees of the settlements, and it was ordered that the stocks, part of the trust funds which were then in Court, should be transferred to the new trustees when appointed, and the balance of the trust funds secured by means of certain policies in manner therein mentioned; and it was ordered that the plaintiffs' costs of the actions up to and including and consequent upon the judgment should be taxed as between party and party, and also as between solicitor and client; and it was further ordered that the defendant, R. Sanderson, one of the defaulting trustees, should pay to the next friend of the infant plaintiffs the plaintiffs' costs of the actions as taxed between party and party, and that the amount by which the plaintiffs' costs when taxed as between solicitor and client should exceed the amount of the same costs when taxed between party and party should be raised by the new trustees out of the sums of Consols which should be standing in their names as trustees of the respective settlements, and be paid by them to the next friend. And general liberty to apply was reserved.

New trustees of the settlements were appointed in August, 1892, and the funds in Court were transferred out to them in pursuance of the order on July 14, 1893. The Taxing Master's certificate was filed May 27, 1899, and shewed that the party and party costs amounted to 643*l.* 0*s.* 3*d.*, and that the amounts to be raised by the trustees were two sums of 118*l.* 10*s.* 2*d.*, payable respectively out of the funds subject to the two settlements.

Certain of the infants had attained twenty-one since 1892, and had created incumbrances on their shares.

The solicitor who had acted for the plaintiffs in the actions was unable to obtain payment of any of these costs, and on November 10, 1899, he took out a summons asking for a declaration that he was entitled to a charge on the two sums of Consols in respect of 880*l.* 0*s.* 7*d.*, the amount of the taxed costs; and that the trustees might be ordered to raise that sum out of the Consols, and that when raised it might be paid to him.

Kekewich, J., on April 10, 1900, refused to make any order on the application.

The solicitor appealed.

The application was treated as an application to enforce the solicitor's common-law lien, not as an application for a charging order under section 28 of the Solicitors Act, 1860, that claim being now dropped.

Renshaw, Q.C., *Leigh Clare*, and *A. P. Poley*, for the appellant.—Apart from section 28 of the Solicitors Act, 1860, the solicitor has a common-law lien for his costs. The claim is not barred under the Statute of Limitations. The statute does not affect the common-law lien, whether possessory or on the fruits of a judgment —*Higgins* v. *Scott* [1831].[1]

The learned Judge seems to have thought that inasmuch as the order of May 6, 1892, was made upon a compromise sanctioned by the Court on behalf of the infants, it must have been intended that the infants should get the full amount of the funds, free from the charges of the solicitor. That is not right. There is no difference between a compromise sanctioned by the Court on behalf of infants and any other compromise. The sanction of the Court is only necessary to place infants in the same position as adults. The compromise is still the compromise of the parties, and unless there is something equivalent to a giving up of his lien by the solicitor it will attach. There was nothing in this case to shew that the solicitor intended to abandon any of his rights. An order for payment to the client without expressly reserving his lien does not interfere with it in any way—*Lloyd* v. *Mason* [1845].[2] It has never been held that where the parties are *sui juris* the solicitor's lien is affected by a compromise—*Cordery on Solicitors* (3rd ed.), 379, 380, and *Twynam* v. *Porter* [1870].[3] The solicitor is entitled to a lien on the fruits of the judgment so far as the interests of his clients extend—*Pritchard* v. *Roberts* [1873].[4]

(1) 9 L. J. (o.s.) K.B. 262; 2 B. & Ad. 413.
(2) 14 L. J. Ch. 257, 258; 4 Hare, 132, 134.
(3) 40 L. J. Ch. 30; L. R. 11 Eq. 181.
(4) 43 L. J. Ch. 129; L. R. 17 Eq. 222.

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WRIGHT'S TRUSTS, IN RE, App.

Warrington, *Q.C.*, and *R. Nevill*, for the plaintiffs.—A compromise sanctioned by the Court on behalf of infants is not the same thing as a compromise made by the parties themselves. Parties *sui juris* can make any compromise they please, but it is sanctioned on behalf of the infants on the ground that it is for their benefit; and it may well be that the Judge would not have sanctioned this compromise if he had known that the costs were to come out of the infants' fund.

If the solicitor had intended to reserve his lien, he should have asked for a specific charge, or brought the matter to the notice of the Court in some way, and got his right reserved. That would not have been unusual in the case of a compromise such as this. If it is intended that the costs should come out of a fund if they are not paid by the party, there should be either special liberty to apply as to the costs, or the trustees should be directed to raise them and pay them to the solicitor. In ordinary cases, as here, the direction is for payment to the client. The liberty to apply here was general liberty only.

It is not disputed that the Statute of Limitations does not apply to the common-law lien. The lien only extends to the interests of the actual clients, not to the whole fund—*Verity* v. *Wild* [1859].[5] The solicitor acted for the mother on a third-party issue, as well as for the infant plaintiffs in the action; but it is the infants' costs only which have been taxed, so that the lien, if any, should be limited to the plaintiffs' interests. It may be a question whether the incumbrances created by those who are of full age do not take precedence of the lien.

[LORD ALVERSTONE, C.J.—We cannot deal with that now.]

Ashton Cross, for the new trustees.

A. P. Poley, in reply.—It is not usual for a solicitor to ask that his lien should be specially reserved. The lien is given by the law of the land, and judicial notice is taken of it without the solicitor bringing it forward—*Bonser* v. *Bradshaw* [1863].[6]

(5) 28 L. J. Ch. 561; *sub nom. Downes, In re; Verity* v. *Wylde*, 4 Drew. 427.

6) 4 Giff. 260

LORD ALVERSTONE, C.J.—It is unfortunate that we have not got any report of the judgment of the learned Judge which would give us in full the reasons upon which he founded his judgment. He seems to have decided that the effect of the order of May 6, 1892, must be that the solicitor's lien was barred, and that it was intended that all the funds in Court should come to the *cestuis que trust* except the difference between the solicitor and client costs and the party and party costs, which by the order the trustees were expressly directed to raise.

Upon the form of the order, I confess I cannot take that view. I do not know, and perhaps I ought to have raised the question in the course of the argument, whether an order could have been made binding the solicitor, and making him a party to the order. That possibly might have been done, but it seems to me that, upon the face of the order, which in no way refers to the solicitor's rights, it is impossible to come to the conclusion that as a matter of law his lien is barred. [His Lordship referred to the position of the solicitor as regards the litigation and the terms of the order of May 6, 1892, and continued:] It was first urged before us that, the order having been sanctioned on behalf of infants, the learned Judge who made it must be assumed to have come to the conclusion that the moneys ought to go to the infants, the solicitor having no right to them. I cannot take that view. It is not customary, it appears (and I should not have thought that it was), to make any reference in the order to the ordinary lien of the solicitor. It is not seriously suggested that if the compromise had been made between parties who were *sui juris* the solicitor's lien would not have attached. Speaking for myself, I think that the result of the infants appearing by their next friend, and the compromise being assented to by the Court on their behalf, is that the parties, for the purpose of the solicitor's lien, are in the same position as if they had all been *sui juris*. Therefore, the appellant, the solicitor, is entitled to his lien.

This is not now an application for a charging order under the Solicitors Act

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1860, or different questions might have arisen. When the summons was taken out, no doubt it took that form, and one can see why, because at that time no part of the 237*l.* 0*s.* 4*d.* had been paid That has since been paid, but to the extent to which that had not been paid I suppose there is no doubt the prayer of the summons might in a proper case have been granted. The decision of Mr. Justice Kekewich, however, goes much further than deciding that there must be no charging order; it goes to the extent of deciding that there is no solicitor's lien. I am of opinion that there is a lien on the interests of the clients for whom the appellant appeared in these proceedings. I say nothing upon the point that has been raised as to whether or not any other person would have priorities in consequence of anything that any of the plaintiffs may have done. I limit my judgment to deciding that I see nothing in the order of May 6, 1892, to deprive the appellant of his solicitor's lien, which has been called a common-law lien, but I think is more correctly put by my brother Rigby as a lien recognised by the Courts. To this extent I think the appeal must be allowed.

RIGBY, L.J. — The first, and really almost the only question which we have to consider is, What is the true construction of the order of May 6, 1892? As regards what was intended at the time neither the learned Judge, nor any of the counsel engaged, nor any one else can really profess to have any independent recollection, and therefore the only thing that we can do is to examine the order itself and see what it says. I hope I shall state correctly, though shortly, the effect of it when I say that it was a compromise in an action by infant plaintiffs whereby a trustee defaulter bound himself to place the trust funds under the disposition of new trustees, or otherwise secure them, and in consideration of that further proceedings were stayed. Of course, the defaulter was ordered to pay the costs, such as he could be made to pay —that is to say, the party and party costs of the litigation which was necessary for the obtaining of that order; but there are other costs—namely, the extra costs as between solicitor and client—which he cannot be ordered to pay, and there is nobody to pay them except the plaintiffs themselves, and the plaintiffs themselves must pay them out of their own interest, and that is what is provided for. Not a word of any kind is said about the solicitor's rights. I should infer from that, that his rights, whatever they were, were not intended to be interfered with. I suppose that it might have been made a term of the agreement that the solicitor should give up his claims as against the fund, whatever they might be, and however valuable they might be, but I think a judgment of the Court requiring him to do a very unusual thing would have taken care to have made it perfectly plain; I do not know how it could have been done better than by getting a release from the solicitor and having it entered in the order, or by getting the solicitor to appear by counsel and consent to the decree, and then making an order against him personally that he should not have recourse to the infants' fund for the purpose of his charges. Nothing of the sort was done, and I must conclude that nothing of the sort was intended to be done. At all events, the solicitor is not bound in any way in this order, and I agree to what has been suggested as the proper order to be made in this case.

VAUGHAN WILLIAMS, L.J. — I agree, and I only want to add that on the affidavits it was suggested that there was some bargain entered into whereby the solicitor gave up his lien. Counsel for the plaintiffs did not argue that point, and as a matter of fact the affidavits did not support that contention at all. The solicitor has not by the terms of the order lost his lien. That lien, of course, is a lien limited to the interests of the clients for whom he acted. With that exception, I do not understand that we are at present called upon to express any judgment as to what may be the effect of the declaration, or whether or not there are any incumbrances overriding, or any interests of his clients, which cannot be got rid of.

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WRIGHT'S TRUSTS, IN RE, App.

Warrington, Q.C.—The decision is as to the lien on the plaintiffs' shares only?

LORD ALVERSTONE, C.J.—Yes.

Appeal allowed.

Solicitors—Gibson, Usher & Co., for appellant; Wetherfield, Son & Baines, for plaintiffs; Lamb, Son & Prance, for trustees.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

BYRNE, J. 1900. Nov. 23, 27. } FOSTER *v.* NEW TRINIDAD LAKE ASPHALT CO.

Company—Dividends—Profits—Accretion to Capital—Injunction.

In 1897 *the defendant company purchased the property and assets of another company. Among the property and assets so purchased was a debt of* 100,000 *dollars secured by promissory notes. This debt and the notes were not specifically mentioned in the agreement for sale. Subsequently new promissory notes were given to the defendant company for* 127,000 *dollars, being the amount of the old debt and notes and interest accrued in respect thereof. In respect of the new notes the defendant company received* 26,258*l.* 16*s. English currency. It did not appear that the amount of these notes had ever been included in any balance-sheet*:—Held, *that an interlocutory injunction must be granted restraining the defendants from distributing as dividend so much of the amount received as represented the original debt of* 100,000 *dollars (to which the plaintiffs limited their claim) without having regard to the value of the total capital assets of the defendant company, and the result of the year's trading.*

In the year 1894 an American company (which for convenience of reference is hereafter styled the old company) acquired the stock and bonds of the New York and Bermudez Co., and also a debt of 100,000 dollars due from the latter company, which had made and issued its promissory notes for the amount. In 1897 the defendant company (which was an English company) purchased the property and assets of the old company. The property and assets so acquired were described by reference to a schedule to the agreement for the sale and purchase, which schedule, although enumerating as assets (*inter alia*) a quarter of a million dollars' worth of shares in the New York and Bermudez Co., and an item of so small a value as 7½ dollars, did not specifically refer to the debt or the promissory notes. On December 31, 1899, the New York and Bermudez Co. gave to the defendant company (in substitution for the promissory notes made to the old company) new promissory notes for 127,000 dollars. The excess of 27,000 dollars over the amount of the old promissory notes represented interest accrued due in respect thereof. The new promissory notes had been met, and it was proposed to treat the money received (amounting to 26,258*l.* 16*s.* English currency) as available for dividend.

The present proceedings were commenced on behalf of debenture-holders, and by one of the shareholders, who sued in a representative capacity, to restrain the division of so much of the 26,258*l.* 16*s.* as represented the 100,000 dollars, without reference to the other business and assets of the company. The case now came on upon an application for an interlocutory injunction.

Levett, Q.C., and *Cassel*, for the plaintiffs.—The proposed division is *ultra vires*. *Lubbock* v. *British Bank of South America* [1892][1] is distinguishable. There a sale of an asset disclosed a profit; here there is an asset which was thought to be worth nothing, but which has turned out in the event to be worth something. There is no appreciation available for dividend until you make up the depreciation in value of the other items of capital.

Mulligan, Q.C., and *J. I. Stirling*, for the defendants.—*Lubbock* v. *British Bank of South America*[1] is in point. The particularity with which the schedule is drawn shews that only scheduled items were to be regarded as capital. The balance-

(1) 61 L. J. Ch. 498; [1892] 2 Ch. 198.

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sheets are not in evidence, but it could be shewn that the 100,000 dollars were never intended to be treated as capital, and in fact have never appeared in any balance-sheet. It is not necessary that it should be profit earned in the business, it is sufficient that it should be an increase in the assets within the year. The real test is whether the capital is diminished so that the security of the creditors is impaired. (Upon the question of profits available for dividend they referred to *Dent* v. *London Tramway Co.* [1880] [2] and *Buckley on the Companies Acts* (7th ed.), pp. 554, 558, and 559.)

Levett, Q.C., in reply.—It is obvious that the schedule is a mere estimate. It does not include the promissory notes, and yet includes as an item of value the shares of the company liable on the promissory notes. Increase of estimated value of assets cannot be divided as profits.

Cur. adv. vult.

BYRNE, J., after stating the facts to the effect above set out, and observing that, as regards the plaintiff shareholder, he treated the application as one to restrain an *ultra vires* payment, continued: I have not now to consider whether or not the amount in question may properly be brought into the next profit and loss account, but simply whether or not the amount may be divided as profit, without regard to the present value of the total capital assets, and whatever the result of the year's trading may be. No question is raised as to so much of the sum as represents interest, the point at issue being as to the amount representing principal of the debt. There is no doubt that the debt was included in the assets originally purchased by the defendant company, and as such formed part of its original capital assets, but it is argued that as the debt was not regarded, or treated, as an asset of any value upon the purchase, and as it has not appeared in the former balance-sheet as part of the assets of the company, and as the only entry in relation to it in the books of the company is a journal entry carrying the notes to a profit and loss account, it ought to be regarded as a windfall in the nature of an unexpected profit, and that it is consequently divisible amongst the shareholders. I cannot accept this view. It is true that the agreement for sale does not enumerate the debt or notes in question in the schedule which purports, according to its heading, to be a statement of assets and liabilities of the old company. That schedule is, as appears by clause 1 of the agreement, an enumeration of matters and things which the vendor warranted to be included in the property sold, or the equivalent in value thereof. Some of the items mentioned in the schedule may have been overvalued, some undervalued, and no doubt fluctuations in value of the assets have supervened; but the amount of this debt, which has since been realised by payment, is a distinct item of the property purchased. It appears to me that the amount in question is *prima facie* capital, and that I have no evidence which would justify me in saying that it has changed its character because it has turned out to be of greater value than had been expected. It was urged for the defendants that the amount applied in payment of the debt was money earned by the New York and Bermudez Co. by favour of the defendant company, and represents a profit which would otherwise have been earned by the defendant company, and, furthermore, that such money might have been applied by the New York and Bermudez Co. in payment of a dividend on the shares in that company, in which case the defendant company, as owning 9,842 shares out of a total of 10,000 in that company, would have received the greater portion as income. I am unable to follow this argument. I do not see how, for the purposes of the present motion, I can have regard to the fact that some other course of dealing by the debtor company would have left the debt still outstanding and would have produced more income for the defendant company. I think that I ought to grant an injunction until judgment or further order to restrain the defendants from distributing the 100,000 dollars as dividend without reference to the other business or assets of the defendant company.

I must not, however, be understood as

(2) 50 L. J. Ch. 190; 16 Ch. D. 344.

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determining that this sum or a portion of it may not properly be brought into profit and loss account, or be taken into account in ascertaining the amount available for dividend. That appears to me to depend upon the result of the whole accounts for the year. It is clear, I think, that an appreciation in total value of capital assets, if duly realised by sale or getting in of some portion of such assets, may in a proper case be treated as available for purposes of dividend. This, I think, is involved in the decision in the case of *Lubbock* v. *British Bank of South America*,[1] cited with approval by Lord Lindley in *Verner* v. *General and Commercial Investment Trust* [1894],[3] where he says: "Moreover, when it is said, and said truly, that dividends are not to be paid out of capital, the word 'capital' means the money subscribed pursuant to the memorandum of association, or what is represented by that money. Accretions to that capital may be realised and turned into money, which may be divided amongst the shareholders, as was decided in *Lubbock* v. *British Bank of South America*.[1]" If I rightly appreciate the true effect of the decisions, the question of what is profit available for dividend depends upon the result of the whole accounts (capital as well as profit and loss) fairly taken for the year; and although dividends may be paid out of earned profits in proper cases, even where there has been a depreciation of capital, I do not think that a realised accretion to the estimated value of one item of the capital assets can be deemed to be profit divisible amongst the shareholders without reference to the result of the whole accounts fairly taken.

Solicitors—W. H. Paterson; Ashurst, Morris, Crisp & Co.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

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(3) 63 L. J. Ch. 456; [1894] 2 Ch. 239.

KEKEWICH, J. 1900. Dec. 6, 18. } HALBOT *v.* LENS.

Principal and Agent—Contract—Signature—Warranty of Authority—Misrepresentation of Fact—Damages.

In order to enable a plaintiff to maintain an action for damages against a defendant who has purported to sign a contract on behalf of an alleged principal, the plaintiff must prove a representation by the defendant that he was authorised so to sign when in fact he was not authorised, and that such misrepresentation was believed.

Collen *v.* Wright (27 L. J. Q.B. 215; 8 E. & B. 647) *must be considered as having overruled* Smout *v.* Ilbery (12 L. J. Ex. 357; 10 M. & W. 1).

Prior to August, 1899, the plaintiff, Eugene Louis Halbot, carried on business in co-partnership with the first defendant, Bernard Clarke Lens, as merchants at Bradford, under the style of Halbot & Lens. In August, 1899, an arrangement was come to between the firm and its creditors, whereby the latter agreed to accept a composition of 12*s.* in the pound. At this time the firm was indebted to its bankers in the sum of 15,000*l.*, for which the bankers held a joint guarantee of B. C. Lens and Ethel Clarke Lens, his wife (who was also a defendant), for 4,000*l.* The bank also held a guarantee of Dr. Thomas Clarke (father of Mrs. Lens) for 5,000*l.* On September 1, 1899, an agreement was entered into, signed by the plaintiff and the defendant B. C. Lens, the latter signing "for self and wife and Dr. Clarke." This agreement was called a "memorandum as to understanding arrived at 1st Sep. 1899," and related to the way in which the business was to be wound up and the assets to be dealt with by the two partners. Halbot was to take over the business, and B. C. Lens was to take certain assets and to pay the composition and settle claims. Clause 3 provided as follows: "All claims (if any) made or existing by Dr. Clarke, or Mrs. Lens, against Mr. Halbot, to be released." Dr. Clarke never gave any authority to the defendant B. C. Lens to sign on his

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behalf, and both the plaintiff and the defendant knew this, and also that Dr. Clarke had declined to assent to the agreement. Mrs. Lens, in the witness-box, declared that she never gave her husband authority to sign the agreement. B. C. Lens thought that he had this authority, or that, in any case, Mrs. Lens would ratify the bargain. The agreement was acted upon by the plaintiff and the defendants, and B. C. Lens proceeded with the liquidation of the affairs of the firm, and threatened to leave the liability of the plaintiff to Dr. Clarke unsatisfied.

The plaintiff brought this action and claimed, *inter alia*, a declaration that, under the agreement, the defendants, or one of them, were bound to procure the release by Dr. Clarke of all claims existing by him against the plaintiff, and to indemnify the plaintiff therefrom, specific performance of the agreement, damages, &c.

Warrington, *Q.C.*, and *Beddall*, for the plaintiff.—The construction of this agreement cannot be altered by parol evidence, and by the agreement B. C. Lens undertook to procure a release for the benefit of the plaintiff, and warranted his authority to sign the document on behalf of Dr. Clarke. For that he is liable in damages for breach of the warranty—*Collen* v. *Wright* [1857].[1]

The right of the other contracting party is to be put into the position he would have occupied if the principal had been himself bound by the document. That is clearly established by the case of *National Coffee Palace Co., In re; Panmure, ex parte* [1883],[2] where the principle of the measure of damages is also laid down. With regard to Mrs. Lens, as she did not authorise her husband to sign, the plaintiff's remedy remains against B. C. Lens for breach of warranty of authority to sign.

[KEKEWICH, J.—The action therefore fails as against Mrs. Lens.]

Renshaw, *Q.C.*, and *T. T. Methold*, for the defendants.—With regard to the case made in respect of Dr. Clarke, the law is laid down in the case of *Smout* v. *Ilbery* [1842].[3] If both parties know that there was no authority for one of them to sign for an absent principal, there can be no misrepresentation, which is the foundation of such an action as this—*Beattie* v. *Ebury* (*Lord*) [1872].[4]

The defendant B. C. Lens appears to have signed for Dr. Clarke for what it was worth, in the hope that Dr. Clarke might subsequently assent. But that is not enough to render him liable in this action.

Warrington, *Q.C.*, replied.

Cur. adv. vult.

Dec. 18.—KEKEWICH, J.—Before discussing the question which was mainly argued before me, and which is one of considerable importance, I must deal with the point, urged on behalf of the plaintiff, turning upon the construction of the third clause of the memorandum of September 1, 1899. That memorandum was intended to operate as an agreement, and it is properly pleaded in the statement of claim as an agreement; but it is not beside the question to observe that it is not expressed to be made between parties, and is entitled "Memorandum as to understanding arrived at on 1st September, 1899," from which it might be inferred that the document was intended to contain the terms on which an agreement was to be made, rather than the agreement itself. Clause 3 of the agreement runs thus: "All claims (if any) made or existing by Dr. Clarke, or Mrs. Lens, against Mr. Halbot to be released." The argument on behalf of the plaintiff was that, inasmuch as Mr. Halbot was to be released, therefore this expressed an agreement by Mr. Lens that he would procure a release for the benefit of Mr. Halbot. I do not think that a fair construction of the clause standing alone. It is not expressed as an agreement that any one person would procure a release, but rather as a condition of the entire agreement that there should be some release; and by referring to other clauses of the agreement it is seen that when it was intended that anything should be done by either

(1) 27 L. J. Q.B. 215; 8 E. & B. 647.
(2) 53 L. J. Ch. 57; 24 Ch D. 367.
(3) 12 L. J. Ex. 357; 10 M. & W. 1.
(4) 41 L. J. Ch. 804; L. R. 7 Ch. 777.

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Mr. Halbot or Mr. Lens it was so stated in plain language.

But now we come to the question whether the defendant Lens is liable in damages to the plaintiff for not having procured the concurrence of Dr. Clarke and Mrs. Lens, on the ground that he purported to sign the memorandum on their behalf as well as on his own. It is agreed that the law on this subject is adequately expounded in the judgments in *Collen* v. *Wright*.[1] A study of the judgments delivered in the Queen's Bench and in the Exchequer Chamber shews that there was no doubt in the mind of any of the Judges what was the question calling for decision; and, indeed, this is as clearly stated in the dissentient judgment of Chief Justice Cockburn as it is in the judgment of the majority of the Court of Exchequer Chamber delivered by Mr. Justice Willes. I could cite many passages by way of illustration, but I will take one only from the judgment of Chief Justice Cockburn, where he says: "The proposition we are called upon to affirm is, that by the law of England a party making a contract as agent in the name of a principal impliedly contracts with the other contracting party that he has authority from the alleged principal to make the contract, and that, if it turns out that he has not this authority, he is liable in an action on such implied contract." That proposition was, in effect, affirmed by the Court of Queen's Bench and by the majority of the Court of Exchequer Chamber. That decision does not proceed on the footing of there having been any wrong or omission of right on the part of the agent in order to make him personally liable on a contract made in the name of his principal; and the judgment in *Smout* v. *Ilbery*,[3] which was delivered fifteen years before *Collen* v. *Wright*,[1] must, I think, be taken to be overruled by the later case.

The conclusion, therefore, is that, in order to enable a plaintiff to maintain an action on such a contract, he must prove a misrepresentation in fact—that is to say, a representation by the defendant that he was authorised to sign on behalf of an alleged principal when, in fact, he was not so authorised, but he need not prove that this misrepresentation was due to an omission or wrong of the party signing. The decision in *Collen* v. *Wright*[1] is briefly summarised on these lines by Lord Justice Mellish in *Beattie* v. *Ebury* (*Lord*),[4] to which case I must again presently refer. If, therefore, the case against the defendant Lens simply is that, having no authority to sign on behalf of his wife or Dr. Clarke, he nevertheless has signed—as in fact he did—as their agent, he must be regarded as having entered into a contract that he had authority so to sign—that is, to bind them; and if there were no such authority, he must be held to have made a misrepresentation in fact which renders him liable to an action on the implied contract.

The defendant Ethel Clarke Lens never authorised her husband to sign the memorandum on her behalf, or to agree to its terms. He thought that he had such authority, or that she would ratify his bargain, and the plaintiff apparently took this for granted. The proposition affirmed by *Collen* v. *Wright*[1] is directly applicable, and the plaintiff is entitled to judgment on that footing. There was some discussion about the measure of damages, but the principle is well settled, and I do not anticipate any difficulty in applying it to the case in dispute. Therefore I say no more about that now.

The case against the defendant Lens on the alleged misrepresentation that he had authority to sign for Dr. Clarke stands on a different footing. The result of the evidence is, I think, clearly to establish that both the plaintiff and the defendant Lens equally knew, not merely that the defendant Lens had no authority to bind Dr. Clarke, but that Dr. Clarke had positively declined to assent to the terms of the agreement, so far as they affected him. Is it possible, under these circumstances, to say that the defendant Lens made a representation of fact? There is a passage in the judgment of Lord Justice Mellish in *Beattie* v. *Ebury* (*Lord*)[4] which, to my mind, throws much light on this question. It is as follows: "But if those cases" (meaning the case of *Collen* v. *Wright*[1] and the others there mentioned) "are examined it will be found in all of them that there was a misrepre-

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sentation in point of fact as to the agent having power to bind his principal, and though I have not found any case in the Courts of law on the question, I have no doubt myself that it would be held that if there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law, that is to say, if the person who deals with the agent is fully aware in point of fact what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, under those circumstances I have no doubt that the agent would not be liable." The case put by the Lord Justice is not on all-fours with the one I have to deal with here; but it strongly accentuates the position that, in order to maintain such an action, there must be misrepresentation in fact, trusted by the person to whom it is made; and I cannot myself see how a man can be properly said to have made such a representation when, in truth and substance, he has said, "Although I will, if you wish it, sign this on behalf of the alleged principal, I tell you plainly that I have not authority from him to do so, and have every reason to believe that such authority will not be forthcoming." A man, of course, might say, "I have no authority, and probably cannot obtain such authority, but yet I will contract to obtain it and run the risk of damages." Such a contract is conceivable, and would be good in law, but ought not, I think, to be inferred except from facts leading directly to that conclusion, and I do not find those facts here. I think it far more likely that it was agreed between the parties that the defendant Lens should add his signature on behalf of Dr. Clarke for what it was worth, each party recognising that it was, in all probability, worth nothing. In my judgment, therefore, the plaintiff has failed to establish misrepresentation of fact against the defendant Lens as regards his signature on behalf of Dr. Clarke, and the action is not maintainable to that extent.

The result is that the plaintiff has succeeded in part, and failed in part. I do not see my way to distribute the costs otherwise than on the principle of equality, and the plaintiff will therefore have such judgment as he is entitled to without costs.

Solicitors—Clarke & Blundell, agents for Gordon, Hunter & Macmaster, Bradford, for plaintiff; Nussey & Fellowes, agents for Vint, Parkinson, Hill & Killick, Bradford, for defendants.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

KEKEWICH, J. 1900. Dec. 5. } BAGOT PNEUMATIC TYRE CO. *v.* CLIPPER PNEUMATIC TYRE CO.

Company—Contract with Third Person for Intended Company—Privity—Inferred Contract—Adoption—Right of Action.

On March 3, 1897, *the plaintiffs agreed with A to grant to him, or to an intended company (the defendants), an exclusive licence to use certain patents, in consideration of payments to be made of a proportion of its profits by the company when formed. On March* 5, 1897, *A agreed to sell to B, on behalf of the proposed company, this agreement and exclusive licence, together with others, for* 120,000*l. The company was incorporated on March* 8, 1897, *and a month later adopted the agreement of March* 5, 1897. *By their balance-sheet of October*, 1899, *which shewed large profits, the defendants claimed to write off* 3,000*l. as depreciation and towards the ultimate extinction of the cost of the licences and contracts. In an action by the plaintiffs to test the validity of this claim,*—Held (*following the decision in* Northumberland Avenue Hotel Co., *In re* (33 Ch. D. 16), *and distinguishing* Howard *v.* Patent Ivory Manufacturing Co. (57 L. J. Ch. 878; 38 Ch. D. 156)), *that there being no direct privity of contract between the plaintiffs and defendants, and no contract which could be inferred or considered as having been adopted by the conduct of the defendants, the plaintiffs had no right of action against them.*

On March 3, 1897, the plaintiffs entered into a written agreement with

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Thomas Couchman Phelps that they would grant to him, or to the company therein mentioned (being the defendant company, which was not then incorporated), an exclusive licence, in the form specified in a schedule, to use certain patents of the plaintiffs; and he, on the other hand, entered into certain contracts with the plaintiffs. The consideration for this agreement was that, after providing for payment to the shareholders of the proposed company by T. C. Phelps in each year of a cumulative preferential dividend equal to 8*l.* per cent. on a capital of 150,000*l.*, and after such sum as the directors of the company should think fit to set aside as a reserve fund, the company should pay to the plaintiffs in each year out of their remaining profits available for dividend a sum equal to 8*l.* per cent. upon a fixed capital of 150,000*l.*, but such yearly payment was only to be payable in case the remaining net profits for the particular year were sufficient to pay the same; and, after providing for payment of the above sums, the plaintiffs should be entitled to receive a further sum equal to one-half of the balance (if any) of net profits of the company available for dividend in each year. It was also provided that the plaintiffs should accept the certificate of the auditors of the company on all matters of accounts and net profits available for dividend, and it was expressly declared that T. C. Phelps should have the right to assign the agreement and the licence to a company then in course of formation, and that, upon the adoption thereof by such company, the same should be binding and effective as if such company had been named in lieu of T. C. Phelps.

By a written agreement of March 5, 1897, made between T. C. Phelps of the one part, and Ernest Piercy, for and on behalf of the company, of the other part, T. C. Phelps agreed to sell to E. Piercy, on behalf of such company, the agreement of March 3, 1897, and the exclusive licence, together with certain other licences and contracts, for 120,000*l.*, to be paid as therein mentioned.

The intended company was registered on March 8, 1897, with a capital of 150,000*l.*, under the name of the Clipper Pneumatic Tyre Co., Lim. (the defendants). On April 8, 1897, an agreement was made between T. C. Phelps, E. Piercy, and the defendants, under which the agreement of March 5, 1897, was adopted by the defendants with a certain modification as to the mode of payment of the purchase price, which modification was subsequently rescinded. In pursuance of the agreement of March 3, 1897, the plaintiffs granted an exclusive licence to T. C. Phelps of the patents for the term then unexpired, but no legal assignment of the licence was ever made to the defendants. The defendants alleged that the patents were of no value.

The defendants issued balance-sheets to their shareholders in March and December, 1898, shewing a net profit of 2,548*l.*, but no dividend was paid or declared. In these balance-sheets a sum of 120,000*l.* in respect of "Cost of licences and contracts" appeared as an asset.

The balance-sheet of October, 1899, disclosed a surplus of 20,000*l.*, and a sum of 3,000*l.* was entered as "Amount written off licences, &c." At the same time a letter was sent to the plaintiffs, written by the direction of the defendants' board, saying that their proposed future policy was to provide, out of profits, for the depreciation and ultimate extinction of the sum of 138,000*l.* (being the 120,000*l.* and certain additions) at which the licences then stood in the balance-sheet. This letter also stated the Clipper Co. were not using any of the plaintiffs' patents, and suggested a cancellation of the existing agreement.

The plaintiffs then brought this action, claiming, *inter alia*, (*a*) a trading account and also a profit and loss account; and (*c*) a declaration that the defendants, as between themselves and the plaintiffs, were not entitled to write off the 3,000*l.* against the profits as depreciation.

The defence was a denial of the plaintiffs' right of action, and a plea that the certificates of the auditors attached to the balance-sheets of the defendants were proper and sufficient with regard to the writing off of the 3,000*l.*

Warrington, Q.C., and *E. F. Spence*, for the plaintiffs.—The first point is a question

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of form, whether the plaintiffs are entitled to sue. There is sufficient evidence upon the agreements and from the acts of the parties for the Court to infer a contract between the plaintiffs and defendants. The latter were equitable assignees of Phelps's licence; they acted under it, and assented to certain modifications of the original agreement. This case does not fall within the decision in *Northumberland Avenue Hotel Co., In re* [1886],[1] but within *Howard* v. *Patent Ivory Manufacturing Co.* [1888].[2] Here there was, in effect, an adoption of the original agreement, and therefore a direct contractual obligation between the plaintiffs and defendants. Another way of stating the case is that Phelps was regarded by the defendant company as a mere trustee for the Bagot Co. Either way, the plaintiffs have a right to sue. *Werderman* v. *Société Générale d'Electricité* [1881][3] shews that liability may attach to the patent itself. Then, on the point of substance, the defendants have no right to make this deduction of 3,000*l.* The profits "available for dividend" means that which it is competent for the company to treat as dividend. It is not compulsory on the company to write off for depreciation—*Lee* v. *Neuchatel Asphalte Co., Lim.* [1889],[4] and *Verner* v. *General and Commercial Investment Trust, Lim.* [1894].[5]

Neville, Q.C., and *Sargant*, for the defendants.—There is no cause of action disclosed. Even if the plaintiffs are right in every particular, there is no suggestion that they will be entitled to anything under the first agreement until an extremely remote period, if ever. But there is no privity of contract between the two companies.

Nor can there be ratification of a contract made by a trustee for an intended company before the company was in existence, even though it is afterwards incorporated—*Northumberland Avenue Hotel Co., In re.*[1] According to that case no inference can be drawn that a new contract was intended to be entered into. The case of *Howard* v. *Patent Ivory Manufacturing Co.*[2] is readily distinguishable, for there a contract was entered into with Jordan, who was present at the directors' meetings, and who carried out the matter, and the property agreed to be sold was transferred to the company.

With regard to the writing off, these licences were wasting property and would be absolutely gone at the end of the term. The auditors' certificates are binding, under the agreement, as to what are "profits available for dividend."

KEKEWICH, J.—The first point made by the defendants goes to the root of the plaintiffs' title. The defendants, in short, say, "You cannot sue us here, because you have no right of action." If that is decided in favour of the defendants, it is unnecessary to go into the other questions between the parties.

It is not alleged, or even suggested, that there is any direct privity of contract between the plaintiffs and the defendants; but the plaintiffs say that they are entitled to sue by reason either of a contract inferred, which is a separate point, or else by reason of some contract which is not inferred from the facts, but which is to be somehow or other imported into the contracts, although not expressed therein. I must deal with these two points separately. The first document is the agreement of March 3, 1897. [His Lordship stated the facts relative to the various agreements.] Assuming the result of the contracts to be that the defendants became bound to Phelps, that carries us a very little way towards the position that the defendant company are bound to the plaintiff company, with whom they have entered into no contract whatever. It seems to me that the facts of this case bring it directly within the authority of *Northumberland Avenue Hotel Co., In re*,[1] decided some fourteen years ago, and which expounded the doctrines which up to that time had been regarded by the Courts as perfectly well settled, and have been so regarded ever since. I do not see that there is any distinction in substance between that case and this. That case was one which came before Chitty, J., in the first instance, and then

(1) 33 Ch. D. 16.
(2) 57 L. J. Ch. 878; 38 Ch. D. 156.
(3) 19 Ch. D. 246.
(4) 58 L. J. Ch. 408; 41 Ch. D. 1.
(5) 63 L. J. Ch. 456; [1894] 2 Ch. 239.

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before the Court of Appeal; and the Judges decided it on the ground that there was no right of action except by privity of contract, and there was no privity of contract where an agreement was made by a trustee for an intended company, even although the company had been afterwards formed. There are, no doubt, distinctions in detail between the two cases, but in substance I think they stand really side by side.

Then it is said that this is not consistent with the case of *Howard* v. *Patent Ivory Manufacturing Co.*,[2] decided by Mr. Justice Kay; or that, if the two cases are consistent, it is because *Howard* v. *Patent Ivory Manufacturing Co.*[2] establishes an exception to the general rule laid down by the other case, and the present case comes within that exception. Now, it is a little difficult, I confess, to understand all the facts, and the conclusion in *Howard* v. *Patent Ivory Manufacturing Co.*[2]; but I think I have sufficiently mastered it for the present purpose, with the assistance of counsel. Mr. Justice Kay there came to the conclusion that there was a contract to be inferred between those who were suing and those who were sued. He says: "In my opinion it is very clear that there was a contract between Mr. Jordan and the company. That is the only possible inference I can draw from the facts which I have stated." There was no express contract. That was not suggested there, but from the facts which he had stated the learned Judge inferred a contract which he could not find expressed. It is not, of course, contended that a Judge or a jury may not, in a proper case, infer a contract which is not directly proved; but I venture to think that in a case of this kind, without in the slightest impugning the authority of the case cited, one must not be hasty to infer a contract, especially when you are dealing with a corporation which properly can only contract under seal by its directors in a large number of cases, and whose directors are bound to keep minutes, so that all the facts ought to be reduced into writing and easily produced. Now where did Mr. Justice Kay in that case infer a contract? The key is to be found in two or three words used by the learned Judge, where he says, after stating the conduct of Mr. Jordan, "Such a course of conduct would be, as I have characterised it during the argument, the most flagrant dishonesty." That, no doubt, assisted the learned Judge to infer a contract, because if there was not a contract which could be enforced, there would be the most flagrant dishonesty. Now I am indebted to defendants' counsel for having pointed out to me why and how the Judge came to that conclusion. It is tolerably plain from the report. There were meetings of the directors in that case, and the question was whether Jordan was liable, not whether any one else was liable. Jordan had been present at meetings of the directors, and at those meetings not only minutes were passed with his assent, but a modification was introduced with his assent, the result being that everything went forward with the intention, to which he was a party, that he should be the performing party to the contract. It seems to me that, after that, it was not difficult for the Judge to come to the conclusion that a contract by Jordan must be inferred from the facts; and, that being so, there was no difficulty in giving the relief sought. Therefore, in the first place, that case is not like this one, and I cannot regard it as being any real exception to *Northumberland Avenue Hotel Co., In re.*[1]

Then the plaintiffs rely upon the case of *Werderman* v. *Société Générale d'Electricité.*[3] That again is a very peculiar case, and requires a little investigation in order to understand it; but when once it is looked into, I do not think it presents any difficulty at all. I do not think it has any real resemblance to the case now in hand. There was first a question there about the right to demur under the Judicature Act. There was also another point whether what had happened there was really a sale or was an assignment not by way of absolute sale, so as to raise the liabilities which were in question there. The Court of Appeal came to the conclusion that it was not an absolute sale. It is disposed of very plainly by the concluding words of the judgment of Lord Justice Lush. Passing that over, what was the

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question there? Certain persons, who are referred to in the headnote as A and B, had entered into a contract on the assignment to them of certain letters patent, that they, or the survivor of them, or the executors or administrators of the survivor, their, or his, assigns, should make certain payments on account of the patent that was assigned; and the defendants were held by the Court of Appeal to be assigns of A and B within the meaning of that clause. Then the question was whether there was any liability. The point taken there, as it is taken here, though under a different state of facts, was that there was no contract to pay. These gentlemen, A and B, had assigned, and the defendants were the assignees, but had entered into no contract to pay. They said they were not liable to pay. Now Sir George Jessel, M.R., disposes of that main point in a very few words: "I think it is tolerably plain that the parties intended certain liabilities to attach to the patent itself." Once you get to that, there was no further question about personal liability. The question was not whether the defendants had entered into a contract to pay, but whether they had taken property to which the liability was attached. If they had, they were bound to perform that as a condition of holding the contract. Lord Justice Lindley sums it up at the end of the case: "The case seems to me almost the same as the common case of persons on a dissolution of partnership assigning the assets charged with the payment of an annuity to the outgoing partner. In that case a purchaser of the assets with notice must take subject to the annuity." What the learned Lord Justice says, and what the learned Master of the Rolls says, agree exactly together. The defendants were there the assigns of a patent to which certain liabilities attached. They could not take the patent and say that they were not liable to pay the sums which had been agreed to be paid. Then it is attempted to meet that here by saying that this licence is made in consideration of the agreement, and of the payments therein agreed to be made by the licensee. It seems to me that that language tells against the plaintiffs. You have a reference to the agreement and to the payments, but it is an independent agreement altogether, one *dehors* the licence for this purpose. It is as if it was said, "in consideration of the licensee having entered into a covenant to make certain payments." It is the covenant which is the consideration, and the covenant must be sued upon as a personal liability, and not otherwise.

Then it is said here that the defendants have adopted responsibility for this, and put themselves in the position of contracting parties by their conduct. In order to shew that certain correspondence was read and reference made to the minutes of the company, which come to this, that they thought they were liable. No doubt they did; but they made a mistake, and you cannot use that as an argument for establishing the fact that they have adopted the contract, and that they have brought themselves under a contract to which they were not parties. That is really disposed of by the decision in *Northumberland Avenue Hotel Co., In re.*[1] It is impossible to wrest that to mean that they were, by doing that, really bringing themselves under a contract under which they already supposed themselves then to be. The two things are contradictory.

That being so, I think there is no right of action, and the action fails. I need not, therefore, dwell upon the other points raised in the case, but I will just deal with one point made by defendants' counsel—namely, that the plaintiffs were also not entitled to sue because there was no reasonable probability of their ever getting anything, even if all the points were decided in their favour and against the defendants. On that point I am against the defendants. Certain accounts have been rendered by the defendants which are challenged, and which shew that the defendants proposed to deal with their profits available for dividend in a certain way. If the plaintiffs are right, the defendants ought not to deal with the profits in that way. It may be no present injury to the plaintiffs, but they are entitled to come to the Court, if they think it worth while, and say, "We must not be charged with standing by and seeing them doing this year after year, and

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then be told hereafter that we assented to this mode of division of the profits, and must now submit to their dealing with these profits in a way which we considered from the first to be wrong, but which we did not come forward and object to." I think the plaintiffs are entitled to come to raise the question, and I am not disposed to hold that they have no right of action on that ground. But on the other ground they have no right of action, and there must be judgment for the defendants with costs.

Solicitors—Capel-Cure & Ball, for plaintiffs; Beale & Co., for defendants.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

COZENS-HARDY, J. 1900. Nov. 28. Dec. 11.

GRAY, *In re.*

Costs — Taxation — Solicitor — Third-Party Order—Lessor and Lessee—Mining Lease — Negotiations — Scale Fee — Attorneys and Solicitors Act, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 38—*Solicitors' Remuneration Act*, 1881 (44 *&* 45 *Vict. c.* 44)—*General Orders, rule* 2 (*b*) *and* (*c*), *Sched. I. Part II.*

A lessor who has paid his solicitor's bill of costs in relation to the lease can recover what he has paid from the lessee except charges for matters antecedent to the instructions for the lease, such as fees paid to a mining expert in the case of a mining lease.

A third-party order for taxation does not alter the nature or enlarge the scope of the liability upon the existence of which the order is based. Where such an order has been made for the taxation of a lessor's bill of costs, at the instance of a lessee, the Court is bound to look at the nature of the items in the bill and to consider whether, apart from the order, the applicant is bound to pay them. The lessee does not by obtaining the order render himself liable to pay the whole bill.

Negus, *In re* (64 L. J. Ch. 79; [1895] 1 Ch. 73), *applied.*

In March, 1895, the Dolcoath Mine, Lim., desired to obtain a mining lease of some property at Camborne, in Cornwall, belonging to Mr. A. F. Bassett, and a correspondence commenced. The negotiations continued until August, 1899, when the lease and counterpart were executed. On March 10, 1900, an order of course was obtained on the petition of the lessees, in which it was alleged that the solicitors were employed by Mr. A. F. Bassett, as lessor, "to prepare a lease of Dolcoath Mine" to the petitioners; that the solicitors, on October 26, 1899, delivered unto the petitioners their bill of fees and disbursements amounting to 301*l.* 12*s.* 4*d.*, which the petitioners were liable to pay, but were advised ought to be taxed; and the petitioners submitted to pay what should appear to be due to the solicitors on the taxation of their bill. The Master taxed the bill at 261*l.* 12*s.*, and made his certificate on August 4, 1900, overruling the lessees' objections of July 17, 1900. The objections were to the allowance of certain items specified in a schedule, which items consisted of charges for negotiations leading up to the lease, and in particular the fees paid to a mining engineer who was consulted on behalf of the lessor, and various correspondence with him. It was admitted that the scale fee did not apply to this mining lease. The reasons alleged in support of the objections were: "Because the Dolcoath Mine, Limited, being lessees of certain mines, and Messrs. Bell, Brodrick & Gray, being the solicitors for Mr. A. F. Bassett, the lessor thereof, the items complained of consist—(*a*) of charges made in respect of advice obtained by the said lessor, his solicitors, or agent, for the purpose of enabling the said lessor to formulate the terms to be inserted in the demise of the mines in question, and of fees paid to mineral experts for giving such advice, such items being in part costs of 'negotiations'; or (*b*) of charges for the Counter-part of the lease. 2. Because

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in the absence of special agreement, a lessee is not under any liability to pay to a lessor any such costs, and no such special agreement exists in this case. 3. Because, although the bill is being taxed at the instance of the lessees, as third parties under section 38 of the Solicitors Act, 1843, the lessees have not, by obtaining the order for taxation, become under any greater liability to pay the costs charges and expenses of the lessor's solicitors in respect of 'negotiations,' or counterpart of the lease, than they were under prior to obtaining such order." Then followed a schedule containing the items in the bill to which exception was taken.

The Taxing Master's answers, dated July 23, 1900, were as follows: "There are two points involved in this case (1) A lessee is by law liable to pay his lessor for the costs of the lease. See *Grissell* v. *Robinson* [1836], 3 Scott, 329; 5 L. J. C.P. 313; 3 Bing. N.C. 10. These costs are limited to such as are properly incurred in the drawing, settling, and completing the lease, and do not include the costs of the counterpart thereof. See *Negus, In re* [1894], 64 L. J. Ch. 79; [1895] 1 Ch. 73. In this case the lessee obtains an order to tax the lessor's solicitor's bill under section 38 of the Solicitors Act, 1843, as a party liable to pay. What is he liable to pay? His liability covers all charges which the lessor is liable to pay his solicitors, in the matter of the lease, as between the solicitor and the party chargeable, and not as between the party liable to pay and the party chargeable. I have taxed the bill on these lines, and the charges allowed are fair and proper, except that I have bowed to the decision in *Negus, In re*, and taken off the costs of the counterpart, which, apart from this decision, I should have allowed as a charge properly payable by the lessor to his solicitor, and also by the third party. *Holliday and Godlee, In re*, 58 L. T. 301." On August 10, 1900, a summons was taken out on behalf of the Dolcoath Mine, Lim., asking that their objections to the taxation might be allowed, and that it might be referred back to the Master to vary his certificate accordingly.

The matter now came on as an adjourned summons.

Eve, Q.C., and *Mark Romer*, for the summons.—The lessees are not liable for costs of negotiations, and especially for these fees of experts. They do not come under a greater liability for costs to the lessor's solicitors than they were under prior to the order to tax. Their liability is limited to the costs properly incurred for the "preparing, settling, and completing the lease," as if it had been under Schedule I. Part II. of the General Orders under the Solicitors' Remuneration Act—*Annual Practice* (1901), vol. 2, p. 594. The older cases on the subject are *Bedson, In re* [1845],[1] and *Massey, In re* [1865].[2] North, J., states in the case of *Holliday and Godlee, In re* [1888],[3] the principle upon which a taxation of this character is conducted, where there is an agreement to pay the costs. But Chitty, J., in *Negus, In re* [1894],[4] held that a deduction could be made from the scale charge in respect of the costs of a counterpart lease, and therefore the principle of deductions is introduced. The Master can take into account whether the third party is in fact liable—*Brown, In re* [1867].[5]

If *Negus, In re*,[4] is right, it is an authority for saying that the measure of the lessee's liability is not co-extensive with the lessor's liability. Then, further, there is no agreement which imports a liability by the lessee to pay for the consulting of experts and the negotiations on the part of the lessor. These costs are not costs "properly incurred" which the lessees must pay, although proper as between the lessor and his solicitors. It is an endeavour to make the lessee liable on an implied agreement. In most of the cases there was an express agreement by the lessee to pay all costs, but there is no express decision as to the liability of a lessee to pay the fees for negotiations incurred by a lessor. In *Prickett, Ex parte; Norfolk (Duchess), in*

(1) 9 Beav. 5.
(2) 34 Beav. 463.
(3) 58 L. T. 301.
(4) 64 L. J. Ch. 79; [1895] 1 Ch. 73.
(5) 36 L. J. Ch. 842; L. R. 4 Eq. 464.

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re [1818],[6] a distinction is drawn between the costs of a proposal and the costs of the lease itself. We do not object to pay the costs of "instructions" for the lease. This bill should therefore be sent back, so that the items properly referable to the preparation and execution of the lease may be distinguished from the other items in the bill.

Vernon Smith, Q.C., and *MacSwinney*, for the solicitors.—The Taxing Master was right, as the lessees stand in the shoes of the lessor for the purpose of this taxation—*Carthew, In re* [1884],[7] *Holliday and Godlee, In re*,[3] and *Marten, In re* [1889].[8] The lessees have admitted their liability to pay when obtaining the order to tax. It is not an implied liability. It is impossible to look into all the items of negotiations. The practice has prevailed that costs of negotiations are chargeable as against the lessee, and are included in the scale fee—*Grissell* v. *Robinson* [1836],[9] *Field, In re* [1885],[10] and *Emanuel and Simmonds, In re* [1886].[11] These last two cases were approved in *Savery* v. *Enfield Local Board* [1893].[12]

The true view, therefore, is that costs leading up to the lease are included; the word "settling" in Schedule I. Part II. is very wide, and rule 2 of the Orders deals with the remuneration in respect of busness "connected with" leases, &c.

Mark Romer, in reply.—The cases have only decided that costs of negotiations cannot be allowed beyond the scale fee; but they have not decided that the costs of "preparing settling and completing" a lease include "negotiations." It is said that these are costs "connected with" the lease, but the only question is whether the lessees were liable to pay them before they obtained the order for taxation.

Cur. adv. vult.

Dec. 11.—COZENS-HARDY, J.—This is an application to review a taxation, and it raises a question of importance and difficulty. [His Lordship stated the facts, and continued:] It is necessary to consider what is the position of a lessee at common law with reference to the costs of a lease, and how far, if at all, that position is altered by reason of an order to tax having been obtained under section 38 of the Attorneys and Solicitors Act, 1843. Now, it was decided in 1836 in *Grissell* v. *Robinson*[9] that a lessor who has paid his own attorney his charges for drawing a lease, can recover the money from the lessee as money paid by the lessor to the use of the lessee. Evidence was there given that it is the custom for the lessor's attorney to prepare the lease at the expense of the lessee. *Jennings* v. *Major* [1837][13] has been treated by text-writers as a decision that the lessor must pay for a counterpart of the lease if he requires one, unless the lessee has expressly agreed to pay for it. And in *Negus, In re*,[4] Mr. Justice Chitty held that a lessee is under no liability to the lessor in respect of charges for the counterpart. In *Lock* v. *Furze* [1865][14] it was asserted by counsel that fees to counsel and surveyors are never allowed. The reporter adds that the Court intimated a doubt about it, and it was arranged that the 65*l.* claimed for expenses should be reduced by 20*l.*, which appears to have been the exact amount of those fees. The question did not therefore arise for decision; but Erle, C.J., says, "Of this sum it is agreed that 20*l.* shall be deducted, as the amount of counsel's and surveyor's fees, which are never allowed." I doubt whether this *dictum* is in accordance with existing usage, so far as counsel's fees are concerned. On principle the lessee must be held to have impliedly contracted to indemnify the lessor against expenses properly incurred in preparing the lease. In a case where the aid of a skilful conveyancer is reasonably required in settling the draft lease, I think the lessee ought to be liable to pay his fees—see *Helps* v. *Clayton* [1864],[15] where the liability of a husband to pay the costs of a marriage settlement is discussed, and *Nicholson*

(6) 3 Swanst. 130.
(7) 53 L. J. Ch. 927; 27 Ch. D. 485.
(8) 58 L. J. Ch. 478; 41 Ch. D. 381.
(9) 5 L. J. C.P. 313; 3 Bing. N.C. 10; 3 Scott, 329.
(10) 54 L. J. Ch. 661; 29 Ch. D. 608.
(11) 55 L. J. Ch. 710; 33 Ch. D. 40.
(12) 62 L. J. Ch. 674; [1893] A.C. 218.
(13) 8 Car. & P. 61.
(14) 34 L. J. C.P. 201; 19 C. B. (N.S.) 96.
(15) 34 L. J. C.P. 1; 17 C. B. (N.S.) 553.

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v. *Joyes* [1853].[16] I think, therefore, that if the lessor had paid his solicitors and sued the lessee he could not have recovered anything antecedent to instructions for lease, and, in particular, could not have recovered the fees of the mining expert. This is in accordance with the law as between mortgagor and mortgagee, for, in the absence of special bargain, the costs of a valuation of the property with a view to the loan are not allowed in taking the mortgage account—*Field* v. *Hopkins* [1890].[17]

It remains to consider what difference is made when the lessee elects to tax under the third-party clause. Now, it is well settled that the bill to be taxed is the bill between the solicitor and his own client, and that the third party can only tax it on the condition of paying what is due to the solicitor from his own client, which may be more than the client, if he had paid it, could have recovered over from the third party—*Fyson, In re* [1846],[18] and *Massey, In re*.[2] If, for example, in a case to which the scale fee would be applicable, the client makes an agreement with the solicitor under section 8 of the Solicitors' Remuneration Act, 1881, that an item bill shall be delivered, I think the third party cannot complain. He must tax on the footing of the agreement. A strong illustration of this principle is found in the case of *Holliday and Godlee, In re*.[3] There a local board agreed to purchase a piece of land at a price to be determined by arbitration; and the agreement contained a clause that the board should pay to the vendors all the costs of the agreement and of the reference to arbitration, and of deducing and evidencing the title, and the assurance to the board, such costs to be paid on the basis of Schedule II. to the General Order, and not on the basis of Schedule I. The arbitration took place, the price was fixed, and the property conveyed. The vendor's solicitors sent their bill of costs to the local board, and the usual third-party order for taxation was made. Objections were taken to a number of payments made to surveyors and mining engineers who had been called as expert witnesses. The local board objected that the payments were excessive and unreasonable. The solicitors answered that the witnesses were called and the payments were made with the approval of the vendors. Mr. Justice North held that the Taxing Master had taxed the bill properly, having regard to the order which had been made, on the ground that as between the vendors and the solicitors all the payments had been authorised. "It is urged," he said, "that it is a great hardship on the purchasers to be obliged to pay any costs which the vendor chooses to authorise. The answer to that is, that the 'costs of reference' mentioned in the agreement meant costs properly incurred; the purchasers are not bound to pay more, but if the vendors demanded more the proper course for the purchasers was either to refuse to pay and await an action by the vendors, or to have the bill of costs referred to an expert for arbitration." It follows, therefore, that, with respect at least to any piece of business properly inserted in the bill which the third party is liable to pay, it is not open to the third party to object that payments sanctioned by the client are excessive. In the present case it was conceded by counsel for the solicitors that certain charges inserted in the bill, though proper as between the solicitors and their client, ought to be excluded from the bill, and the Master has taken this view. I refer to charges with reference to a writ for specific performance of the agreement for a lease. The Master has also struck out from the bill the costs relating to the counterpart lease, although such costs were clearly proper as between the solicitors and their client. How is the line to be drawn? There is great difficulty in arriving at a satisfactory answer. I think the true view is that the third-party order does not alter the nature or enlarge the scope of the liability, upon the existence of which the order is based. This view is supported by Mr. Justice Chitty's judgment in *Negus, In re*.[4] In that case there was an agreement for a lease not containing any express agreement by the lessee to pay the costs. A bill was delivered by the lessor's solicitor, and an order for taxation was obtained under the third-party clause. Mr. Justice

(16) 22 L. J. Ch. 833.
(17) 59 L. J. Ch. 174; 44 Ch. D. 524.
(18) 9 Beav. 117.

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Chitty held that the scale fee should apply, but that as the scale fee included the costs of a counterpart lease, which the lessee was not liable to pay, a deduction ought to be made from the scale fee. Mr. Justice Chitty deals with this point as follows: "One other point remains, viz., that this is a third-party taxation, and the general rule is that a third party stands, as between himself and the solicitor whose bill he is taxing, in the position of the party chargeable. But that rule does not prevent the Taxing Master from considering the question of the liability of the third party. This has been decided, and, by way of illustration, I may refer to *Brown, In re*.[5] The trustee in that case was liable, as between himself and the solicitor who was defending his bill as against the *cestuis que trust*, for the items impeached; but Lord Romilly held that those items were properly disallowed by the Taxing Master because they could not have been charged as against the trust estate. The solicitor had pointed out to the trustee, as was his duty, that he would not be allowed to charge; but still the trustee insisted upon the work being done, and yet these items were struck out from the bill when it was taxed by a third party. Now it is part of the general law (though it is unnecessary to go into the authorities) that in the case of lessor and lessee, the lessee is not bound to pay for the counterpart, and the scale fee prescribed by Schedule I., Part II., includes the counterpart; the words in Schedule I. are 'Lessor's solicitor for preparing, settling, and completing lease and the counterpart,' and the decisions upon these rules generally shew, that the business contemplated by the rules must be wholly performed by the solicitor in the transaction, in order to make the scale remuneration apply. There was a counterpart in this case, and it is plain that the landlord was liable to his solicitor to pay for this counterpart; the Taxing Master in applying the scale, as he did, according to the amount of the rent, has necessarily included the charge for the counterpart, in respect of which there is no liability on the part of the tenant to the landlord; consequently, it was argued for the tenant, that the scale could not apply on this third party taxation. In my opinion that argument cannot be sustained, for these rules having—as has been well explained by Lord Halsbury in the case of *Savery* v. *Enfield Local Board*[12]—been made for the purpose of preventing disputes on taxation, and providing some guidance as to the mode in which charges should be made, prescribed and fixed a gross sum for each document prepared, which could be known beforehand to any person able to employ a solicitor; and I cannot conceive it to have been the intention of the framers of the rules that whilst the landlord had to pay, say a minimum of 5*l.* to his solicitor, still the solicitor might be entitled to charge 10*l.* or 20*l.* on the non-scale system as against the lessee. My opinion is that this contention cannot prevail, and I think the Taxing Master was right in taxing this bill in the manner he has done, as being the bill that the landlord has to pay. There is a novelty in the point about the counterpart, and I think that the only solution of this supposed difficulty that is reasonable and right is this—that the Taxing Master should tax, as he has done this bill, as he would have taxed it as between the solicitor and landlord, viz., on the scale footing, and then seeing that the tenant was only liable for the preparing, settling, and completing the lease, he should have made a reasonable deduction from the scale in respect of the counterpart. The parties here have been very reasonable, and they do not require me to send the bill back to the Taxing Master upon this small point: they have agreed that 5*s.* for the stamp duty on the counterpart, and 18*s.* in respect of the proper costs in relation to the counterpart, as distinct from the lease itself, should be deducted from the amount which the third party taxing has on the present taxation to pay."

Negus, In re,[4] has been followed by the Taxing Master somewhat unwillingly so far as the counterpart is concerned. But every word of the judgment seems to me to apply equally to the fees of the mining expert which he has allowed. The governing idea of Mr. Justice Chitty's judgment is that even in a third-party taxation the Court is bound to look at the

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GRAY, IN RE.

nature of the items, and to consider whether, apart from the order, the applicant is under any liability to pay them. In other words, although the solicitor may put in one bill, as against his own client, a series of items some of which may go beyond the liability of the third party, the third party does not, by obtaining an order to tax, render himself liable to pay the whole bill. With respect to matters falling within his liability under a contract express or implied, he cannot dispute the amount properly payable as between the solicitor and his own client, but in other respects his liability is not increased by obtaining a third-party order to tax. In the present case the petition only alleged that the solicitors were employed by Mr. Bassett, as lessor, "to prepare a lease," and the submission to pay contained in the order must be limited to what properly results from such employment.

I have carefully considered several cases which have arisen under express contracts by the lessee to pay the lessor's costs and the application of the scale to such circumstances. These cases are *Field, In re*,[10] *Emanuel and Simmonds, In re*,[11] *Savery* v. *Enfield Local Board*,[12] and *Horn and Francis, In re* [1896] [19]; but I have not derived much help from them. They only decided what business was covered by the scale fee. They did not raise the question which presents itself in the case with which I have to deal.

The result is that the bill must be referred back to the Taxing Master to review his taxation in respect of the scheduled items. The respondents must pay the costs of the application.

Solicitors—Robbins, Billing & Co., agents for Daniell & Thomas, Camborne, for applicants; Bell, Brodrick & Gray, for respondents.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

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(19) 66 L. J. Ch. 15; [1896] 2 Ch. 797.

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
ROMER, L.J.
1900.
Dec. 10, 11.

EWART *v.* FRYER.

Landlord and Tenant — Forfeiture — Lease to a Company—Condition for Re-entry on Liquidation—Voluntary Winding-up of Solvent Company—Underlessee—Terms of Relief — Rent — Public-house — Conveyancing and Law of Property Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 2, *and* 6 (1)—*Conveyancing and Law of Property Act*, 1892 (55 *&* 56 *Vict. c.* 13), *s.* 2, *sub-s.* 2, *and s.* 4.

Where an underlessee applies to the Court under section 4 *of the Conveyancing Act*, 1892, *for relief in consequence of the forfeiture of the lease of his immediate lessor by the original lessor, the Court has discretion to vest the property in him for a new term upon such conditions and at such a rent as it shall, having regard to all the circumstances of the case, think just as between the parties, and the lessor must be treated as having not only his original rights as lessor but, by virtue of the forfeiture, the rights of the lessee also.*

A lease of a public-house was granted to a brewery company for thirty years at a rent of 300*l.*, *with a proviso for re-entry if the lessees or their assigns, being a company, should enter into liquidation, whether compulsory or voluntary. The company granted an underlease of the premises at a rent of* 800*l.*, *reducible to* 300*l. if the underlessee bought his beer from them. The company went into voluntary liquidation for the purpose of amalgamation with two other companies. It was solvent at the time. The lessors brought an action to recover possession of the premises on the ground of the forfeiture caused by the voluntary liquidation. The underlessee claimed relief under section* 4 *of the Conveyancing Act*, 1892:— Held, *on the authority of* Horsey Estate, Lim. *v.* Steiger (68 L. J. Q.B. 743; [1899] 2 Q.B. 79), *that the voluntary liquidation was a cause of forfeiture, that the underlessee was entitled to a new lease of the premises, and there must be an enquiry as to the rent at which the new lease ought to be granted, bearing in mind that the house could no longer be a tied house.*

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EWART *v.* FRYER, App.

Appeal from a decision of Kekewich, J.

The action was brought by the trustees of the will of C. H. Ewart, who died on December 30, 1896, to recover possession of a public-house held under a lease granted by the said C. H. Ewart on the ground of forfeiture.

The lease was dated October 26, 1896, and thereby C. H. Ewart demised the public-house to Combe & Co., Lim., a brewery company, for thirty years from December 25, 1895, at a yearly rent of 300*l.*; and there was an express condition that if and whenever (*inter alia*) the lessees or their assigns, being a company, should enter into liquidation, whether compulsory or voluntary, then it should be lawful for the lessor, his heirs and assigns, to re-enter upon the demised premises.

By an underlease also dated October 26, 1896, Combe & Co., in consideration of a premium of 8,000*l.* paid to them by F. J. Fryer, demised the public-house to Fryer for 29¼ years from June 24, 1896, at a yearly rent of 800*l.*, reducible to 300*l.* in the event of the underlessee buying his ale and stout from the company. On the same date Fryer mortgaged the premises by sub-demise to the company to secure 8,400*l.* and further advances up to 8,700*l.*, and entered into a covenant to repay the debt. Combe & Co., with a view to amalgamation with two other brewery companies, passed resolutions on December 29, 1898, for a voluntary liquidation, and these resolutions were duly confirmed on January 13, 1899. Combe & Co. were perfectly solvent at the time, as were also the other two companies with which it amalgamated. The resolutions were duly registered on January 14, and advertised in the *London Gazette* on January 17, 1899.

The plaintiffs alleged that they first became aware of these resolutions on June 20, 1899, and on August 12, 1899, they demanded delivery up of the public-house in pursuance of the proviso for re-entry in the lease on the lessees entering into liquidation. This being refused, they, on August 15, 1899, brought this action against Fryer and the amalgamated company. Fryer was in possession of the premises. Both the defendants raised the defences that the plaintiffs had received rent under the lease from the defendant company—namely, on January 5 and March 30, 1899, after they had notice of the liquidation; and also that the plaintiffs had never served upon Combe & Co., Lim., nor upon the defendant company, any notice as required by section 14 of the Conveyancing and Law of Property Act, 1881. The defendant Fryer counterclaimed for a declaration that, if the plaintiffs were entitled to recover possession against the defendant company, he was entitled to relief under section 4 of the Conveyancing and Law of Property Act, 1892, and for an order vesting in him the demised premises for the residue of the term of the underlease upon such conditions as the Court might think fit.

Fryer had always paid rent at the rate of 300*l.* a year.

Kekewich, J., held that, having regard to *Horsey Estate, Lim.* v. *Steiger* [1899],[1] it was impossible for him to say that the voluntary liquidation of Combe & Co. did not work a forfeiture of the lease; and there was no evidence of waiver by the receipt of rent by the plaintiffs after the amalgamation or otherwise, and the original lease and underlease were therefore gone. As regards the relief to the underlessee, the remedy was a new one—the term of the underlessee was not revived, but a new estate vested in him. Under section 4 of the Conveyancing Act, 1892,[2] the Court could vest that estate

(1) 68 L. J. Q.B. 743; [1899] 2 Q.B. 79.

(2) Conveyancing and Law of Property Act, 1892, s. 4: "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for

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upon such conditions as the Court should under the circumstances think fit, and it had a very large discretion in the matter. The lessor had to be considered as well as the sub-lessee, and he was of opinion that the Judge was at liberty to say that the rent ought to be varied, if that was right. It might be unfair to the lessors under the existing circumstances of this case to grant the sub-lessee a lease on the old terms. He declared that the plaintiffs were entitled to recover possession of the public-house, and ordered that the premises should vest in Fryer for the residue of the term of the original sub-lease at a rent to be settled by the Judge in chambers, and having regard to all the circumstances of the case, including the absence of a covenant making the public-house a tied house. And he ordered that Fryer should execute a deed containing covenants and provisions corresponding with those in the original lease, to be settled by the Judge in case the parties differed.

The defendants appealed.

Warmington, Q.C., and *R. Merivale*, for the appellant Fryer.—Having regard to *Horsey Estate, Lim* v. *Steiger*,[1] we cannot contend that the lease to Combe & Co. did not become forfeited by the voluntary winding-up. But we say the forfeiture was waived by the receipt of rent after notice of the liquidation in the *London Gazette*—Companies (Winding-up) Rules, 1890, rule 41; *Buckley on Companies Acts* (7th ed.), p. 785. The purpose of the advertisement is to inform the whole world of the liquidation. The winding-up order, when advertised, has been held to be a notice of discharge to servants of a company—*General Rolling-Stock Co., In re; Chapman's Case* [1866].[3] Assuming that there has been no waiver, and that the lessees cannot avail themselves of any want of notice, the underlessee is entitled to relief under section 4 of the Conveyancing Act, 1892. He is entitled to such relief as the Court may under the circumstances think fit. Similar words were used in sub-section 2 of section 14 of the Conveyancing Act, 1881, but the Court can give wider relief to the underlessee under the Act of 1892 than it could give to the lessee under the Act of 1881—*Chomeley School, Wardens of* v. *Sewell* [1894][4] and *Imray* v. *Oakshette* [1897].[5] The compensation is attached to the forfeiture. When the lessee comes for relief the rent cannot be altered.

The 8,000*l.* premium is in effect a payment made for the grant of the underlease. That should be taken into consideration. The section really provides for the indemnity of a person whose rights are being taken away by the forfeiture. It must be looked at from that point of view.

Renshaw, Q.C., and *J. Davenport*, for the defendant company.—On the question of forfeiture, so long as the decision in *Horsey Estate, Lim.* v. *Steiger*[1] stands it may be against the company. The facts there were not quite the same as in the present case. There the winding-up was for the purpose of reconstruction.

[ROMER, L.J., referred to *Oriental Bank Corporation, In re* [1884].[6]]

There is another question in which the company is interested—namely, whether proper notice was given under sub-section 1 of section 14 of the Conveyancing Act, 1881, as qualified by sub-section 6, clause 1. Under that sub-section notice was not necessary in the case of a condition for forfeiture on the bankruptcy of the lessee, and under section 2, sub-section 15, bankruptcy included liquidation by arrangement; but by sub-section 2 of section 2 of the Conveyancing Act, 1892, forfeiture for bankruptcy or liquidation is for one year from the date of the bankruptcy or liquidation taken out of the cases in which notice is unnecessary—*Horsey Estate, Lim.* v. *Steiger*.[1] Notice in this case ought to have been given in accordance with sub-section 1 of section 14 of the Act of 1881. As a fact, no such notice was given in this case, but merely a notice to deliver up possession.

Warrington, Q.C., and *T. T. Methold*, for the plaintiffs.—The plaintiffs take their stand on *Horsey Estate, Lim.* v. *Steiger*,[1] and contend that there has been a forfeiture, and that the lease and underlease have gone.

any longer term than he had under his original sub-lease."

(3) 35 Beav. 07 L. R 1 Eq. 346.

(4) 63 L. J. Q.B. 820; [1894] 2 Q.B. 906.
(5) 66 L. J. Q.B. 544; [1897] 2 Q.B. 218.
(6) 54 L. J. Ch. 322; 28 Ch. D. 634.

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There is no case of waiver. There is no evidence that knowledge of the fact of the liquidation ever came home to the plaintiffs.

Under section 4 of the Act of 1892 the Court has a discretion to vest the estate in the person asking for it upon such terms as the Court thinks fit. There is a difference between that section and section 14 of the Act of 1881 in that respect. Section 14, in sub-section 2, deals with an application for relief against forfeiture —the relief is that the lease remains. Section 4 of the Act of 1892 deals with the case of a person who has no direct relation with the lessor, no privity of estate with him. The only connection between them is that he happens to hold the land from the lessee. The application is not for relief against forfeiture. The Court, in effect, in these cases makes a new lease for the parties, and can exercise its discretion. It is not bound to vest the property in the underlessee for the whole term of the underlease.

Warmington, Q.C., replied.

RIGBY, L.J.—In this case the question arises whether the compensation which can under section 4 of the Conveyancing Act, 1892, be given to an underlessee ought to be given on the principle decided by Mr. Justice Kekewich, or on some narrower principle. I think we are all agreed on—in fact, we have not called upon the respondents to argue—the question as to waiver. We do not think there was any waiver that could be established against the respondents. The real dispute was whether the underlessee could gain an advantage out of the forfeiture. He covenanted to pay a rent of 800*l.* a year if the house was not a tied house, and 300*l.* a year if it was a tied house, he getting his beer from Combe & Co. The lease to Combe & Co. has altogether gone out of existence, and there can be no question now as to the beer being taken from their brewery; and, of course, if the underlessee can nevertheless get the property at a mere rent of 300*l.* a year he would be better off by 500*l.* a year than he has been. I do not think that is right. I think Mr. Justice Kekewich was right in saying that care must be taken so to fix the rent that he does not get that advantage. I think that the decision arrived at is right, and that the appeal ought to be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I agree. [His Lordship referred to the facts, and continued:] It has been held—and nobody disputes but that it was rightly held—that the voluntary liquidation constituted a forfeiture. It constituted a forfeiture which Mr. Ewart's representatives have enforced. It seems to me that great stress ought to be put upon that fact, because that fact, as far as I am concerned, is the key of the judgment that I am going to deliver. Under these circumstances the underlessee, whose interest will, of course, if nothing is done, be destroyed by the forfeiture of the lease of his lessors, comes under section 4 of the Act of 1892 to do what I think is aptly and properly described as applying for relief; and the question is: What are the powers of the Court in respect of that relief, and what are the conditions upon which relief ought to be granted? The practical way in which the question arises is this: Is the underlessee entitled to have a lease vested in him at a rental of 300*l.* a year, or is he, in some way or other, to pay either the 800*l.* a year, or at all events some figure larger than 300*l.* a year?

In my judgment, section 4 of the Conveyancing Act, 1892, was intended to protect a vested interest which the Legislature thought ought to be protected. At law there is no privity between the underlessee and the original lessor. The object of the statute was that protection should be given to the underlessee. The Conveyancing Act, 1881, had given protection to the lessee; but, it being held that that section was not wide enough to cover the case of an underlessee, it became necessary to pass the Act of 1892, so that underlessees also might have protection. At common law underlessees were always recognised to this extent—that if there were a lease and an underlease by the lessee, no surrender by the lessee to the lessor, or arrangement made between the lessee and the lessor, was allowed to defeat the interest or estate of the underlessee;

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and I think that this statute only carries that principle a little further. It was intended that forfeiture by the lessee acted upon by the lessor was not to defeat the right of the underlessee. It is to be observed that under section 4 of the Conveyancing Act, 1892, the Court has power to make an order vesting not the lease, but the property comprised in the lease, or any part thereof, in an underlessee, upon such conditions as to the execution of any deed or other document—there is the power to order the landlord to make a new lease—payment of rent (which may mean, probably, but I do not say necessarily, and we need not decide it, the payment of the intervening rent or mesne profits), costs, expenses, damages, compensation, giving security, or otherwise, as the Court, in the circumstances of each case, shall think fit; but the underlessee cannot require a lease to be granted to him for any longer term than he had under his original sub-lease. Those are the words which define the conditions upon which the Court may give relief to a person entitled as underlessee. In my judgment, the words do not entitle the Court to say, "We think that this property in the market is worth so much a year, and therefore we direct that a lease shall be granted at so much." I do not think that that was the intention of the statute; but we have not got that question to deal with, because, there having been a forfeiture of the lease, the lessors at the present moment must be treated as having vested in them not only their own rights as lessors, but also the rights of the lessees under the lease which has been forfeited; and it seems to me to be right and proper that the Court, in fixing what rent is to be paid for the future by the underlessee, should bear in mind that it is dealing on the one hand with the rights of the underlessee, and on the other hand with persons who are not only the original lessors, but who, by virtue of the forfeiture which they have enforced against the lessees, are entitled to be treated as having vested in them all the rights of the lessees. Under those circumstances. it seems to me that it was right for Mr. Justice Kekewich to make the order which he did. I am not saying what may be the exact circumstances which will have to be taken into consideration upon the enquiry, but, according to my view, whenever an enquiry of this kind is made it ought to be upon the basis that there is a lessee who is liable to conform to the terms of the underlease, and a lessor who now has the right to enforce as far as possible the rights of the original lessee. In this particular case that cannot be done, because there is this strange state of things: there is a rent of 800*l.* a year reducible to 300*l.* a year if the underlessee takes all his beer from a particular firm; and under those particular circumstances it does seem that there must be some enquiry to ascertain what is the fair rent at which the underlessee ought now to hold the premises. I think that in this particular instance the order is right; but, apart from the difficulties of this case, I should have said generally that, if a forfeiture has been enforced against the lessee, the lessor ought to be treated as a person entitled to enforce the rights of the lessee.

ROMER, L.J.—Having regard to the decision in *Horsey Estate, Lim.* v. *Steiger*,[1] the only point of substance which is now open to this Court on this appeal is the question as to the terms upon which the rent of the new lease that has to be created as between the lessors and the underlessee should be fixed. I think that in this case Mr. Justice Kekewich has come to a right conclusion, but as there is a question of principle involved as to the way in which section 4 of the Conveyancing Act, 1892, should be dealt with, I think that it will be right that I should add the following remarks to what has already fallen from my brethren.

In the first place, it is to be borne in mind that all the rights of the company—the intermediate lessors—in the demised premises have gone. They have ceased to exist; and I am dealing in my general remarks with a case of that kind—a case where a right of forfeiture by the original lessor as against the intermediate lessor has been upheld by the Court, and determined in favour of the original lessor. The effect of the plaintiffs having

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succeeded in their action of forfeiture as against the company has been that, subject to any claims which the underlessee may make under section 4 of the Conveyancing Act, 1892, all the rights in the demised premises belong to the plaintiffs, the freeholders. We start with that assumption, and that view is clearly a correct one. The underlessee has no right apart from what is given to him by section 4, and when he applies to the Court under that section 4 he does so at a time when the plaintiffs have to be regarded as the absolute freeholders, and when any rights which might be said to have existed as between the company and Fryer in favour of the company, if they could be said to exist at all, belong really to the plaintiffs. Section 4 of the Act of 1892, in my opinion, ought not to be cut down or unduly hampered by giving restricted meanings to each phrase that is used in it. It is to my mind purposely framed generally, so as to give the utmost liberty to the Court to do what is just as between the parties. I think that the section gives the most ample discretion to the Court to say upon what conditions and terms a lease should be vested in an underlessee, and does this absolutely unfettered by any limitation, except that contained in the words at the end of the section. That section did not, to my mind, of necessity contemplate that the terms of the original lease should be kept alive, either all or any of them, though, no doubt, speaking generally, regard would be had to them, and most of them probably would be kept alive in the new lease that had to be fixed as between the original lessor and the underlessee; but no special term is of necessity to be imported into the new lease. The section is perfectly general. For example, the Court is not bound to give to the lessee the whole of the term of his underlease. Probably it generally would do so, but it is not bound of necessity to do it. It is only bound to have regard to the words at the end of the section, and not to give him a longer term than the term of his underlease. The terms of the lease as to the covenants and so forth are, in my opinion, left open to be dealt with according to what is thought just by the Court regarding all the circumstances. The section provides for the execution of any deed or other document which the Court in the circumstances of each case shall think fit, and further provides that the Court may fix such terms as it thinks fit as to "payment of rent, costs, expenses, damages, compensation, giving security, or otherwise." Does that of necessity say what rent shall be the rent of the new lease? In my opinion, no. It does not follow that it must of necessity be either the rent fixed by the original lease or the rent fixed by the sub-lease. It is to be such a rent as will do justice between the parties under the circumstances. For example, it would clearly be inequitable in such a case as I have stated to say that the rent must of necessity be the rent of the lease. Take the case where the lease was at a rent of 50*l.* and the underlease at a rent of 150*l.*—would it be equitable that, because of the forfeiture of the original lease at the instance of the original lessor, and the abolition of the original rent, the underlessee at a rent of 150*l.* should be suddenly able to say, "Now I ought to have the rent in my lease reduced from 150*l.* to 50*l.*"? To my mind, clearly not. It must not be forgotten, as I have already said, that when the underlessee comes to the Court for assistance he does it on the footing that the original lessee's rights are gone in favour of the original lessor. Neither would it be fair in every case to fix the rent of the new lease by reference to the rent of the underlease. Take a case where the original lease was at a rent of 150*l.* and the underlease at a rent of 50*l.*: clearly it would be unfair in that case to fix the rent by reference to the rent of the underlease. The landlord would not be obliged to give up his rent of 150*l.* in exchange for the lesser rent of 50*l.* The Legislature has taken care not to hamper the Court. It has taken care to give to the Court the fullest powers of adjusting matters, and doing what is right when the whole circumstances of the case are regarded. Those circumstances would involve the terms of the original lease, the terms of the underlease, the circumstances of the forfeiture, what results may have followed the forfeiture, and the position

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of the parties generally. If the underlessee is by his new lease in substantially no worse a position than that which he occupied before the forfeiture he certainly cannot complain. Take the present case. One cannot, in fixing the rent of the new lease, simply rely upon either the rent of the original lease or the rent of the underlease. One cannot take the rent of the underlease, 800*l.*, absolutely, because that, to my mind, would be unfair to the underlessee; neither could one take it as 300*l.*, because, in my opinion, that would be unfair to the lessors. If the rent were fixed at 300*l.*, that would be really taking away some of the property of the landlord and giving it for no consideration to the underlessee. The underlessee at a rent fixed at 300*l.* would be getting a pecuniary advantage by reason of the forfeiture of the original lease which he has, in my opinion, no right to. It is a question for the discretion of the Court looking at all the circumstances of the case, and I think the Judge in the Court below has exercised his discretion fairly and properly. The proper thing would be to say, Let such a rent be fixed as, looking at all the circumstances of the case, would be the proper rent for this lease, including the terms of the underlease, but bearing in mind that the house is no longer a tied house, and cannot be made a tied house by the terms of the new lease. That is a condition of affairs which cannot be helped now, and must be grappled with.

I think, looking at the whole circumstances of this case, the Judge in the Court below has exercised a fair and right discretion as between the original lessors and the underlessee, and that this appeal fails.

Appeal dismissed.

Solicitors—Bompas, Bischoff, Dodgson, Coxe & Bompas, for appellants; Bolton & Co., for respondents.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

BYRNE, J. 1900. Nov. 23, 24. Dec. 11.

TURNER *v.* SMITH.

Mortgage—Transfer—State of Account between Mortgagor and Mortgagee—Negligence—Contemporaneous Deeds.

In 1892 *the plaintiff, a tenant for life of freehold property, which was subject to a mortgage for* 1,500*l.*, *put her solicitor in funds for the purpose of paying off the mortgage. The solicitor misappropriated the money and concealed the fraud by continuing to pay interest. The plaintiff did not enquire respecting a reconveyance or receipt for the money nor require the delivery of the deeds. The defendant and his co-trustee (who died before action brought) were also clients of the same solicitor, and on October* 4, 1895, *forwarded to him a cheque, which the solicitor paid into his private account on the following day. On October* 4, 1897, *the solicitor took a transfer of the mortgage debt and security to himself, drawing on his firm's account for the consideration-money. On the following day, October* 5, 1897, *he transferred the mortgage debt and security to the defendant and his co-trustee. It did not appear that the defendant and his co-trustee had bargained with the solicitor for any particular investment for the proceeds of their cheque:*—Held, *that the two deeds of October* 4 *and* 5, 1897, *could not be regarded as part of one transaction; that the solicitor as mortgagee could not have set up the mortgage against the plaintiff, and the defendant as transferee took subject to the state of account between the solicitor and the plaintiff, and was in no better position. A reconveyance of the property was accordingly directed upon the footing that the defendant was a satisfied mortgagee.*

On December 23, 1879, the plaintiff being then owner in fee-simple of No. 1 Queensborough Terrace, Bayswater, by a memorandum in writing charged the property with repayment to James Ingram, Cartmell Harrison, and James Croft of 1,000*l.* and interest at 4½ per cent., and by another memorandum in writing dated October 26, 1880, she further charged the

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property to the same persons with repayment of 500*l.* and interest at the same rate. By deed of settlement dated June 11, 1881, made on the marriage of the plaintiff with the Rev. Thomas Isaac Guest, the property was conveyed subject to the memoranda of charge to uses under which the plaintiff became tenant for life in possession. By deed dated November 20, 1886, made between Messrs. Ingram, Harrison, and Croft of the first part, the Rev. T. I. Guest and the plaintiff (then his wife) of the second part, Cartmell Harrison of the third part, and Messrs. Freeman of the fourth part, the mortgage debt of 1,500*l.* and interest was transferred, and the property was conveyed to Messrs. Freeman by way of mortgage to secure the same debt and interest.

By deed dated December 23, 1886, the mortgage was transferred by Messrs. Freeman to Messrs. Maul, and by them to William Negus, the last transfer being dated January 30, 1891.

In the months of February and April, 1892, while the mortgage was still vested in Negus, the plaintiff put Cartmell Harrison, who was acting as her solicitor, in funds for the purpose of paying off the mortgage, which he undertook to do. In breach of his undertaking he misappropriated the money, and maintained the fraud by continuing to pay interest on the mortgage as it became due to the mortgagee for the time being.

No enquiry was made in 1892 or subsequently by the plaintiff for any reconveyance or receipt by the mortgagee nor respecting the deeds relating to the property. She left the whole matter in the hands of Harrison, and as she neither paid any further interest nor was charged in account with any in respect of this mortgage by Harrison, she never suspected the fraud.

The mortgage debt and security were transferred on December 8, 1893, from Negus to Mary Le Neve Foster.

In January, 1896, while the mortgage was still vested in Mary Le Neve Foster, Negus, who was acting as her solicitor, was pressing Harrison for payment off of the mortgage debt. In the event, on February 20, 1896, Mary Le Neve Foster transferred the mortgage debt and security to Thomas James Hamp, another client of Negus.

All the transfers subsequent to that of December 23, 1886, to the Messrs. Freeman were effected without any reference to the mortgagor, the plaintiff. She was not a party to any of the deeds, no notice of them was given to her, nor were any enquiries made of her as to the state of account or otherwise.

At the end of May, or on June 1, 1897, Negus probably gave notice on behalf of Hamp to Harrison, calling in the mortgage; for on June 1, 1897, Harrison wrote to Negus: "I return the notice. You do not say when the money is to be paid off, I presume in six months."

Harrison then appears to have represented to Negus that he was arranging a transfer, as on September 2, 1897, he wrote to Negus: "Hamp.—I return you this draft transfer approved. The money, however, will not be in for some little time."

It did not appear whether the name of the transferee was then inserted in the draft transfer referred to in this letter.

About that time Harrison was negotiating with one J. W. Smith to become transferee of some mortgage, although there was no evidence to shew that he identified the particular mortgage of which he intended to obtain a transfer.

On September 20, 1897, he wrote to Negus to this effect: "We shall be prepared to complete the transfer on the 1st October."

On October 1, 1897, Harrison again wrote to Negus:

"Queensborough Terrace.

"For some reason or other (I do not know what) my client did not send his cheque as he promised to do to-day but I have written to him to ask him to see me on Monday morning when I shall no doubt get it and complete."

And on the same day he wrote to J. W. Smith:

"I am disappointed at not hearing from you or seeing you. I shall be coming up on Monday and will come by the 9.53 train so as to have the opportunity of seeing you."

Mr. J. W. Smith forwarded to Harrison 1,500*l.* on or before October 4, 1897, as

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the latter acknowledged receipt of a cheque for the amount on that day, and the cheque was duly paid in to Harrison's private account at Drummonds' on the following day, October 5.

By deed of transfer dated October 4, 1897, Hamp transferred the mortgage debt and property to Harrison, who drew on his firm's account at Hoares' Bank, for the consideration-money. On the following day, October 5, 1897, Harrison transferred to J. W. Smith and the defendant, who were trustees. Upon the death of J. W. Smith, the whole interest became vested in the defendant as the survivor.

The deeds were handed over by Harrison to the Messrs. Smith, and as Harrison continued to pay interest to them until April, 1899, their suspicions were not aroused, and no question was raised until December, 1899, when application was made to the plaintiff for payment of the half-year's interest which became due in the October previous.

The action was then brought to establish the right of the plaintiff as mortgagor to have a reconveyance and delivery up of the title-deeds upon payment of costs of reconveyance.

Norton, *Q.C.*, and *G. Rashleigh*, for the plaintiff.—By taking a transfer to himself the force of the mortgage was spent, and Harrison became a trustee for the plaintiff. If the defendant had taken a transfer direct from Hamp, the plaintiff's action would fail, as the misappropriation by her agent could not affect the prior mortgagee or any subsequent transferee. The transferee takes subject to the state of account between the mortgagor and mortgagee—*Matthews* v. *Wallwyn* [1798],[1] *Williams* v. *Sorrell* [1799],[2] *Norrish* v. *Marshall* [1821],[3] and *Southampton's* (*Lord*) *Estate, In re*; *Allen* v. *Southampton* (*Lord*) [1880].[4] These cases are recognised by Cozens-Hardy, J., in *Dixon* v. *Winch* [1899],[5] and he there admits that the cases are against his view respecting the negligence of a mortgagor not requiring the delivery of the deeds. The transferee could not have been defrauded had he enquired of the mortgagor how the accounts stood between her and her alleged mortgagee. *Dixon* v. *Winch* [5] is distinguishable in that there part only of the mortgaged property was sold, which would account for the retention of the deeds. *Gordon* v. *James* [1885] [6] is distinguishable. There the plaintiffs executed a deed of transfer, in reliance on which the defendant did nothing until the time for action had passed away. Here the plaintiff has been merely passive.

Rowden, *Q.C.*, and *Philpotts*, for the defendant.—There was but one transaction, although Harrison was an intermediate transferee—*Harman* v. *Richards* [1852] [7] and *Thurston* v. *Nottingham Permanent Benefit Building Society* [1900].[8] The case must accordingly be decided on the same footing as if Hamp had transferred direct to the defendant. With the defendant's money paid to him for the purpose of investment by taking a transfer of the mortgage, Harrison could not deny the defendant's right to the mortgage, and he took the transfer as a trustee for the defendant. He fulfilled the duty which he owed by transferring the legal estate to the defendant and his co-trustee, and there is no suggestion of any overriding equity which entitles the plaintiff to call upon the Court to displace the legal estate.

But the plaintiff is out of Court by reason of her own negligence. By not requiring a transfer to herself, she put the means of committing a fraud into Harrison's hands, and the case is governed by *Gordon* v. *James*.[6] By permitting him to retain possession of the deeds, she enabled him to give colour to a paper title. That again is negligence—*Northern Counties of England Fire Insurance Co.* v. *Whipp* [1884].[9] The observations in *Dixon* v. *Winch* [5] support the defendant's case. Both *Norrish* v. *Marshall* [3] and *Southampton's* (*Lord*) *Estate, In re*,[4] were cases of equitable mortgages.

The defendant will be allowed to retain the deeds—*Heath* v. *Crealock* [1874].[10]

(1) 4 Ves. 118.
(2) 4 Ves. 389.
(3) 5 Madd. 475.
(4) 50 L. J. Ch. 218; 16 Ch. D. 178.
(5) 68 L. J. Ch. 572; affirmed, 69 L. J. Ch. 465; [1900] 1 Ch. 756.
(6) 30 Ch. D. 249.
(7) 22 L. J. Ch. 1066; 10 Hare, 81.
(8) [1901] 1 Ch. 88.
(9) 53 L. J. Ch. 629; 26 Ch. D. 482.
(10) 44 L. J. Ch. 157; L. R. 10 Ch. 22.

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There is a subsidiary point. As a matter of fact there was a small balance due to Harrison from the plaintiff, and the defendant is entitled to stand in his shoes as to that.

Norton, Q.C., in reply.—The defendant has offered no evidence, and it must be assumed that he did not advance his money in reliance upon any representation that he was to have this particular security, and further in point of fact his money did not go to pay off this mortgage debt. That fact distinguishes the present case from *Thurston* v. *Nottingham Permanent Benefit Building Society*,[8] which introduces no new law—see *Bird* v. *Philpott* [1900].[11] The plaintiff is entitled to the legal estate upon discharging what is due to the defendant; and as he has not acquired the mortgage debt, he must reconvey upon payment of his costs, charges, and expenses.

Cur. adv. vult.

BYRNE, J., after stating the facts as above set out, continued: The real question is who of two innocent parties is to suffer for the frauds of Cartmell Harrison. The plaintiff claims that upon the transfer to Cartmell Harrison by Hamp the mortgage debt was discharged, and that by taking a transfer without her privity the transferees, Messrs. Smith, became bound by the state of account as it then existed between their transferor and herself, and that therefore the defendant cannot claim to hold the property as against the plaintiff. On the other hand, the defendant contends that the plaintiff by her neglect in not seeing that she obtained a reconveyance or receipt for the mortgage-money, and in not requiring possession of the deeds, put it into the power of Harrison to commit the fraud, and to give colour to the false representations which were made upon the transfer to Messrs. Smith as to the subsistence of the mortgage debt. He further contends that the two transfers of October 4 and 5, 1897, must be looked upon as parts of one transaction, and that the transfer to Harrison ought not to be regarded as representing anything more than part of the machinery for transferring the debt and security from Hamp to Messrs. Smith, and not as representing any real transaction.

Up to the date of the transfer to Cartmell Harrison, the plaintiff admits that as between herself and the subsequent transferees there was a valid and subsisting debt and mortgage security, inasmuch as no part of the debt had been paid, although Harrison, as the plaintiff's agent, had received the money for the express purpose and with the obligation of paying off the then mortgagee in the year 1892.

The effect in law of taking a transfer of a mortgage without the privity of the mortgagor has been so recently summed up by Mr. Justice Cozens-Hardy in the case of *Dixon* v. *Winch*,[5] that I cannot do better than adopt his words: "It is well settled that, where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer —*Matthews* v. *Wallwyn*.[1] It is also well settled that payments of interest or payments on account of capital made by the mortgagor to the mortgagee after, but without knowledge of, a transfer must, in the absence of collusion, be allowed to the mortgagor as against the transferee—*Williams* v. *Sorrell*.[2] This doctrine has been extended to the case where the whole mortgage debt is, under similar circumstances, paid off—see *Norrish* v. *Marshall*[3] and *Southampton's (Lord) Estate, In re*.[4]" I need not refer to the expression of opinion which follows, because the learned Judge recognises the law as stated; nor need I go further into the decision in that case either in the Court of first instance or in the Court of Appeal, as it turned on very special facts which differ from those in the present case. Starting with the statement of the law as above, it appears to me that, assuming the transfer to Harrison to have operated as an assignment and conveyance to him in his personal capacity, and not in the capacity of trustee for Smith, the result must follow that the mortgage debt thereupon immediately became discharged, and that he held the property as trustee for the plaintiff; the principle being, as stated by Sir John Leach in *Norrish* v. *Marshall*,[3] "that as against an assignee without

(11) 69 L. J. Ch. 487; [1900] 1 Ch. 822.

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notice"—meaning without notice to the mortgagor—"the mortgagor has the same rights as he has against the mortgagee, and whatever he can claim in the way of set-off, or mutual credit, as against the mortgagee, he can claim equally against the assignee."

There is no evidence that Harrison had agreed to invest Smith's money in a particular mortgage; and although it is not very easy to understand why Harrison took the transfer to himself, only to retransfer it on the following day, the fact remains that he did take a transfer to himself. It may be that, being uncertain whether he should get the money from Smith, he obtained the transfer to himself before receiving the cheque. He certainly did so before the cheque was credited to him. The money paid by Harrison to Negus was paid by cheque drawn on the account of the firm of Ingram, Harrison & Ingram, at Messrs. Hoares', and that cheque was debited to the firm on October 5, and I am unable to hold that at the time of the transfer to himself he had constituted himself a trustee of the particular security for the Messrs. Smith. I accordingly decide that the latter having taken the transfer from Harrison without the privity of the mortgagor, the defendant can only hold it against the latter subject to the state of account between Harrison and the mortgagor. As between Harrison and the mortgagor the mortgage debt was non-existent. It appears to me that the mortgagor never lost her right to redeem, and that directly her agent, who had received the amount to pay off the mortgage, became himself the transferee of the mortgage, the debt was extinguished, and no transferee from him could treat the debt as a subsisting charge upon the property.

In the result I think the plaintiff is entitled to succeed and to have a reconveyance upon the terms of paying the costs of the deed.

Solicitors — Beachcroft, Thompson, Hay & Ledward, for plaintiff; R. T. Harding, agent for H. W. Chandler, Basingstoke, for defendant.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

KEKEWICH, J. 1900. Dec. 12. } ATT.-GEN. *v.* COLE.

Nuisance—Reasonable Use of Property—Noxious Fumes—Injunction.

A "reasonable" nuisance has no existence in law.

If a man so carries on his business as to create a nuisance he is acting unreasonably, and ought to be restrained by injunction.

Reinhardt *v.* Mentasti (58 L. J. Ch. 787; 42 Ch. D. 685) *explained.*

Action brought by the Attorney-General, at the relation of the Wandsworth District Board of Works, to restrain an alleged nuisance created by the defendants in their business.

The defendants were fat-melters, and carried on business at Southfields. The nuisance arose from noxious gases and fumes emanating from the defendants' works, to the annoyance of the neighbourhood.

Warrington, Q.C., and *Chubb*, for the plaintiffs.

P. O. Lawrence, Q.C., and *Stewart-Smith*, for the defendants.

KEKEWICH, J., found as a fact that, although the defendants carried on their business in a reasonable manner from their own point of view, and did everything they could to prevent a nuisance or annoyance being created, yet there undoubtedly was a nuisance, such as must be restrained by injunction.

He continued: It fell to me to consider this question (whether a nuisance of a permanent character had been established) very much in a case of *Reinhardt* v. *Mentasti* [1889],[1] which I refer to because I venture to think that my judgment has been very much misunderstood. I thought in that case that I was not at liberty to consider whether the defendant was doing what was reasonable from his point of view. He was conducting an eating-house near another man's dwelling-house, and in a very reasonable manner as regards an eating-house. He was doing that which was for the convenience of his customers,

(1) 58 L. J. Ch. 787; 42 Ch. D. 685.

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and to enable him in the ordinary course of that business to provide what his customers wanted; but in doing so he created a nuisance, and it seemed to me there that, when once it was established that he was creating a nuisance, the fact that he was doing what was reasonable from his point of view was no defence. Mr. Justice Buckley has commented upon that in a recent case of *Sanders-Clark* v. *Grosvenor Mansions Co.* [1900],[2] where he seems to think that I really differed in effect from Lord Selborne in *Ball* v. *Ray* [1873].[3] Of course, nothing could be further from my intention; and, although perhaps the blame may have been mine in the use of language, Mr. Justice Buckley has a little misunderstood what I intended to say. That case has also been commented upon in *Garrett on the Law of Nuisances*. His criticism is severe, but not too severe if it is just. He seems to think that my judgment differs from that of the Court of Exchequer Chamber in *Bamford* v. *Turnley* [1860].[4] It so happens that I studied *Bamford* v. *Turnley*[4] with very great care before I gave my judgment in *Reinhardt* v. *Mentasti*,[1] and I thought that I was founding my judgment on the judgment of the Exchequer Chamber; it was so intended. I have taken this opportunity of again reading *Bamford* v. *Turnley*,[4] and I am bound to say that, notwithstanding these criticisms, what I said in *Reinhardt* v. *Mentasti*[1] was altogether agreeable, as it was intended to be, to what was laid down in *Bamford* v. *Turnley*.[4]

These remarks are not so much meant with regard to my own case, as to bring me back to the main question, which I think may be stated in this manner: Can a man reasonably create a nuisance? I think the answer of *Bamford* v. *Turnley*,[4] from which there has never been, so far as I am aware, any departure at all, is that he cannot. Then he cannot say that he is acting reasonably. The two things are self-contradictory; he is either acting reasonably or he is committing a nuisance. If he is committing a nuisance, he is not acting reasonably. That seems to me to be the short result, and I think that ought to apply here.

(2) 69 L. J. Ch. 579; [1900] 2 Ch. 373.
(3) L. R. 8 Ch. 467.
(4) 31 L. J. Q.B. 286; 3 B. & S. 62.

Solicitors—W. W. Young & Son, for plaintiffs; Alexander Pope, agent for H. R. Jones, Wandsworth, for defendants.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

FARWELL, J. 1900. Dec. 7, 8.

DOWSETT, *In re*; DOWSETT *v.* MEAKIN.

Will—Special Power of Appointment—Testamentary Exercise of Power—Subsequent Compulsory Sale of Subject—Ademption—Wills Act, 1837 (7 *Will.* 4. & 1 *Vict. c.* 26), *s.* 23.

The question whether a testamentary gift or appointment is adeemed by the subsequent disposal of the subject of the gift during the lifetime of the testator is in every case a question of the construction of the will.

If the gift or appointment be given simply by a description of the subject as it exists at the date of execution of the will, it will be adeemed if the subject be subsequently disposed of during the lifetime of the testator. If, on the contrary, it be given by a description which not only includes the subject of the gift as it then exists, but includes it in whatever other form it may happen to exist at the date of the testator's death, it is not then adeemed by any subsequent disposal of it, provided that at the testator's death the original subject of the gift is represented by actual property which can be identified.

In applying this principle to the testamentary execution of a power of appointment, there is no distinction between general and special powers.

Adjourned summons.

By his will dated July 10, 1869, the late John Dowsett devised to certain trustees therein mentioned, after the expiration of three years from the date of his decease, certain freehold houses, numbered respectively Nos. 149, 151, and

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DOWSETT, IN RE.

153 Cable Street, in the parish of St. George-in-the-East, Middlesex, upon trust to pay one-third of the net rents and profits of the same to his daughter Maria Dowsett during her life, and after her death upon trust to pay the said one-third to all and every the child and children of the said Maria Dowsett who should attain the age of twenty-one years, or should die under that age leaving issue, if more than one, in equal shares. And in case the said Maria Dowsett should die without leaving any child who should acquire a vested interest in her share, then the testator devised such share unto such one or more of the brothers or sisters, nephews or nieces of the said Maria Dowsett as the said Maria Dowsett should by will or any codicil thereto direct or appoint. And in default of any such direction or appointment, the testator declared that such share should fall into his residuary estate.

The testator John Dowsett died on or about November 11, 1873, and his will was duly proved on December 2, 1873.

By her will dated March 8, 1880, Maria Dowsett, in express exercise of the aforesaid power of appointment given to her by the will of her father John Dowsett, directed and appointed and also gave and devised all that her one-third part or share in the houses Nos. 149 and 151 Cable Street to her sister Mary Anne Wilkinson, for life; and after her death she appointed, gave, and devised the said one-third share to her nephew E. E. Meakin in fee-simple, but subject to and charged with a payment to her niece Theodora W. Meakin of an annuity of 10*l.* so long as she should remain unmarried. But in the event of the said E. E. Meakin dying before the said Theodora W. Meakin without leaving issue him surviving, then the testatrix gave and devised the said one-third share to her said niece Theodora W. Meakin in fee-simple. And the testatrix thereby appointed, gave, and devised all that her one-third part or share of or in the house No. 153 Cable Street to her sister Emma Jane Gibbons for the term of her natural life, and after her decease to her nephew W. A. Meakin in fee-simple. But in the event of the said W. A. Meakin predeceasing his cousin J. W. Dodsworth without leaving issue him surviving, then the testatrix appointed, gave, and devised such third share to the said J. W. Dodsworth in fee-simple.

By an indenture dated April 8, 1891, the houses Nos. 149, 151, and 153 Cable Street were conveyed to the London and Blackwall Railway Co. under their compulsory powers for the consideration of 5,600*l.* This sum had already been paid into Court under the Land Clauses Consolidation Act, 1845, on February 23, 1891; and the larger part of it, including the one-third undivided share of the said Maria Dowsett, was subsequently from time to time invested by a number of orders of the Court in the purchase of certain freehold ground-rents at Clapham, Hammersmith, Willesden, Tottenham, and Stepney. These freehold ground-rents were from time to time conveyed in fee-simple by a number of different indentures to the trustees for the time being of the will of John Dowsett, to be held by them upon the trusts and subject to the provisions expressed and contained in the said will concerning the said premises Nos. 149, 151, and 153 Cable Street.

A partition action for the division of these freehold ground-rents was commenced by Maria Dowsett in 1893, and an order for partition was made on March 11, 1893, by Stirling, J. By the chief clerk's certificate filed in the action on January 25, 1894, certain freehold ground-rents at Clapham, Hammersmith, Willesden, Tottenham, and Stepney were more particularly specified in the second part of the second schedule thereto as representing the original one-third share in the premises Nos. 149, 151, and 153 Cable Street, to which the testatrix Maria Dowsett was entitled for life under the will of her father John Dowsett.

By an indenture dated January 26, 1894, the trustees for the time being of the will of John Dowsett declared, in pursuance of the judgment in the said action, that they would thenceforth stand possessed of the freehold ground-rents specified as aforesaid in the second part of the second schedule of the chief clerk's certificate upon the trusts by the will of the said John Dowsett declared concerning the one-third share in the houses

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DOWSETT, IN RE.

Nos. 149, 151, and 153 Cable Street, in which the said Maria Dowsett was then interested for life.

Maria Dowsett died on December 21, 1899, without leaving issue, and without having formally altered or revoked her aforesaid will, which was proved on January 17, 1900.

A question having arisen as to whether the appointment contained in the will of Maria Dowsett of the one-third share in which she was interested in the houses 149, 151, and 153 Cable Street, took effect to any, and what extent, in view of the subsequent dealings with the property which have been already set out above, or whether the premises specified in the second part of the second schedule of the chief clerk's certificate ought now to be held in trust for the persons interested in the residuary estate of the testator John Dowsett, the present summons was taken out by the trustees of the will of the said John Dowsett and by the persons interested in the residuary estate, asking for the determination of the point in question.

J. M. Stone, for the plaintiffs.—Having regard to the provisions of section 23 of the Wills Act, 1837, it is clear that the gift by appointment of the one-third share of the houses Nos. 149, 151, and 153 Cable Street, in which Maria Dowsett was interested for life, has been adeemed by the subsequent dealings with the property—*Gale* v. *Gale* [1856],[1] *Collinson* v. *Collinson* [1857],[2] *Bagot's Settlement, In re* [1862],[3] *Blake* v. *Blake* [1880],[4] *Willett* v. *Finlay* [1891],[5] and *Moses, In re*; *Beddington* v. *Beddington* [1900].[6] The fact that the sale to the railway company was compulsory is immaterial; in *Bagot's Settlement, In re*,[3] the point was treated as being of no importance.

R. J. Parker, for two of the defendants.—The general principle with regard to ademption does not necessarily apply in every case—*Johnstone's Settlement, In re* [1880].[7] This view is supported by the *dictum* of Lord Cairns, L.J., in *Cooper* v. *Martin* [1867].[8] There is a distinction, moreover, in this respect between general and special powers, in favour of special powers; and this is the case of a special power. In the case of a special, though not of a general, power, the instrument of execution ought to be read as though from the beginning it constituted an integral part of the instrument of creation. Especially is this true where the subject of a special power has been sold and the proceeds resettled upon the original trusts. That is the case here.

F. Stallard, for the remaining defendants.

J. M. Stone, in reply, was stopped by the Court.

FARWELL, J., after stating the facts, continued: It is argued by the plaintiffs that there has been in this case a failure by ademption, and therefore that there is no property on which the appointment can now operate. In my opinion that is the true view. In cases of this sort it appears to me that the question is always a question of construction. Has the testator, in executing the power of appointment, expressed his intention to give the particular property, or to give that property or any other property for the time being representing it? In the present case, I have absolutely nothing but the bare description of the houses. Subject to what I will say in a moment about special powers, it appears to me that there is no difference in principle between a gift of "Blackacre," or of moneys specifically described, by virtue of property in "Blackacre" or in such moneys, and an appointment of "Blackacre," or of such moneys, under a general power. If the testator, having made his will in those terms, afterwards parts with the property, the gift fails for the very excellent reason that there is nothing on which it can operate when the testator dies. A testator, whether he has property of his own, or whether he has a power of appointment over property, can, if he

(1) 21 Beav. 349.
(2) 24 Beav. 269.
(3) 10 W. R. 607.
(4) 49 L. J. Ch. 393; 15 Ch. D. 481.
(5) 29 L. R. Ir. 156.
(6) 35 L. J. N.C. 471; W. N. (1900), 182.
(7) 49 L. J. Ch. 596; 14 Ch. D. 162
(8) L. R. 3 Ch. 47, 55, 56.

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please, use a form of words which will give effect to his intention, if he so desire it, that that property, or any money or other property into which it may be changed, shall pass at his death to the object of his bounty. In the simple case of a gift or appointment of particular property, described as such, no such question can arise. That, in my opinion, is the explanation of all the cases that have been referred to by counsel for the plaintiffs—for example, *Gale* v. *Gale*,[1] *Blake* v. *Blake*,[4] and *Collinson* v. *Collinson*.[2] They are decisions of different Masters of the Rolls; and in each case the learned Judge has held that there was not enough to shew that more than the property described by the particular description passed. In *Johnstone's Settlement, In re*,[7] on the other hand, Vice-Chancellor Malins thought that there was enough to shew that the intention was to give the funds representing the particular property into whatsoever shape they might have been altered at the date of the testator's death.

Then counsel for the defendants argued that there is a difference to be derived from the consideration that this is a special power. In my opinion that distinction is unsound. The point, to some extent, depends upon the construction of section 23 of the Wills Act, 1837. There are no words in that section, that I can see, that would in any way exclude a special power, or prevent the application of the section to a special power; nor, in common-sense, can I see that there is any reason for such exclusion. If the real meaning of failure by ademption is that there is no subject-matter on which the instrument purporting to dispose of such subject-matter can operate, that reason is equally forcible, whether the original intention to dispose arise from property, or arise from a general, or from a special, power of appointment.

Counsel for the defendants argued that I ought, in this case, to read the instrument executing the power into the original instrument creating it, and he urged upon me that this was done only in the case of special, and not of general, powers. I do not altogether accede to that statement as a statement of law. For some purposes you do read the instrument executing the power into the instrument creating it, even in the case of a general power; thus, before the Conveyancing and Law of Property Act, 1881, a wife could not convey real estate to her husband by virtue of her estate; but she could appoint real estate to her husband under a general power, because the estate was fed out of the seisin of the person creating the power. Nor is it true to say, universally and for all purposes, that you read the instrument executing a special power into the instrument creating it. For example—and in this lies the fallacy of the argument advanced by counsel for the defendants—you do not read it in so as to relate back to the time of the instrument creating the power.—*Marlborough (Duke)* v. *Godolphin*.[9] If it were not so, there would be no question of lapse in instruments executing special powers. Suppose the case of the will of a person having a special testamentary power of appointment among children, and suppose that such person appoints to a child, who dies in the lifetime of its parent. The result is that the testator has made a gift which has failed by reason of the death of the object. The same principle applies to the failure of the subject. I see no difference in principle between the failure of the object and the failure of the subject. The reason is the same in both cases. You do not read back the appointment into the original instrument creating the power so as to disregard all subsequent circumstances. You have to read the power with the instrument executing it; and then you find that at the date when the instrument comes into operation, either there is no person to take, or else there is no property on which the power can operate. To my mind there is no distinction, therefore, in this respect between general and special powers. The only possible distinction that might be suggested is this—that, inasmuch as it is easier to trace the property held under a special power, in most cases, because it is held by trustees who could probably point out any new form that it has taken, there might be greater facility in the Court

(9) 2 Ves. sen. 78.

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concluding that the testator did intend, in a case where he had used ambiguous expressions, to give by the execution of his power the property into whatever shape it might have passed at the date of his death. There is nothing of that sort here. There is simply an appointment of "Blackacre," and, under those circumstances, I can only say that the gift has been adeemed, and that there has been a failure.

As to the costs, since *Gale* v. *Gale* [1] has to some extent been doubted by Lord St. Leonards in his work on *Powers* (8th ed.), p. 308, and possibly by others, it will be right to declare the costs of all parties a charge on the property, with liberty to apply in order to raise them, if they cannot be otherwise raised.

Solicitors—Stones, Morris & Stone, for plaintiffs; Aldous & Welfare, for defendants.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

BYRNE, J. 1900. Dec. 5, 6.

COLEY, *In re*; GIBSON *v.* GIBSON.

Settlement—Construction—Provision for "all and every the child and children or grandchild" of a Named Person Living at the Death of the Survivor of Husband and Wife—Right of Grandchildren to Take in Competition with Children.

Under a gift to "all and every the child and children or grandchild" of a named person, where there is no context requiring the word "or" to be read "and," a grandchild (whether his parent be living or dead) cannot take in competition with a child of the named person, if there be one of that class living at the period of distribution.

By an indenture of settlement dated December 20, 1853, Consols and India Three per Cent. Stock, amounting to 4,350*l.*, were vested in trustees to be held by them (in the events which had happened) in trust "for all and every the child and children or grandchild of Julia Gibson the wife of John Gibson party hereto living at the death of the survivor of" Henry Coley and Marion his wife.

Henry Coley survived his wife, and died on January 14, 1900. Julia Gibson had thirteen children. Of these thirteen children eight survived Henry Coley and were living at the hearing of the present application. Of the other five children four died in the lifetime of Henry Coley without ever having been married, and one died in the lifetime of Henry Coley leaving an only child. Of the eight living children some were married and had children.

The present summons was taken out for the purpose of ascertaining whether the persons comprised in the class of beneficiaries included grandchildren of Julia Gibson living at the period of distribution, whether the grandchildren were issue of the children of Julia Gibson living at or dead before the same period.

Mulligan, Q.C., and *C. Gurdon*, for the plaintiff (who was an unmarried daughter of Julia Gibson).—The word "or," where it occurs in a deed, cannot be read "and." *Margitson* v. *Hall* [1864] [1] was against so reading it in a deed. In the present case the gift is to classes as joint tenants in the alternative, and each class is exclusive of the other—*Holland* v. *Wood* [1870] [2] and *Amson* v. *Harris* [1854].[3]

Christopher James, for a grandchild of Julia Gibson (whose parents were living).—The word "or" should be read "and." The grandchildren form part of the class to take—*Eccard* v. *Brooke* [1790].[4] If this be not so, then the grandchildren whose parents are alive take equally with those whose parents died before the period of distribution.

Frank Russell, for another grandchild (the child of a child of Julia Gibson, who died before the period of distribution).—The contingency of surviving the period of distribution applies both to the original and substituted class. That being so, the gift must be construed as substitutional—

(1) 9 L. T. 755; 12 W. R. 334.
(2) L. R. 11 Eq. 91.
(3) 19 Beav. 210.
(4) 2 Cox, 213.

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COLEY, IN RE.

Congreve v. *Palmer* [1853][5] and *Atkinson* v. *Bartrum* [1865].[6]

Mulligan, Q.C., in reply.—The cases cited are all cases respecting tenants in common, and do not apply to joint tenants. The survivors of the class of children take all.

P. F. S. Stokes, for the trustees of the settlement; and *Levett*, Q.C., and *Stewart-Smith*, for other parties, took no part in the argument of this point.

BYRNE, J.—In this case a question of construction arises upon the terms of a certain settlement made on the marriage of Henry Coley with Miss Marion Pink. In the events which have happened the following trust has come into operation. [His Lordship read the provision before stated, and continued:] I have already decided that grandchildren cannot take in competition with their parents.

The clause has been read, and I think rightly, by everybody as though the word "grandchild" were equivalent to "grandchildren or grandchild." There are three contentions that have been raised: First, it is said that no grandchildren can take if there are children living at the period named for ascertaining the class; secondly, that grandchildren of a child predeceasing that period take the share their parents would have taken if living; and thirdly, that all grandchildren, even though their parents be living, must take amongst them the share which any deceased child would have taken. Now the word "or" in this clause must, I think, be interpreted literally. If that reading be correct, the class of grandchildren is a substitutional class. The question arises upon a settlement, but I do not know that for the purposes of construction in the events which have arisen, and having regard to the class that was to take, that makes any difference as to the construction to be put upon it. I have been referred to cases in which a similar question has been determined in respect to wills, and which bear more or less upon the subject I have to decide; and upon consideration not only of the cases cited, but of others, I have come to the conclusion that the effect of them is accurately summed up in *Theobald on Wills* (5th ed.), at p. 592: "When the gift is to a class or their issue, the further question arises whether the original and substituted legatees form two mutually exclusive classes, so that no substituted legatees can take if there are any members of the original class to take, or whether the issue of members of the original class dying can take with the surviving members of the original class. It is clear that if all the original class survive the time of distribution, they alone take." And for that he cites *Sparks* v. *Restal* [1857][7] and *Margitson* v. *Hall*.[1] "So, if none of the original class survive the time of distribution, the substituted legatees alone take. . . . But if some of the original class die leaving children and others survive the time of distribution:—If the gift is to several persons *nominatim* as tenants in common or their children, those who survive the time of distribution take, together with the children of those who die before it. *Price* v. *Lockley* [1843].[8] In the same way, in the case of a simple substitutional gift to children or their issue to be divided amongst them in equal shares, the issue of a child dying after the testator and before the time of distribution take with the other children."

Now, it is to be observed first of all, had there been no children at the period named, grandchildren and grandchildren only would have taken. So, on the other hand, had there been the whole number of children living at the period of distribution—had none of them died—they would have taken to the exclusion of grandchildren. There are two things to be observed in this clause which differentiate this case from any to which my attention has been called. In the first place, this is not a gift to child or children or their issue, but it is a gift to child and children or grandchildren. That, of course, has occurred in certain cases, but there are no words in this deed denoting division, equality, or the creation of a tenancy in common, nor have I even the word "respectively" to assist me to a construction which would give to grandchil-

(5) 23 L. J. Ch. 54; 16 Beav. 435.
(6) 28 Beav. 219.
(7) 24 Beav. 218.
(8) 6 Beav. 180.

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dren, children of a deceased parent, that share which the parent would have taken had he or she survived the period named. Of course, the tendency of the decisions has been, wherever the context allows it, to substitute for a parent a child or children, and such a context has been found in many cases. Such a construction of course becomes a comparatively easy matter when there are words denoting an intention of division of the property into shares. But I have no such words here—I have simply a gift in words which create a joint tenancy amongst those who take. I cannot predicate of any child that that child takes a share; each child with the other members of the class of children, or each grandchild with the other members of the class of grandchildren taking under either of these gifts, would take the whole of the property in joint tenancy. Under those circumstances it appears to me that I have no words at all in this settlement which will enable me to say that there is anything equivalent to a substitution of grandchildren being children of members of the first class for the parent dying before the period at which the first class was to be ascertained. Although I admit that I think the case is an extremely difficult one, I have come to that conclusion.

I may add this—that had I come to the other conclusion I should have felt extreme difficulty in avoiding the argument of counsel that in this settlement there are no words importing that the grandchildren forming the alternative or substitutional class ought to be confined to children of the parent dying. That has had some weight with me in bringing me to the conclusion that I have arrived at. Such a conclusion I should only adopt with the utmost reluctance. The result is, I do not think that the children of the parents dying before the period of distribution can take.

Solicitors—W. M. Tayler & Son; Druces & Atlee; C. G. Algar.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

BYRNE, J. 1900. Dec. 11, 12, 13.

HAYWARD, *In re*; TWEEDIE *v.* HAYWARD.

Executor—Right of Retainer—Executor Equitable Tenant for Life.

An executor, who is a tenant for life and cestui que trust, is not entitled to retain a sum due from the testator's estate for interest, where there are trustees competent to sue for the corpus of the sum.

Dunning, *In re*; Hatherley *v.* Dunning (54 L. J. Ch. 900), *followed.*

Loomes *v.* Stotherd (1 L. J. (o.s.) Ch. 220; 1 Sim. & S. 458) *examined and explained.*

The testator in the cause had covenanted in his marriage settlement with the trustees thereof that in case the intended marriage should take place his executors or administrators should within six calendar months after his death pay to the trustees the sum of 5,000*l.* with interest, as therein mentioned. Under the trusts declared by the settlement, and in the events which had happened, the testator's widow became entitled to a life interest in the fund.

The testator appointed his widow executrix, and died leaving an insolvent estate.

The trustees of the settlement commenced a creditor's action for the administration of the testator's estate. In that action the widow claimed to retain in respect of her life interest, and the question now came on for determination.

Norton, Q.C., and *M. Romer*, for party having conduct.—There is no right of retainer—*Dunning, In re; Hatherley* v. *Dunning* [1885].[1] The right is generally rested on this, that the executor could not sue himself, and was allowed to retain as compensation. It has also been said that where the executor has to pay money to a trustee who would be bound to hand it back to him, he may retain. That would be justified by the reluctance of the Court to permit circuitous actions. But that would have no application where the persons with whom the covenant is made are in existence and able to sue. *Cockroft*

(1) 54 L. J. Ch. 900.

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v. *Black* [1725] [2] and *Franks* v. *Cooper* [1799] [3] were reviewed in *Dunning, In re.*[1] *Loomes* v. *Stotherd* [1823] [4] was not cited, but is inconsistent with that case, and is not law.

[BYRNE, J.—Have you referred to *Loane* v. *Casey* [1775] [5] ?]

It is a simple case of trustee and sole beneficiary.

Rowden, Q.C., and *J. G. Wood*, for the widow.—Upon principle the claim should be admitted. The extensions to the original doctrine were—first, where the executor is a trustee; and secondly, where the debt is due not to the executor, but to a trustee for him. The growth of the doctrine may be traced from *Cockroft* v. *Black* [2] and *Franks* v. *Cooper* [3] to *Loomes* v. *Stotherd.*[4] It is admitted that if the widow were sole beneficiary the claim should be allowed, and there is no sound reason for rejecting it because the claim is put forward in respect of a partial interest. *Loomes* v. *Stotherd* [4] is referred to as an authority in *Seton on Judgments*, in *Lewin on Trusts*, and in *Theobald on Wills*. *Dunning, In re,*[1] is distinguishable. It was not a case of debt, but of damages for misappropriation of trust funds.

[BYRNE, J., referred to *Thompson* v. *Thompson* [1821].[6]]

That case was decided in the interval between the date of the hearing of *Loomes* v. *Stotherd,*[4] which was in April, 1819, and the further consideration (upon which occasion it was reported) in 1823.

Norton, Q.C., in reply.—*Thompson* v. *Thompson* [6] is against the claim.

BYRNE, J.—In this case a question arises as to the right of an executrix to retain in respect of a life interest to which she was entitled. [His Lordship then stated the facts of the case, and continued:] I think myself the point is covered by the decision in the Court of Appeal in *Dunning, In re.*[1] The facts are sufficiently stated at the commencement of Lord Justice Cotton's judgment to enable the judgment to be understood: "The testator acted as solicitor to the trustees of his marriage settlement, under which his wife took a life interest, with remainder to his children. This fund got into the testator's hands, and was not accounted for, and for it he is clearly liable. But the claim of his executrix to retain this debt out of his assets stands on a wholly different footing. The right to retain arises wholly from the fact that, as a creditor by suing at law and obtaining judgment could get priority for his debt, and as an executor who was also creditor could not sue himself, he was allowed the same advantage as he would have gained had he been able to sue, and was allowed to retain the amount of his debt in priority to the other creditors. And he was allowed this right even in a case where he was only trustee of the amount due, or where he was himself beneficially entitled to the debt, though it was actually payable to another person as trustee for him." Then the learned Judge proceeds to deal with the particular case, saying, "the retainer has been allowed on the footing of the widow's life interest being valued as if it were an annuity owing to her from the testator, besides being allowed in respect of his children's right in remainder. Now, if the right to receive this debt and the liability to pay the same were centred in the same person, it would be right to allow the retainer. But here the executrix was not the person in whom the right to recover the debt was vested, as there were existing at the testator's death trustees of the settlement who were competent and bound to sue for and obtain judgment against the executor for the amount, or to take proceedings for administration of the estate." I need not read the rest of that judgment. Then Lord Justice Lindley, referring to *Cockroft* v. *Black,*[2] speaks of it as reaching the furthest point in respect of retainer such as is asked for here. I must say that I think every word of Lord Justice Cotton's judgment applies to the present case inasmuch as there are trustees who are competent to sue for and recover the debt.

I should have left it there had not the case of *Loomes* v. *Stotherd* [4] been so much

(2) 2 P. Wms. 298.
(3) 4 Ves. 763.
(4) 1 L. J. (o.s.) Ch. 220; 1 Sim. & S. 458.
(5) 2 W. Bl. 965.
(6) 9 Price, 464.

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relied upon by the executrix. In reference to the reports of that case, which is stated with more detail in the *Law Journal* than in *Simons and Stuart*, I find that there were two points argued. The first point was a very important one, the judgment deciding that a devisee has a right to retain a debt due to himself or to his trustees out of the produce of the estate devised to him; the other point being as to the costs of the administration—namely, whether they should come out of the estate in priority to the debt or not. [His Lordship then stated the facts in *Loomes* v. *Stotherd*[4] from an abstract of the Register Book with which he had been furnished. But as the substance is contained in the report in 1 L. J. (o.s.) Ch. 220, it is not considered necessary to set them out.] So far as the reports go, it appears, as I have said, to be a decision only on the points before mentioned. But undoubtedly it was a case where the defendant was permitted to retain out of the proceeds of sale of real estate the amount of a debt in which she was equitably interested for her life. The case has not got into any of the text-books to which I have been referred as being an authority for the proposition for which it is cited, nor is there any case in which it has been followed as deciding such a question. I have not, therefore, the same difficulty as if I had to deal with an old established authority on a particular point. In any event I should have thought myself bound by the decision of the Court of Appeal in *Dunning, In re*,[1] but, as I have said, I do not think that *Loomes* v. *Stotherd*[4] is an authority for the proposition for which it is now invoked—namely, that a tenant for life *cestui que trust* is entitled to retain where there are trustees competent to sue for the *corpus* of the fund.

Solicitors—Robbins, Billing & Co., agents for Forrester & Moir, Malmesbury; A. F. & R. W. Tweedie.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

LORD ALVERSTONE, C.J.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
1900.
Nov. 29, 30.

WATTS *v.* DRISCOLL.

Partnership—Mortgage of Partner's Share—Dissolution—Purchase of Mortgaged Share by Partner—Rights of Mortgagee—Account—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 31.

Under sub-section 2 *of section* 31 *of the Partnership Act*, 1890, *the assignee of a share in a partnership business is entitled upon a dissolution of the partnership to receive the actual share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and to an account for the purpose of ascertaining that share. Therefore, where partners have knowledge of an assignment of a share, any arrangement between them for a dissolution of the partnership upon the terms of the share of the assigning partner being purchased by the other partner at a price agreed upon between them, would not be binding upon the assignee if made without his consent.*

Appeal from a decision of Farwell, J.

The action was brought to enforce a security which the plaintiff had upon the share of the defendant W. S. Watts in the partnership business carried on by him and the defendant Driscoll.

The plaintiff had agreed to advance to his son, the defendant W. S. Watts, sums amounting to 1,921*l.* 18*s.* 8*d.* for the purpose of enabling him to purchase one half share of the business carried on by the defendant Driscoll, and become a partner with Driscoll in the business. The terms of the advance were that W. S. Watts should assign to the plaintiff his interest in the business to secure the advance. The money was duly advanced, and on January 9, 1899, articles of partnership were entered into between Driscoll and W. S. Watts whereby they agreed to become partners for fourteen years from January 1, 1899, the partnership to be terminable at the expiration of seven years from the date thereof on six

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calendar months' notice in writing by either party to the other.

There were provisions in the articles that, in the event of the determination of the partnership by the bankruptcy or death of a partner, or by reason of breach of the articles or inability of a partner to attend to the business, the share of the partner who was bankrupt, dead, or outgoing might be purchased by the other, the price to be paid being the net value of such share on the day of the determination of the partnership, and if the parties could not agree the value was to be ascertained by valuation. Upon the determination of the partnership, if no other arrangement was made under the foregoing provisions, the goodwill, property, and effects of the firm were to be sold as a going concern, and the assets realised, and the net proceeds, after paying the debts and liabilities of the firm, divided between the partners. By deed of March 23, 1899, the defendant W. S. Watts assigned to the plaintiff his interest in the partnership business and the assets thereof and his share in the profits thereof by way of security for the moneys advanced by the plaintiff. Driscoll had notice of this deed.

Differences between the two partners arose, and on Aug. 14, 1899, an agreement was come to between them that Driscoll should purchase the share and interest of W. S. Watts in the business for 500*l.* On September 12, 1899, a deed was executed dissolving the partnership as from June 30, 1899, upon this basis. A balance-sheet of the business for the half-year ending June 30, 1899, had been prepared prior to the deed of September 12, 1899. The share of capital standing to the credit of W. S. Watts in this balance-sheet was 1,860*l.* 13*s.* 2*d.*, and the share of profits to June 30, 161*l.* 5*s.* 6*d.*

The dissolution was carried out without the knowledge or consent of the plaintiff, and he brought this action against Driscoll and W. S. Watts claiming a declaration that he was entitled to a charge upon the share of W. S. Watts in the partnership assets as on the date of the dissolution, and also all proper and necessary accounts, and payment of what should be found due to him on such accounts.

Farwell, J., held that the plaintiff was entitled to a charge on the share of the defendant W. S. Watts in the partnership assets as on June 30, 1899, the date of the dissolution fixed by the partners; and also to an account as from that date.

The defendant Driscoll appealed.

Hughes, Q.C., and *F. P. Onslow*, for the appellant.—The rights of the parties depend on the Partnership Act, 1890, s. 31.[1] The mortgagee is only entitled to an account as from the date of the dissolution, and is only entitled to receive the share to which the assignor is entitled as against the other partner—Partnership Act, 1890, s. 31, sub-s. 2; and s. 42, sub-s. 2; and *Whetham* v. *Davey* [1885].[2] It is immaterial whether the agreed value is over or under the real value. In the absence of fraud the mortgagee is bound by the terms of the partnership agreement.

Notice to the other partner of the mortgage is quite immaterial for this purpose. It would only be material if the other partner were to pay the amount of the share to the mortgagor instead of to the mortgagee.

The mortgagee takes subject to all partnership equities—*Kelly* v. *Hutton* [1868],[3] *Cavander* v. *Bulteel* [1873],[4] and *Lindley on Partnership* (6th ed.), p. 367.

Under section 19 of the Partnership

(1) Section 31 of the Partnership Act, 1890, provides: "(1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners. (2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

(2) 30 Ch. D. 574.

(3) 37 L. J. Ch. 917; L. R. 3 Ch. 703.

(4) 43 L. J. Ch. 370; L. R. 9 Ch. 79.

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Act, 1890, the mutual rights of partners may be varied by the consent of all the partners. Any one looking at this partnership deed would have had notice that there was no provision as to the mode of liquidation in the event of the partners dissolving before the expiration of seven years, and that it was left to the partners to come to some arrangement with regard to it. What the assignor could assign must be ascertained with reference not only to the partnership deed, but also to any arrangement between the partners. If his share is not ascertained and paid out at the dissolution the mortgagee is entitled to an account, and the mode of distribution of the assets is settled in the absence of any arrangement by section 44 of the Act of 1890. In the present case it has been ascertained at 500*l*. Partnerships are regulated by express contract between the partners, or by the contract implied by law from the relation of the parties, and now by the statute, and a third party has no right to put any fetter on the mode of dissolution—*Crawshay* v. *Collins* [1808][5] and *Featherstonhaugh* v. *Fenwick* [1810].[6] There is nothing to prevent the partners from making the arrangement that they have made. The bargain is perfectly valid, and the mortgagee takes subject to it.

Bramwell Davis, *Q.C.*, and *Boome*, for the plaintiff.—Before the Partnership Act, 1890, a partner could either mortgage or assign his share in the partnership, and the assignee, if the business were allowed to go on, took subject to all equities arising in the ordinary course of the partnership, but to nothing else. He would not have been bound by any such arrangement as this, which was something outside the partnership, and not contemplated by the parties. That is shewn by *Kelly* v. *Hutton*.[3] *Cavander* v. *Bulteel*[4] did not carry the matter any further. The mortgagee only takes subject to equities which arise out of the previous dealings of the assignor with the firm—*Smith* v. *Parkes* [1852].[7] *Whetham* v. *Davey*[2] shews that accounts after a dissolution between the trustee in bankruptcy of a partner and the other partners would not be binding on a mortgagee of the share of the bankrupt partner.

Under section 46 of the Act of 1890, the rules of equity and of common law applicable to partnership continue in force except so far as inconsistent with the express provisions of the Act Section 19 does not enable partners to dispense with those rules.

An assignee of a *chose in action* takes subject only to equities existing at the date of the assignment, not to those arising afterwards. Before the Act of 1890 partners could not alter the rights of a mortgagee of a share behind his back. Under sub-section 1 of section 31, it is clear, the assignee cannot require accounts while the partnership continues; but on dissolution he is entitled under sub-section 2 to the share of the assignor in the partnership assets—the share itself, not the proceeds of it. That share must be ascertained according to the partnership deed. That that is the right view is shewn by the provisions of section 23 as to the procedure in respect of a judgment debt of a partner—*Brown, Janson & Co.* v. *Hutchinson & Co.* [1895].[8]

Hughes, *Q.C.*, in reply.—The partners must have some right of varying the terms of the partnership deed. Otherwise they could not do such things as changing the bankers of the partnership, or altering the capital. As a security in the sense of a mortgage on property mortgage of a share in a partnership is not worth much. It is in the nature of a floating charge. The mortgagee has to trust to the capacity of the partners to carry on the business properly, and their interest in doing so. The risk as to the value of the share is not greater than any other risk which he has to run.

[VAUGHAN WILLIAMS, L.J.—It may be that the partners could vary the incidents of the partnership during its continuance. In the present case it is sought to determine it.—He referred to *Mangles* v. *Dixon* [1852].[9]]

An alteration of the terms of dissolution

(5) 15 Ves. 218, 226.
(6) 17 Ves. 228.
(7) 16 Beav. 115.
(8) 64 L. J. Q.B. 359, 619; [1895] 1 Q.B. 737; 2 Q.B. 126.
(9) 3 H.L. C. 702.

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is one of the incidents of a partnership even if both parties were aware of an assignment.

LORD ALVERSTONE, C.J. — The only question on this appeal is whether a bargain between two partners, under which one of them was to go out of the business and sell all his interest to the other partner for 500*l.*, is binding upon the mortgagee of the selling partner's share. I have no doubt that Driscoll knew at the time when his partner proposed to sell his share that the father did not concur in the arrangement the son proposed to make. It is not very material, because the learned Judge came to the conclusion that before July Driscoll knew of the existence of the mortgage. It was said that, under the circumstances, the bargain for the sale of the son's share, and the dissolution of the partnership on those terms, was to be treated as binding on the father as mortgagee of his son's share. I agree with Mr. Justice Farwell that the arrangement cannot be treated as binding on the father.

We have to consider in this connection section 31 of the Partnership Act, 1890. Up to the time of the passing of that Act there seems to have been some doubt whether the assignee of a share in a partnership had a right to compel the other partner to account to him—see *Lindley on Partnership* (6th ed.), p. 367. I think that it was intended by section 31 to settle the rights of the parties under such circumstances. Sub-section 1 provides that during the continuance of the partnership the assignee must accept the account of profits agreed to by the partners. That is in accordance with the view stated in many decisions—that so long as the partnership lasts, the assignee or mortgagee of a share cannot, in the absence of fraud, impeach the accounts. Sub-section 2 refers to the case of a dissolution. We were pressed by counsel for the appellant to say that the words in sub-section 2, "the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners," include the share according to any arrangement made in the absence of fraud between the outgoing partner and the other partners on the basis of which the dissolution takes place; and that whatever the terms of the bargain might be on which the dissolution was to take place, even though it had no reference to the amount of the partnership assets to which the outgoing partner was entitled, and no provision was made for ascertaining the amount of the share of the assigning partner, or for the taking of the accounts, the mortgagee or assignee must be bound by it. That, in my opinion, is going a great deal too far. I think it was intended to give the assignee the right of having the accounts taken whenever the unexpected event happened.

It was said that it could be seen on an inspection of the partnership deed that this was a dissolution in a manner not contemplated or provided for by the terms of the deed; that the clauses of the deed shew that a winding-up was provided for on the death, or bankruptcy, or misconduct of a partner, or upon notice at the expiration of seven years, whereas this was a dissolution by agreement between the partners. It was further argued that, because the partners might agree to put an end to the partnership upon terms not contemplated by the partnership deed, of which possibility the assignee had notice, he would therefore be bound by any agreement of dissolution, in the absence of fraud, made between the mortgagor and the other partner, though it might be made behind his back and against his will. I think that so to hold would render nugatory the right that the assignee has under the Act to receive on a dissolution the share to which the assigning partner is entitled as between himself and the other partner, and to have an account taken for the purpose of ascertaining the amount of the share. The old law, that the assignee is bound by the accounts *bona fide* taken in the course of the partnership on the footing of its being a going concern, has not been altered. I have come to the conclusion that in this case no account at all was taken. The defendant Watts, having made up his mind to go out of the partnership, made a bargain with his partner, behind the back of the mortgagee and against his will, that if the partner would

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pay him 500*l.* he might have all his share in the partnership. It was said by counsel that that sum was all that the share was worth in figures. I do not think that we ought to draw that conclusion from the facts. No reference whatever was made in the arrangement to the actual value of the goodwill, which was a matter for consideration, and I think that, in the interest of the mortgagee, an account should be taken and the value of the goodwill should be ascertained, and under section 31 of the Partnership Act, 1890, he is entitled to such an account. The effect of the section is to make clear that which was the law before the Act was passed. I think that Mr. Justice Farwell was right, and that the appeal should be dismissed.

RIGBY, L.J.—I am of the same opinion. I think that when one talks of "equities," that is a very different thing from a bargain which may do gross injustice to the mortgagee, and it may be has been entered into with that view. If the Act obliges one to say that such a bargain is to be protected, then it must be so, but I cannot find anything to that effect in this Act. Sub-section 1 of section 31 deals with the case of a partnership during its continuance, the object being to prevent a mortgagee or assignee of a share from interfering with the progress of the business of the partnership. Sub-section 2 deals with a totally different matter. It provides that if there is a dissolution on any ground whatever, even though not provided for by the partnership deed, then the assignee of a share in the partnership shall be entitled to the actual share of the assigning partner; not that that partner may by the terms of the dissolution alter that share according as the partners may arrange, and do away with it altogether—and the argument must go to that length—but that the actual share is to be ascertained by taking an account as from the date of the dissolution—in the present case, June 30—for the year preceding the dissolution. The assignee is in that respect only placed in the same position as every mortgagee of a *chose in action* is, because there is no longer any necessity for depriving him of his ordinary rights when the partnership has come to an end.

The equities of the parties are preserved on a dissolution, and if one member of a firm were to be allowed upon a dissolution to altogether alter his position as regards his co-partner, and that regardless of the interests of the mortgagee, which were known to both parties, that would be very far from equitable.

VAUGHAN WILLIAMS, L.J.—I agree. As I understand, it is not disputed in this case that the order made by Mr. Justice Farwell would be the right order but for the bargain for sale and purchase entered into between Watts, jun., and Driscoll. That being so, one has to consider the question whether that bargain, which was made with notice of the mortgage, is an agreement which can override the rights of Watts, sen. In my judgment it cannot override his rights. Let us consider how the matter stands. If this had been an equitable assignment of a *chose in action*, and had not been connected in any way with the partnership relation, no one would deny that a creditor and debtor, if the debtor had notice of an assignment by the creditor of the debt due to him, could not enforce an agreement which they had made subsequently to that assignment altering the rights of the assignee. It is said that that is not so in the case of a partnership, but in that case the arrangements and dealings between the partners *inter se* can affect and alter the rights of an assignee of a share in the partnership. Why should that be so? It was said, because of the nature of the relation between partners. It is said that a person cannot be introduced into a partnership without the assent of the other partners, and therefore any one who takes a mortgage or assignment of a share in a partnership takes it subject to that partnership relation which exists and is the basis of that which is assigned to him. It was said that in *Whetham* v. *Davey*[2] it was held by Mr. Justice North that a mortgagee of a share in a partnership must be taken to be content that during the continuance of the partnership the mortgagor should act as his agent in partnership matters, and that he should be

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bound by what the mortgagor does in the course of the partnership. As appears from *Kelly* v. *Hutton*,[3] the mortgagee or assignee must be taken to have notice of the partnership deed. It is his duty to enquire what the terms of the deed are, and he cannot complain of, or repudiate, anything which is done by the mortgagor, the partner, in pursuance of the terms of the deed. If, therefore, in the present case that which was done when the sale took place had been something done in pursuance of the partnership deed or something done in the course of the partnership relation, it might be that the agreement, although it injuriously affected the rights of the mortgagee, would have been binding on him; but in my judgment what was done here was not something done between these partners in their relation as partners. The agreement was not upon an account taken between the partners in the course of the business. There is no evidence in this case to suggest that the agreement was made in any way to further or carry out the partnership business. It was, as plainly appears, a mere contract of sale and purchase, which would of necessity put an end to the partnership; and the question whether such a transaction entered into subsequently to the mortgage by parties with knowledge of it can be justified as a transaction entered into by partners in the course of the partnership transactions, is a question which, in my opinion, ought to be answered in the negative.

Under these circumstances, in my opinion, quite apart from the provisions of section 31 of the Partnership Act, 1890, this order would have been perfectly right; and, so far as the section itself is concerned, it only affirms the view that it was right. It seems to me that the order made by Mr. Justice Farwell is exactly the order which was contemplated by sub-section 2 of section 31.

Appeal dismissed.

Solicitors—W. W. Bond, for appellant; T. Durant, for respondent.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

LORD ALVERSTONE, C.J.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
1900.
Oct. 30. Nov. 1, 2.
Dec. 17.

BORAX CO., *In re*; FOSTER *v.* BORAX CO.

Company—Debentures—Floating Security—Sale of Property and Assets—Dissentient Debenture-holders.

The power of a company, which has issued debentures expressed to be a charge by way of floating security on the property, undertaking, and assets for the time being, whether present or future, of the company, to deal with its property and assets in the ordinary course of business, extends to a sale thereof, in accordance with its memorandum of association, without making any specific provision for the satisfaction or discharge of the debentures.

Government Stock &c. Investment Co. *v.* Manila Railway (66 L. J. Ch. 102; [1897] A.C. 81) *applied.*

Per VAUGHAN WILLIAMS, L.J.—Quære, *whether the carrying out of an agreement for sale containing a covenant by the company not to exercise its powers in respect of one of its principal objects as defined by the memorandum of association could not be restrained upon the application either of shareholders or the holders of debentures of the company.*

Appeal from a decision of Farwell, J.

The defendant company was incorporated in 1887. The objects of the company, as stated in its memorandum of association, were, so far as material to be stated, as follows: "(*a*) To carry on in the United Kingdom, France, Germany, Belgium, Turkey, and elsewhere as may from time to time be determined the business of miners, refiners, distillers, manufacturers of and dealers in (either wholesale or retail) boracite, borax, boracic acid, and any other similar ore, and any other business incidental or subsidiary thereto; (*b*) to purchase, lease, rent, or acquire mines; (*c*) to purchase, acquire, work, and carry on certain named factories; (*d*) to form or assist in the formation of any subsidiary, allied, or affiliated companies and to make and to carry into

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effect arrangements, whether by purchase or otherwise, for the acquisition of the goodwill of or any interest in any business of the kind authorised by this memorandum, or for amalgamation or union of or sharing in interests, whether in whole or in part, with any other company, person, or persons, or public or private undertaking carrying on any business similar or analogous to any business which the company is authorized to carry on; to sell all or any part of the company's business or property and to subscribe for, take, hold, distribute, allot, sell, or deal with, or guarantee or endorse any debentures, shares, stocks, or securities of any other company, société anonyme, or other association or undertaking."

The defendant company soon after its incorporation issued a series of debentures for 100*l.* each, bearing interest at the rate of 6 per cent. These debentures were expressed to be a charge by way of floating security on the undertaking of the company.

The plaintiff, Arthur Foster, became the holder of 114 of these debentures.

In May, 1898, the defendant company went into voluntary liquidation. In July, 1898, the Court sanctioned a scheme of arrangement, declaring it to be binding on the debenture-holders, and stayed all further proceedings in the winding-up except for the purpose of carrying the scheme into effect. The scheme of arrangement provided that the defendant company should execute new debentures, divided into two classes, "A" and "B," and should distribute them among the holders of the old debentures, which should thereupon become extinguished, in the proportion of one "A" and one "B" debenture for every old debenture.

By the form of each "A" debenture the defendant company agreed to pay on a future date (left blank) or on such earlier date as was therein mentioned, to the bearer or registered holder the sum of 50*l.*, with interest in the meantime at 4 per cent., and charged with the payment of the principal sum and interest by way of floating security all the property, undertaking, and assets for the time being, whether present or future, of the company. The debenture was made subject to the condition that the principal moneys secured by the debenture and all arrears of interest, if any, should immediately become payable if an order was made or an effective resolution was passed for the winding-up of the company. The "B" debentures were, so far as material for the present purpose, in the same form and contained a similar condition.

In pursuance of this scheme the company issued to the plaintiff 114 "A" and 114 "B" debentures.

The total issue of each series of debentures was 147,600*l.* in 2,952 debentures of 50*l.* each.

On November 29, 1898, an agreement was entered into between the defendant company and the defendant L. H. De Friese, which, after reciting that a new company, to be called "Borax Consolidated, Limited," or by some other name, was about to be formed, with the object (*inter alia*) of acquiring and working the property and assets of the defendant company, provided for the sale free from incumbrances of the whole of the property and assets of the defendant company, including goodwill (with the exception of certain securities to the value of between 23,000*l.* and 24,000*l.*, which were to be retained by the defendant company as its own property), to the defendant De Friese, as on October 1, 1898, for the sum of 320,000*l.*, which was to be paid as follows: (*a*) 100,000*l.* at the option of the purchaser either in cash or as to the whole or any part thereof by the issue or transfer to the defendant company, or as they might direct, of 4½ per cent. mortgage debenture stock of the new company to be treated as of par value; (*b*) 150,000*l.* at the option of the purchaser either in cash or as to the whole or any part thereof by the allotment or transfer to the defendant company, or as they might direct, of fully paid-up cumulative preference shares of 10*l.* each of the new company, to be treated as of par value; (*c*) 70,000*l.* by the allotment or transfer to the defendant company, or as they might direct, of 7,000 fully paid-up ordinary shares of 10*l.* each of the new company.

Articles 9 and 10 of the agreement provided as follows:

"9. The company shall until completion

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carry on its business in the same manner as heretofore so as to maintain the same as a going concern and shall not deal with or dispose of any of the premises hereby agreed to be sold except for the purpose and in the course of carrying on its business in the ordinary way. As from the 30th day of Sept. 1898 the company shall be deemed to have been and to be carrying on the said business on behalf of the purchaser and shall account for all the benefits and profits received and be indemnified against all expenses and liabilities incurred in the course of carrying on the same.

"10. Subject to clause 9 of this agreement the company shall not after the date of this agreement carry on business as miners refiners distillers or manufacturers of or dealers in boracite borax boracic acid or similar ores substances or products or as owners of borate or other similar properties otherwise than in conjunction with and for the benefit of and on behalf of the new company."

In accordance with the agreement of November 29, 1898, an agreement dated January 10, 1899, was made between the defendant De Friese and H. E. Thomas, as trustee on behalf of the company then about to be formed and to be called Borax Consolidated, Lim., whereby the defendant De Friese agreed to sell to the Consolidated Co. all the property and assets of the defendant company included in the agreement of November 29, 1898, subject to the provisions contained in that agreement, and also the property and assets of five other companies.

In pursuance of the above-mentioned agreements, Borax Consolidated, Lim., was registered on January 11, 1899, with the object of acquiring the undertakings comprised in the agreement of January 10, 1899, and seven other businesses or undertakings connected with the production of borax, with a share capital of 1,400,000*l.*, and power to issue debenture stock to the amount of 1,000,000*l.*

It was proposed to give the holders of debentures in the defendant company debentures in Borax Consolidated, Lim., of equal amount to the debentures they held in the Borax Co., in exchange for such debentures.

Holders of debentures of the defendant company to the amount of 96,650*l.* had assented to the proposed sale to the new company, and there were other holders to the extent of 187,150*l.* who had not expressed any opinion thereon. The plaintiff was the only person who had actually objected.

On February 9, 1899, the writ in the present action was issued against the defendant company, De Friese, one of the assenting debenture-holders, and Borax Consolidated, Lim., by which the plaintiff on behalf of himself and all other debenture-holders in the defendant company, claimed—first, a declaration that the "A" and "B" debentures constituted a charge on all the property, undertaking, and assets of the defendant company; secondly, that the defendant company might be perpetually restrained from carrying out the proposed sales to the defendants De Friese and Borax Consolidated, Lim., without first making due provision for the satisfaction and discharge of the "A" and "B" debentures; and thirdly, that, in the alternative, the debentures might be enforced by foreclosure and sale.

The plaintiff then moved for an interlocutory injunction in the terms of the writ.

On March 21, 1899, North, J., granted an interlocutory injunction (68 L. J. Ch. 410; [1899] 2 Ch. 130).

The defendant company appealed. In the interval, further assents to the proposed sale had been procured by the defendant company, so that the holders of all the debentures, except to the value of 16,900*l.*, were assenting; and on the defendant company offering to pay into Court, to abide the result of the trial of the action, an amount sufficient to satisfy the whole of the debentures held by persons who had not assented, including the plaintiff, the Court of Appeal, on May 10 (without expressing any opinion on the merits of the case), discharged the order under appeal upon the terms of that being done (68 L. J. Ch. 412; [1899] 2 Ch. 137).

In consequence of this order the agreements of November 29, 1898, and January 10, 1899, were carried into effect.

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BORAX CO., IN RE, App.

At the subsequent trial of the action before Farwell, J., on March 5, 1900, the plaintiff claimed to be entitled to have his debentures paid off or to foreclosure; and contended that the injunction had been dissolved on the terms that he should get that to which he was entitled.

Farwell, J., was clearly of opinion that the Court of Appeal intended that the sale should proceed, and that the money paid into Court was meant to be a security for the dissentient debenture-holders in substitution for the assets sold by the Borax Co. His Lordship accordingly made a declaration that the plaintiff and all other dissentient debenture-holders had a charge upon the 16,900*l.* and such other assets of the defendant company as had not been included in the agreement of November 29, 1898, for the amount of their principal and interest.

The defendant company appealed.

Swinfen Eady, Q.C., and *P. B. Abraham*, for the appellants.—The defendant company has the right, without the consent of the plaintiff or of any of the other dissentient debenture-holders, to sell all its assets (with the exception of certain securities) on the terms proposed. The debenture-holders have no specific charge over these assets. All that they have is, in terms, a floating charge over all the property and undertaking and assets for the time being, whether present or future, of the company. That they will still have, even though the original assets over which the floating charge exists are changed in their nature. The existence of the floating charge does not prevent the company from selling part of its assets. As to the meaning of "floating charge" see *Government Stock &c Investment Co.* v. *Manila Railway* [1896] [1] and *Tailby* v. *Official Receiver* [1888].[2] What is proposed to be done in the present case is *bona fide* and in the best interests of all concerned; there is nothing which, on the merits, is capable of being impeached; there is nothing, therefore, in the transaction which can be objected to. The evidence here is all one way, that the transaction is highly beneficial for all concerned. The memorandum of association of the company confers the power to carry out this transaction, and every person has notice of the memorandum—*Wall* v. *London and Northern Assets Corporation* [1898].[3]

The powers of a company in dealing with its assets are only those defined by the memorandum; and if the company is acting within those powers the debenture-holders cannot interfere; they have no voice in the matter—*Cotton* v. *Imperial &c Agency Corporation* [1892] [4] and *New Zealand Gold Extraction Co.* v. *Peacock* [1893].[5] If the company has power to do what is proposed under its memorandum, the dissentient debenture-holders must shew some limit in the debentures, and that they are unable to do.

Even though the security of the debenture-holders is diminished, or jeopardised, if what is proposed to be done is within the powers of the company the debenture-holders have no cause of action—*Vivian & Co., In re; Metropolitan Bank* v. *Vivian & Co.* [1900],[6] and *Panama, New Zealand &c. Co., In re* [1870].[7] Nothing that the company has done has caused it to cease to carry on business, so as to entitle the debenture-holders to enforce their security — *Wallace* v. *Automatic Machines Co.* [1894].[8] The widest scope must be given to the words "ordinary course of business"—*Willmott* v. *London Celluloid Co.* [1886].[9]

Hughes, Q.C., and *Clauson*, for the respondent.—Whether the transaction is or is not a beneficial one does not make the slightest difference to the rights of the debenture-holders. The plaintiff is entitled to insist upon those rights on behalf of himself and the other dissentient debenture-holders. The fact that a majority of the debenture-holders have acquiesced is not sufficient, because there is not the usual clause in the debentures that a majority shall bind the minority.

(1) 66 L. J. Ch. 102; [1897] A.C. 81.
(2) 58 L. J. Q.B. 75; 13 App. Cas. 523.
(3) 68 L. J. Ch. 248; [1898] 2 Ch. 469.
(4) 61 L. J. Ch. 684; [1892] 3 Ch. 454.
(5) 63 L. J. Q.B. 227; [1894] 1 Q.B. 622.
(6) 69 L. J. Ch. 659; [1900] 2 Ch. 654.
(7) 39 L. J. Ch. 162, 482; L. R. 5 Ch. 318, 320.
(8) 63 L. J. Ch. 598; [1894] 2 Ch. 547.
(9) 56 L. J. Ch. 89; 34 Ch. D. 147.

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Nor does the fact that the debentures have gone up in value in any way affect the matter. The question is, has the company taken away the security which it originally charged in favour of the debenture-holders? Whether or not the transaction is *ultra vires* is to be gathered from what was laid down by the House of Lords in *Ashbury Railway Carriage &c. Co.* v. *Riche* [1875].[10]

This is not a dealing in the ordinary course of business—*Vivian & Co., In re*,[6] and *Wallace* v. *Evershed* [1899].[11] A debenture is a commercial document, and any person who acquires one contemplates that the security will be dealt with in a commercial manner and in the ordinary course of business, and that he will not have his security swept away.

[RIGBY, L.J.—Have you considered cases as to the failure of the substratum of a company?]

Yes; and the principal cases on that point are *German Date Coffee Co., In re* [1882],[12] and *Haven Gold-Mining Co., In re* [1882].[13]

Swinfen Eady, Q.C., in reply, referred to *Att.-Gen.* v. *Great Eastern Railway* [1880].[14]

Cur. adv. vult.

Dec. 17, 1900.—LORD ALVERSTONE, C.J., stated the facts, and continued: We have now to consider whether the plaintiff and the other dissenting debenture-holders are entitled to enforce payment of the amount of their debentures in priority to the assenting debenture-holders. Mr. Justice Farwell has not decided that the company had so ceased to carry on business that it could be wound up, nor was this contended before us in the argument on behalf of the respondents. I come to the conclusion upon the facts that the company will, notwithstanding the arrangement made with De Friese, still be carrying on some part of the undertaking as contemplated by the memorandum of association, and could not be wound up. I also come to the conclusion—which is, perhaps, another way of stating the same view—that the company, in the agreements made to which exception is taken by the respondent, has not acted *ultra vires* of the memorandum of association.

But it is contended that, although this may be so, the effect of the agreements entered into by the company is such that the transaction cannot be carried out without the consent of all the debenture-holders, and that, therefore, the non-assenting debenture-holders are entitled to claim payment in full. It seems to me that the right of debenture-holders, who have only a floating charge on the undertaking and its assets, is clearly settled by the judgment of the House of Lords in *Government Stock &c. Investment Co.* v. *Manila Railway*,[1] and I will quote only the language of Lord Macnaghten: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes." In my opinion, in order to enable the debenture-holder to insist on payment of his debentures in such a case as this he must shew either that the act complained of is *ultra vires*, or that, to use the language of Lord Macnaghten, "the undertaking has ceased to be a going concern," or that the terms of the debenture which he holds give him the express right to veto or negative the operations which the company are proposing to carry out within their powers. In my opinion, the facts in this case do not support any of the above positions. There is nothing in the debenture to prevent the company from carrying out this particular operation, if it is, as I hold it to be, within the memorandum of association; and in my opinion Mr. Justice Farwell ought to have declined to give the plaintiff and the other dissenting debenture-holders any special rights in respect of the 16,900*l.* brought into Court, and ought to have treated them as having the

(10) 44 L. J. Ex. 185; L. R. 7 H L. 653.
(11) 68 L. J. Ch. 415; [1899] 1 Ch. 891.
(12) 51 L. J. Ch. 564; 20 Ch. D. 169.
(13) 51 L. J. Ch. 242; 20 Ch. D. 151.
(14) 49 L. J. Ch. 545; 5 App. Cas. 473.

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same rights as the debenture-holders who had assented.

For these reasons I think the appeal should be allowed with costs here and below.

Rigby, L.J.—In this case Mr. Justice North, on an interlocutory motion, granted an injunction until the hearing restraining the defendants from carrying out a sale of their assets to Mr. De Friese and the Borax Consolidated, Lim., without first making due provision for the payment of the debenture-holders whose assent to such transfer had not been obtained. No previous authority is cited for such a finding when, as in the present case, the company is only doing what is plainly authorised by the memorandum of association and a substantial and independent business has throughout remained to be carried on. On appeal to the Court of Appeal it appeared at the end of the discussion that holders of debentures to the aggregate amount of 16,900*l.* or thereabouts had not assented to the transfer; and the Borax Co. consenting, without deciding, or indeed discussing, whether the injunction was rightly granted or not, it was ordered that on payment into Court to the general credit of the cause of 16,900*l.* the injunction should be dissolved. There had been some discussion as to bringing the bonds of the plaintiff into Court, but no terms were arranged, and ultimately the order was made, not by consent, but on the authority of the Court, and the appeal motion was not heard on its merits. The injunction being dissolved, the proposed transfer was carried into effect. The property and assets comprised therein became vested in Borax Consolidated, Lim., and the defendant company have had transferred to them in pursuance of the agreement for transfer, and are now the holders of 100,000*l.* mortgage debenture stock and 150,000*l.* cumulative preference shares, and 70,000*l.* in fully paid ordinary shares of Borax Consolidated, Lim., in satisfaction of the purchase-money of 320,000*l.* agreed upon. The above-mentioned mortgage debenture stock, cumulative preference shares, and ordinary shares are still the property and assets of the defendant company, together with a balance amounting to between 23,000*l.* and 24,000*l.* agreed to be retained by the defendant company as its own property of certain securities in no way relating to the Borax Co. The action came on for trial before Mr. Justice Farwell. It was contended for the plaintiff that by the transfer of all its assets except the 23,000*l.* to 24.000*l.* of securities the company was brought into such a state that it was proper at the suit of debenture-holders to treat it as liable to be wound up, and that the plaintiff's debentures were immediately payable at par, which were the grounds whereon Mr. Justice North granted the interim injunction; but the Judge, on the construction of the bonds, and on a review of the facts, negatived these contentions, and held that the plaintiff and all other the holders of the "A" and "B" debentures of the defendants, the Borax Co., Lim., had a continuing floating charge on all the property, undertaking, and assets of the defendants, the Borax Co., Lim., but not on such of the said assets as were sold to De Friese and Borax Consolidated, Lim.

This declaration, in my judgment, entirely negatives the whole case made by the plaintiff and the grounds on which the interim injunction was granted. It is not appealed against by the plaintiff, and it is not, strictly speaking, open to this Court to discuss the grounds on which it is founded. I do not, however, differ from anything said by the Lord Chief Justice. The declaration actually made was entirely unnecessary, as there never was a doubt that unless the sale were declared improper the floating charge existed. The declaration, however, is followed by a passage as follows: "And doth order and adjudge that the plaintiff Arthur Foster and all other the holders of the said debentures who have not assented to the said sale have a floating charge on the 16,900*l.* money on deposit in Court to the credit of this action." In my judgment this order, if it means, as no doubt it does, that the non-assenting debenture-holders are entitled to a floating charge to the exclusion of the others, is not only inconsistent with the previous declaration

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(since the 16,900*l.* is one of the assets of the company), but proceeds upon a wrong view of the order of the Court of Appeal of May 10, 1899, which did not give any charge on the fund not otherwise existing, but treated it as a fund available for compensation of dissentient debenture-holders only in case at the trial they should prove to have sustained damage by the sale, and the sale itself should as regards them be held wrongful, neither of which events has been established.

The defendants, the Borax Co., Lim., ask to have the action dismissed with costs, and the judgment in the Court below, except as to costs ordered to be paid by the plaintiff, reversed. It appears to me that they are entitled to this relief, the plaintiff having failed entirely. The appeal should be allowed with costs, and the action dismissed with costs, and the judgment reversed, except as aforesaid, the costs of the action to include the costs of the motion for an injunction and the appeal from the order made thereon.

Vaughan Williams, L.J.—I agree, but think it right to state my reasons. It seems to me that Mr. Justice Farwell, by his judgment, decided first that the contention of the plaintiff that the floating charge had attached, and the moneys payable thereunder had become payable before the due date, could not be supported. And it seems to me that the learned Judge so decided on two grounds—one being that the company had not ceased to carry on business, and the other that the debentures defined the events on the happening of which the debenture debt was to become payable before the due date, and that ceasing to carry on business was not one of those events. Secondly, Mr. Justice Farwell decided, following as he said the decision of Mr. Justice North, that the sales could not have taken place except upon the terms of substituting cash to the full amount of the claim of the dissentients for the full amount of the property taken away—that is, he decided that the sales, apart from the order of the Court of Appeal, were wrongful and liable to be restrained, not because such sales were *ultra vires* conferred by the memorandum of association, but because the carrying out of such sales would be substituting a different charge from that given to the debenture-holders by the debentures. Thirdly, Mr. Justice Farwell, construing the order of the Court of Appeal, decided that it did not mean that the parties to the contract of sale might go on at their peril upon bringing 16,900*l.* into Court, but meant: "Bring into Court 16,900*l.*, the total amount of the debentures of the dissentients, and on those terms complete your sale free from all incumbrances of those dissentients." Mr. Justice Farwell thought that the effect of the order was that there should be no claim left against the assets taken by the purchasers, the Consolidated Co. The 16,900*l.* was to be substituted for so much of those assets. I am not here discussing whether Mr. Justice Farwell was right in so finding and holding. I am only saying that he did so find and hold, and I think that the judgment as ordered must be construed in the light of what Mr. Justice Farwell found and held.

It seems to me perfectly plain that although Mr. Justice Farwell found against the plaintiff, on his contention that he was entitled to immediate payment of the sum secured by the debentures on the ground that the company had ceased to carry on business, yet he plainly intended to decide the action in favour of the plaintiff, and that this is only intelligible by reference to the finding of Mr. Justice Farwell, that except on the conditions imposed by the Court of Appeal the sale was wrongful and subject to be restrained, because it would substitute a different charge from that given by the debentures. Now, in the first place I think that if the judgment of Mr. Justice Farwell means that the order of the Court of Appeal did anything more than provide security for the satisfaction and discharge of the bonds of the dissentient debenture-holders, in case it should turn out on the trial that the plaintiff and the dissentient debenture-holders were entitled to have the defendant company restrained from carrying out the proposed sales without first making due provision for such satisfaction and discharge, the learned Judge was wrong. I think it clear that

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the 16,900*l.* was ordered by the Court of Appeal to be paid into Court to the credit of the action merely as security for the plaintiff and the other dissentient debenture-holders in case the claim in the statement of claim should be established in principle. It is true that after the order of the Court of Appeal the plaintiff could not obtain an injunction by the judgment in the action; but he could obtain the alternative remedy of satisfaction, if he established that the proposed sales were such as ought not to be carried out without first making due provision for such satisfaction. In my judgment there is nothing in the order of the Court of Appeal to exclude from the trial of the action the question involved in the claim (as it stood in the pleadings) for an injunction—that is to say, the question whether or not the sale was wrongful against the debenture-holders—and liable to be restrained at their instance, because it endangered their security. And to alter the security of the debenture-holders otherwise than in the ordinary course of business as authorised by the memorandum of association, would, in my opinion, endanger the security.

The difficulty of the plaintiff is that it cannot be denied that generally it is true to say that a debenture-holder who takes a floating charge on the undertaking and property of a company cannot complain of anything which is done by the company *intra vires*, and in the ordinary course of business; and Mr. Justice Farwell, following Mr. Justice North, has in effect held that the sale or amalgamation agreement of the company with De Friese was *intra vires*, and in the ordinary course of business, because he has held that, notwithstanding the sale, the company have not ceased to carry on business. This decision may be right or may be wrong, but it cannot be discussed because there is no appeal by the plaintiff against it.

To my mind the real objection to this agreement is that whereas the memorandum of association by clause (*a*) enables the company to carry on in the United Kingdom, France, Germany, Belgium, Turkey, and elsewhere as may for the time being be determined the business of miners, refiners, distillers, manufacturers of and dealers in (either wholesale or retail) boracite, borax, boracic acid, and any other similar ore, clause 10 of the agreement of sale by the company to De Friese contains the following provision. [His Lordship read the clause, and continued:] This clause in the agreement seems by its very terms to preclude the company from exercising its powers in respect of an object included in the undertaking, an object as to which there are reasons contained in the terms of the memorandum itself for saying that it is the principal object, and the other objects merely subsidiary. For a company thus to preclude itself seems to me a very different thing from the non-exercise of a power, or from the selling of a part of the property of the company essential to carrying out an authorised object of the company, or even the chief object authorised by the memorandum. For a company thus to preclude itself for ever seems to me in effect to be an alteration of the memorandum of association by excluding therefrom the objects which the company have agreed not to exercise. It will be observed that the memorandum gives no power to sell the "undertaking," and the agreement did not purport to sell it.

I am by no means sure that the debenture-holders were not when they brought this action entitled to the injunction claimed. But unfortunately the statement of claim, though it sets out clause 10 of the agreement and alleges that the proposed sale will endanger the security, does not in terms complain of the clause as altering the nature of the undertaking by limiting it, and the point was never argued either before Mr. Justice North or Mr. Justice Farwell. The point was argued that the business as carried on after the sale would not be the business carried on when the debenture-holders lent their money and on security of which they relied. This point seems to me a bad point, and to be merely the point against which Mr. Justice Cozens-Hardy decided in *Vivian & Co., In re; Metropolitan Bank* v. *Vivian & Co.*[6] This is a very different question from the question whether the carrying out of an agreement containing a covenant by the

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company not to exercise its powers in respect of an object, and that the principal object included in the memorandum, can be restrained on the application of either shareholders or debenture-holders, but as my brethren think that the point is not open now, I shall not discuss the matter further, but leave it open so far as I am concerned.

Appeal allowed.

Solicitors—Clements, Williams & Co., for appellants; Linklater & Co., for respondent.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

FARWELL, J. 1901. Jan. 17.

PARKER, *In re*; STEPHENSON *v.* PARKER.

Will — Construction — Sum Set Apart out of Residue—Devolution—Gift Over of Residue as a Whole.

If the will of a testator shews an intention that the entirety of his residue should go over as a whole, a sum directed to be set apart out of residue will, on the failure of the trusts affecting it, fall back into and follow the destination of the remainder of the residue, and will not devolve upon the next-of-kin of the testator.

Skrymsher *v.* Northcote (1 Swanst. 566; 1 Wils. C.C. 248) *observed upon.*

The testator in the cause by a codicil dated January 29, 1881, to his will dated September 18, 1879, after reciting the provisions which he had made respecting one equal third part of his residuary estate for the benefit of the children of his late son Arnold Parker, proceeded: "Now I do hereby revoke the bequest of such remaining equal one-third part of my said residuary estate, and the trusts affecting the same, and in lieu thereof I direct that the trustees or trustee of my said will shall stand and be possessed of and interested in the said one third part of my said residuary estate upon the trusts following, that is to say: As to the sum of 4,500*l.* part thereof, the sum of 2,250*l.* to be held in trust for each of my two grandchildren, Arnold Shirecliffe Parker and Norman James Parker (sons of my said son Arnold Parker), who shall attain the age of 21 years. And as to the remaining part of the said one third part of my said residuary estate, In trust for such one or more of the four children of my said late son Arnold viz, Francis Kenyon Parker (in my will called Frank Parker), Agnes Mary Parker (in my will called Agnes) and the said Arnold Shirecliffe Parker and Norman James Parker, who being sons or a son shall attain the age of 21 years, or being a daughter shall attain that age or marry under that age. And in case there shall not be any such child of my said son Arnold Parker, I direct that the said one third share of my said residuary estate, or any accruing share, shall go and be held in trust for" the testator's daughter Emma Stephenson and her husband and children as in the codicil mentioned. "And in default to my next of kin, according to the Statute of Distributions."

The testator died on December 9, 1881. His will and codicil were proved on May 17, 1882.

The testator's grandson, Arnold Shirecliffe Parker, attained the age of twenty-one years on April 18, 1898. The testator's grandson, Norman James Parker, died under the age of twenty-one years on February 22, 1900.

The surviving trustees of the will commenced the present proceedings to obtain the opinion of the Court whether there was an intestacy as to the 2,250*l.* bequeathed in trust for Norman James Parker, or whether the said sum of 2,250*l.* was to be held in trust for the three children of the testator's late son Arnold, who had attained the age of twenty-one years.

P. M. Walters, for the plaintiffs.

Arkle, for one of the next-of-kin of the testator. — The case is governed by *Skrymsher* v. *Northcote* [1818],[1] *Greer* v.

(1) 1 Swanst. 566; 1 Wils. C.C. 248.

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PARKER, IN RE.

Pertwee [1846],[3] and *Lloyd* v. *Lloyd* [1841].[3] It is a share of residue, and cannot fall into residue.

T. T. Method, for the living children of the testator's son, Arnold Parker.—The gift over in the event of all dying points to an intention that the property should go over as a whole. It is analogous to the case of ascribing to the word "survivor" the sense of "other." The 2,250*l.* follows the destination of the balance of the fund—*Champney* v. *Davy* [1879].[4] *Skrymsher* v. *Northcote*[1] has been dissented from—see *Judkin's Trusts, In re* [1884].[5]

[FARWELL, J., referred to *Palmer, In re; Palmer* v. *Answorth* [1893].[6]]

Arkle, in reply.—There was a gift over in the case of *Skrymsher* v. *Northcote*.[1]

FARWELL, J., after stating the facts to the effect above stated, continued: The question calling for decision is whether the 2,250*l.* given to Norman James Parker is disposed of under the gift of "the remaining part of the said one third part of my said residuary estate," or whether the gift devolves as upon an intestacy. For the next-of-kin of the testator reliance is placed on *Skrymsher* v. *Northcote*,[1] which undoubtedly bears a strong resemblance to the present case; and in that case also the will contained a gift over. I do not think it is necessary for me to say whether *Skrymsher* v. *Northcote*[1] can stand, having regard to *Palmer, In re; Palmer* v. *Answorth*,[6] because in my opinion I am bound to apply the rule of construction established by decisions in the Court of Appeal in reference to the analogous cases where survivors has been read "others." Although the rule might have been applied in *Skrymsher* v. *Northcote*,[1] it must be remembered that the particular point—namely, the weight to be given to the terms of a gift over—is of comparatively modern origin.

Here I have got the words "as to the remaining part of the said one third part of my said residuary estate," which are ambiguous in this sense; they may mean "remaining after deducting the 4,500*l.*," or they may mean true residue, that is, "remaining after deducting so much of the 4,500*l.* as is required to satisfy the legacies to Arnold and Norman." I will assume that *Skrymsher* v. *Northcote*[1] was well decided according to the law as it then stood. But I have a gift over which shews that the testator intended that the gift of the residue in favour of the children of his late son Arnold should not fail, unless all the children died under the age of twenty-one if males, or under that age and unmarried if females, an event which has not happened. Now a gift over in the case where survivor has been read "other" has been held to shew that the fund is to go over as a whole, and only if there is a total failure of the objects of the gift. The cases have held that although the word "survivor" has its true meaning of "survivor," where there is no gift over, yet a gift over imports a different signification. Applying that doctrine, I must hold that the remaining part of the clause, coupled with the gift over, does shew that the testator was dealing with the share of residue as a whole, and that it must therefore be read as a true residue. It is not unimportant to note that the ultimate gift is to next-of-kin. The declaration will be that the children of Arnold, the son of the testator, and not the next-of-kin of the testator, are the parties entitled.

Solicitors—Guscotte, Wadham & Bradbury, agents for Wightman & Parker, Sheffield, for plaintiff and first defendant; Geare & Pease, agents for Wake & Sons, Sheffield, for other defendants.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

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(2) 15 L. J. Ch. 372; 5 Hare, 249.
(3) 10 L. J. Ch. 327; 4 Reav. 231.
(4) 48 L. J. Ch. 268; 11 Ch. D. 949.
(5) 53 L. J. Ch. 496; 25 Ch. D. 743.
(6) 62 L. J. Ch. 988; [1893] 3 Ch. 369.

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[IN THE COURT OF APPEAL.]

LORD ALVERSTONE, C.J.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
1900.
Nov. 30. Dec. 3.

WELLBORNE, *In re.*

Solicitor—Bill of Costs—Taxation by Cestui que Trust—Twelve Months after Payment—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *ss.* 39 *and* 41.

The discretion given to the Court by section 39 *of the Solicitors Act*, 1843, *to order taxation at the instance of a cestui que trust of a bill of costs which has been paid by a trustee is limited by the proviso in section* 41 *that the application must be made within twelve months after payment.*

Downes, *In re* (13 L. J. Ch. 159; 5 Beav. 425), *followed.*

Decision of KEKEWICH, J. (69 L. J. Ch. 462; [1900] 1 Ch. 857), *reversed.*

Appeal from decision of Kekewich, J. (69 L. J. Ch. 462; [1900] 1 Ch. 857), on a motion by Messrs. Wellborne, solicitors, to discharge an order made on March 5, 1900, on the application of one of the beneficiaries under the will of J. C. West, for taxation under section 39 of the Solicitors Act, 1843, of three bills of costs for 100*l.* 2*s.*, 9*l.* 16*s.* 6*d.*, and 11*l.* 19*s.* 4*d.* respectively, delivered by the applicants to the trustees of the will. The first of these bills had been paid by the trustees in 1896, and the application to tax was made by summons on January 16, 1900.

Kekewich, J., held that the proviso in section 41 of the Solicitors Act, 1843,[1] that an application for taxation must be made within twelve months after payment, does not apply to an application under section 39 by a *cestui que trust* for taxation of a bill paid by trustees. He accordingly ordered taxation.

The solicitors appealed.

P. O. Lawrence, Q.C., and *F. Stallard*, for the appellants.—The sections of the Solicitors Act, 1843, applicable to the case are sections 37 to 41. The person liable to pay can obtain an order for taxation in the same form as the person employing the solicitor. The application for taxation here was made under section 39. The words, "any such bill as aforesaid," in section 41,[1] refer to any such bill as is mentioned in sections 37, 38, and 39, and the bill, if paid, cannot be referred for taxation unless the application for reference be made within twelve calendar months after payment—*Downes, In re* [1844],[2] *Massey, In re* [1845],[3] *Neate, In re* [1847],[4] *Dickson, In re* [1856],[5] *Baker, In re* [1863],[6] *Press and Inskip, In re* [1865],[7] and *Jackson, In re; Boughton Leigh* v. *Boughton Leigh* [1889].[8] These cases are all in favour of the appellants. *Drake, In re* [1856],[9] was relied on as being against them; but that was only an instance of a case of taxation under special circumstances after payment. It was not cited in *Baker, In re*,[6] nor in *Press and Inskip, In re*.[7] In *Chowne, In re* [1884],[10] the decision of Kay, J., was in favour of the appellant's contention. The case went to the Court of Appeal and was decided there on other grounds, but Fry, L.J., made some remarks which are said to be against the appellants. It is to be observed that the cases on the subject had not been cited to him. In *Sutton and Elliott, In re* [1883],[11] the question was whether the words "any such bill as aforesaid" in section 41 meant a signed or unsigned bill, and it was held that they must include an unsigned bill.

The object of the section was that after twelve months a solicitor should know

(1) Solicitors Act, 1843, s. 41: "The payment of any such bill as aforesaid shall in no case preclude the Court or Judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall in the opinion of such Court or Judge appear to require the same, upon such terms and conditions and subject to such directions as to such Court or Judge shall seem right, provided the application for such reference be made within 12 calendar months after payment."

(2) 13 L. J. Ch. 159; 5 Beav. 425.
(3) 8 Beav. 458.
(4) 10 Beav. 181.
(5) 26 L. J. Ch. 89; 8 De G. M. & G. 655.
(6) 32 Beav. 526.
(7) 35 Beav. 34.
(8) 58 L. J. Ch. 387; 40 Ch. D. 495.
(9) 22 Beav. 438.
(10) 52 L. T. 75.
(11) 52 L. J. Q.B. 752; 11 Q.B. D. 377.

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what was his position, and should not be liable to be disturbed. A *cestui que trust* is in no better position in this respect than his trustee.

Warrington, Q.C., and *Leigh Clare*, for the respondent.—On the construction of the Act, apart from the authorities at all events, section 41 does not apply to section 39. It is an enabling section, and empowers the Court to direct taxation of a bill, notwithstanding that it has been paid. It cannot, therefore, refer to section 39, as that section gives express power to tax a bill which has been paid, and such an enabling power would not be wanted. Section 37 refers to unpaid bills, and but for section 41 a bill payable by the party chargeable could not be taxed after payment. Section 41 shews in what cases that can be done. Section 39 gives a discretionary power, and under that the Judge can take into account any circumstances that he pleases.

[LORD ALVERSTONE, C.J., referred to *Binns* v. *Hey* [1843].[12]]

The decision of *Dickson, In re*,[5] is only applicable to section 38, not to section 39. What is said in *Baker, In re*,[6] is clearly an *obiter dictum*. *Drake, In re*,[9] is applicable to the present case. *Massey, In re* [1865],[13] is a case under section 38. In *Dawson and Bryan, In re* [1860],[14] a mere overcharge was held enough to justify taxation under section 39.

P. O. Lawrence, Q.C., in reply.—The words at the end of section 39 bring in the provisions of section 41. *Chowne, In re*,[10] recognises that. We rely on section 41, where "any such bill as aforesaid" must mean any of the bills mentioned in sections 37, 38, and 39. The Act has been construed for over forty years in the way we suggest, and the practice has been adopted that there shall be no taxation on an application made after twelve months from payment. There is no decision against this.

LORD ALVERSTONE, C.J.—If this point had come up for decision for the first time I should have had very great doubt whether we could hold that the lapse of twelve months was a bar to taxation under section 39. It seems to me that there is a very great deal to be said for the view that, looking at the language of section 41, it was not intended to deal with cases where bills had been paid by a trustee. But at the same time, having said that, I think that there is sufficient doubt as to the meaning of these sections to lead us to give great weight to the established practice.

I think that in the first place section 37 lays down what I may call the general code with regard to the taxation of bills. Section 38 deals with bills which may under special circumstances be taxed on the application of persons not originally chargeable, whether they have been paid or not. Section 39 goes further, and says that a bill may be taxed though it has been paid, at the instance of the persons interested in the property out of which the money was to come, with a general discretion in the Court as to allowing the review or reference to take place. It is to be noted that neither of those sections 38 or 39 deals with any question of time after payment—they deal solely with the question of allowing reference after payment in the one case (section 38) under special circumstances; in the other (section 39) under general discretion.

Then we come to section 41. There is a great deal to be said for the view that section 41 on the face of it looks like a general section applicable to all the preceding sections, yet, if we were driven to put a strict construction on the words "such bill as aforesaid," I think that in all probability, as I have already indicated, one would consider that it applied to the case of a bill the payment of which had not been previously dealt with; and in the same way, when one finds that the section refers to "special circumstances" of the case, one would think that it applied to the case of some bill as to which no reference to special circumstances had been made in earlier sections. Still, although the clause does not fit exactly either to section 38 or to section 39, it is possible to take the view that the words "payment of any such bill as aforesaid" refer generally to the whole of the three

(12) 13 L. J. Q.B. 28; 1 Dowl. & L. 661.
(13) 34 L. J. Ch. 492; 34 Beav. 463.
(14) 28 Beav. 605.

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clauses. Then I think it is possible to take the view that, if that is the general scope of the section, the proviso at the end, which relates to time after payment, which is certainly not a subject-matter that has been touched in any of the previous clauses, was inserted in order that there might be a limit with regard to what might or might not be done after a certain period has elapsed. And in favour of the general application of the clause I certainly am rather pressed by the argument addressed to us by counsel for the appellants that the taxation does not preclude the *cestuis que trust* from taking exception to the action of the trustee if he has employed the solicitor unduly, and it would be no answer to his claim to say that the bill had been taxed as between the trustee and the solicitor. And although counsel for the respondent has argued that where a bill is being taxed as between the solicitor and the trustee, the person liable, the Master ought to take into consideration what could be properly chargeable, yet still I think that this Act was dealing principally and mainly with the question of the solicitor's charges as such.

Under those circumstances, it not being, I admit, very satisfactory to my mind, but there being a reasonable doubt as to what was intended to be the scope of section 41, and it being open to take the view that at any rate the proviso was intended to apply to the three previous sections, we have what is a practically continuous course of decision from a very few years after the Act down to the present time. We have the judgments of Lord Langdale and Lord Romilly, Lord Justice Turner and Mr. Justice Kay. On the other side there is the decision of *Drake, In re*,[9] which seems to indicate that section 41 must be limited because of the reference to special circumstances in it, which was also the subject of part of the enactment of section 38. We have also the doubt, or rather the opinion, of Lord Justice Fry, that it was doubtful as to whether section 41 applied to cases under section 39. In this state of things it seems to me that we ought not to disturb the practice, and that if this settled practice on this somewhat doubtful Act of Parliament is to be put right, it must be put right by legislation.

For this reason I think the appeal should be allowed.

RIGBY, L.J.—Section 39 does not use the expression "special circumstances," but I think it is perfectly clear that it is only on special circumstances that a Judge could avail himself of the discretion given him by that section. It is not to be supposed that he could in any case as a matter of course make such an order as is contemplated by that section. Then section 41 says that the payment of a bill of costs shall in no case—whether or not a case provided for by section 39—preclude the Court from referring the bill for taxation if the special circumstances of the case shall, in the opinion of the Court or Judge, appear to require the same, and terms and conditions may be imposed, provided the application for such reference be made within twelve calendar months. It appears to me that without at all saying that there might not be a doubt originally upon the meaning of the Act, we ought now to take it as sufficiently settled that after payment of a bill by virtue of section 41 there can be no taxation if twelve months have expired. I think that in *Pemberton, Ex parte; Tyther, in re* [1852],[15] Lord Cranworth clearly indicates that as his opinion. "I entertain great doubt," he said, "whether there is authority, in the absence of a case of fraud, to interfere under the summary jurisdiction which is given or regulated by the Act. The provisions of the 37th section" (he was dealing with section 37 mainly, no doubt) "are all directed to the taxation of bills remaining unpaid. Then the 41st clause is directed to bills which have been paid, and it contains this proviso": (I think he means to say it is directed quite generally to bills that have been paid) "'provided the application for such reference be made within 12 calendar months from payment.' I doubt whether there was any jurisdiction to direct taxation"—indicating his opinion, although it was not a conclusive one, that the proviso of section 41

(15) 22 L. J. Bk. 76; 2 De G. M. & G.

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is applicable, I think not only in cases within section 37, but in all cases, as, indeed, the very general words of the section would seem to shew.

VAUGHAN WILLIAMS, L.J.—I agree. If it had not been for Lord Langdale's decision in *Downes, In re*,[2] and the practice which has been referred to, I do not think I should have had any hesitation myself in adopting counsel for the respondent's argument. I feel bound to say, so far as I can say that a section has a reasonably plain construction which has been differently construed by such great authorities, that I do feel that the construction of this section is reasonably plain; but on the other hand, there is the decision, and there is the fifty years' practice which has followed the decision; and under those circumstances it is more convenient at all events that the law should be treated as settled. I do not think there is any necessity, however, to treat it as settled to any greater extent than there is direct authority. Now I do not understand that there is a continuous line of direct authority as far as the application of section 41 generally to section 39 is concerned, because so far as the first part of the section is concerned it seems to me that there is direct decision in *Drake, In re*,[9] that so much of section 41 does not apply to section 39. The practice seems to have been rather more limited than that, but on the point that arises before us it does seem that the practice has been reasonably well settled for the last fifty years.

Solicitors—Wellborne & Son, for appellants; Chester & Co., for respondent.

[*Reported by A. J. Spencer, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
ROMER, L.J.
1900.
Dec. 12.

FISHER *v.* BLACK AND WHITE PUBLISHING CO.

Company — Dividend — "Profits available for dividend"—Reserve Fund—Memorandum and Articles of Association — Companies Act, 1862 (25 & 26 *Vict. c* 89), *Schedule I. Table A, art.* 74.

The memorandum of association of a limited company provided that the "profits from time to time available for dividend" should be applicable—first, to the payment of a dividend of 15 *per cent. to the ordinary shareholders; and secondly, should be divided between the ordinary shareholders and the holders of founders' shares in specified proportions. The articles adopted Table A, expressly excluding some articles in Table A, but made no express mention of article* 74, *which enables directors to create a reserve fund*:—Held, *that article* 74 *of Table A was not excluded by implication, and that the words "profits from time to time available for dividend" in the memorandum meant the net profits after deducting all sums properly appropriated by the directors for other purposes, and that the application of part of the profits to a reserve fund was a proper purpose under article* 74.

Per ROMER, L.J.—*Article* 74 *of Table A was so far modified that the reserve fund could not be used for equalising dividends.*

Appeal from an order of Kekewich, J.

This was an action by a holder of founders' shares, brought by the plaintiff on behalf of himself and other holders of founders' shares, to restrain the company and their directors from carrying over to a reserve fund a one-third share (or any part thereof) of the profits of the year remaining after a dividend of 15 per cent. on the ordinary shares had been provided for.

The capital of the company consisted of 9,500 ordinary shares of 10*l.* each, and 500 founders' shares of 10*l.* each, issued as fully paid-up. The memorandum of association provided by clause 5 that as between the holders of the ordinary shares

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and the holders of the founders' shares "the profits from time to time available for dividend shall be applicable as follows: (1) To the payment of a non-cumulative preferential dividend of 15 per cent. per annum on the capital paid up on the shares other than the founders' shares; (2) of the surplus, two-thirds shall be applicable to the payment of a further dividend on the capital paid up on the shares other than the founders' shares, and the remaining third shall be applicable to the payment of dividend on the founders' shares rateably."

The articles of association provided (article 1) that the regulations contained in Table A in the First Schedule to the Companies Act, 1862, except so far as thereby excluded or modified, should be deemed to be the regulations of the company; (article 11) "The holders of the ordinary shares shall be entitled to be paid out of the profits in each year as a first charge a non-cumulative preferential dividend at the rate of 15 per cent. per annum on the amount for the time being paid up on the ordinary shares held by them respectively"; (article 12) "The surplus profits in each year shall be dealt with in manner following—that is to say, two-thirds shall belong to and be divided between or among the holders of the ordinary shares rateably in proportion to the amount for the time being paid up on the ordinary shares held by them respectively, and the remaining one-third shall belong to and be divided between the holders of the founders' shares in proportion to the number of shares held by them respectively." The articles of association expressly provided that articles 52, 53, and 54 of Table A (relating to directors) should not apply, but made no express mention of articles 72, 73, and 74 of Table A.[1]

The accounts of the company for the year ending July 31, 1900, shewed a profit (after allowing for an interim dividend of 2½ per cent. on the ordinary shares already paid) amounting to 13,225*l.* Out of this sum the directors by their report proposed to pay a dividend of 12½ per cent. on the ordinary shares amounting to 5,721*l.* 17*s.* 4*d.*, to carry 7,000*l.* to a reserve fund, and to carry over 503*l.* 14*s.*, thus paying no dividend to the holders of founders' shares.

On a motion by the plaintiff for an interlocutory injunction, Kekewich, J., held that clause 74 of Table A was excluded by implication as being inconsistent with clause 5 of the memorandum of association, and that the holders of founders' shares were entitled under clause 5 to have one-third of the surplus profits applied in payment of a dividend to them, and granted an interlocutory injunction.

The defendants appealed.

Renshaw, Q.C., and *Stewart-Smith*, for the appellants.—The memorandum and articles of association must be read together with clauses 72, 73, and 74 of Table A,[1] and subject to the power conferred by article 74 on the directors to create a reserve fund. The words "profits from time to time available for dividend" do not mean the same thing as net profits. The creation of a reserve is a proper deduction. Articles 11 and 12 do not conflict with this view, but rather assist it.

[ROMER, L.J.—They refer to the payment of a dividend out of profits.]

Nepean (with him *Warrington, Q.C.*), for the respondents. — The provisions of clause 5 in the memorandum of association and of articles 11 and 12 of the articles of association are in the nature of a bargain between the different classes of shareholders, and are inconsistent with clauses 72 and 74 of Table A,[1] which must be treated as excluded by implication. "Profits from time to time available for

(1) Schedule I. Table A of the Companies Act, 1862, provides as follows: (72) "The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." (73) "No dividend shall be payable except out of the profits arising from the business of the company." (74) "The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalising dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select."

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dividend" in this connection mean all profits available for that purpose, having regard to the fact that no dividend is properly payable except out of the profits arising from the business of the company.

[VAUGHAN WILLIAMS, L.J.—The words can hardly mean the net profit balance as shewn by the profit and loss account.]

No reply was called for.

RIGBY, L.J.—The question arises upon the construction of a memorandum and articles of association, and in particular of clause 5 of the memorandum, and articles 11 and 12, and article 74 of Table A, which table, except so far as it is excluded, forms part of the articles.

I will begin with the memorandum. [His Lordship read the material parts of clause 5.] First of all let us consider what is meant by "the profits from time to time available for dividend." It seems to me that if that meant exactly the same thing as "the profits" it would be very useless to introduce the qualifying words "from time to time available for dividend," which I think have a considerable part to bear in this matter. One argument that has been insisted upon is that all profits are included, and that you must look to article 73 of Table A, which is also one of the clauses of this company's articles of association, and that there you will find a limitation—namely, that dividends are to be paid out of profits arising from the business of the company. I do not think that we can be properly called upon to explain or separate one part of profits from another. All the profits mentioned in article 73 are profits, and I do not get any assistance in trying from that article to learn what are "profits from time to time available for dividend."

Now, articles 11 and 12 have been referred to, and they require consideration. No doubt article 11 is that the holders of ordinary shares shall be entitled to a non-cumulative preferential dividend of 15 per cent. on the amount for the time being, which shall be paid out of profits in each year as a first charge. That is a non-cumulative dividend. Then in article 12 the surplus profits in each year —that is the amount that remains after payment of the 15 per cent.—shall be divided into two-thirds and one-third. That very clearly is dealing with the same subject-matter as was dealt with in clause 5. It would be idle, I think, to hold that the deliberate intention was to produce a rule for the division of profits different from that of clause 5 of the memorandum. I should rather assume—and I do so without much difficulty—that these articles meant to lay down the ordinary rule, and that when it was provided that a dividend of a fixed amount should be paid, that did not mean that it should be paid out of any profits that were available for dividend. As was pointed out by Lord Justice Romer in the course of the argument, the language of article 11 particularly and of article 12 in the same way, though not quite so pointedly I think, points to not an aliquot share of gross profits, but a dividend which is to be a first charge, and a non-cumulative one, to be paid out of the profits, and in so far as that first charge cannot be paid out of the profits it must fail; if the profits were only 5 per cent., for instance, the first dividend of 15 per cent. could not be paid; but I think generally, in reading articles 11 and 12 we must construe them as meaning paid after the fashion and in the manner in which a dividend may be paid. So far we have not got to any conclusion as to the precise meaning of the words "profits available for dividend," but there is no difficulty in surmising what they must mean. They must mean profits which are properly applicable for payment of dividends; and when we go to article 74 of Table A we find a provision which, so far as I know, is the only provision—there may be others, but there is this at any rate—which provides for a limitation of the profits which are applicable and can properly be applied for payment of dividends, for we find that "the directors may, before recommending any dividend,"—that takes the matter quite clearly out of the profits available for dividend—"set aside out of the profits of the company such sum as they may think proper as a reserved fund to meet contingencies, or for equalising dividends, or for repairing or maintaining the works connected with the business of the

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company." It seems to me that one of the duties—perhaps the very first duty—which they have to undertake when they formulate a statement of account of the profits for the period they are dealing with, is to determine what they shall set apart for a reserve fund; and when they have set it apart they must invest it, and from that moment when they have set apart the reserve fund it is no longer a fund of profits available for dividend. Then clause 5 does not in any way deal with what they set apart as a reserve fund. They have power to do it—as prudent men they ought to do it—to meet any contingencies. They ought to apply their minds, and they ought to determine whether or not it shall be done, whether a reserve fund shall or shall not be created; and from the moment they have done it, clause 5 of the memorandum and articles 11 and 12 of the special articles of the company have nothing whatever to do with the matter—they must divide the sum which remains after deducting the reserve fund. As I said before, there may be some other things to be done first—I have not had my attention called to any, but there may be—and if there are, then the other funds required for the purpose must be set apart too; and it is only when you have set apart those funds that you can begin to estimate and ultimately set apart in the form of dividends any profits which are available for a dividend.

VAUGHAN WILLIAMS, L.J.—I agree. I do not think this is an easy case. I think, moreover, that it is extremely probable that the question which has been raised upon this particular memorandum of association and these particular articles is one which may affect a great many companies. Of course one knows that the forms which are used in one case are often in common use in other cases. But although I think the case a difficult one, I agree that it is not necessary to take time to consider it, because these cases are probably decided better freshly after hearing the arguments than after deferred consideration. The question which we really have to decide is a question of the construction of clause 5 in the memorandum of association. It is really a question what is the meaning of the words "the profits from time to time available for dividend." In considering that question both sides have invited us to treat clause 5 of the memorandum as an ambiguous clause and to construe it in the light of the articles, and I propose therefore to do so. I think that the words "profits from time to time available for dividend" in clause 5 mean the net profits after deducting all proper appropriations by the directors. I said in the course of the argument that I did not think that these words could mean the net profit balance as shewn by the profit and loss account. I do not think that anybody contended that they did mean that. If the words do not mean that, then it seems to me that there is no resting-place between that meaning and the meaning of the net profits after deducting all sums properly appropriated by the directors before they arrive at the sum out of which the dividends are to be paid. If the directors chose to appropriate a portion of the profit balance, as shewn by the profit and loss account, to the replacement of so much of the capital as had been expended for revenue purposes, nobody denies that they could do that; and, on the other hand, nobody says that there is an obligation on them to do that. It is a matter within their discretion so to appropriate the profit balance. They might, if they chose, pay the whole profit balance without making any such appropriation for the purpose of replacement of capital.

That being so, I think that this question arises, whether the appropriation of part of the profit balance to the formation of a reserve fund to meet contingencies is a proper appropriation by the directors; and I think it is a proper appropriation by the directors. Every one seems agreed that it is a proper appropriation by the directors if article 74 of Table A is an article which is in force. The articles here begin by saying, "In so far as these articles do not exclude or modify the regulations contained in the table marked A in the first schedule to the Companies Act, 1862, the last-mentioned regulations shall so far as the same are applicable be deemed

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to be the regulations of the company." Then one finds later on that articles 52, 53, and 54 of Table A shall not apply. That being so, it is plain that article 74 is not expressly excluded, and it can only be excluded because of its inconsistency with something that one finds expressly provided in the memorandum of association or the articles. I see nothing in the memorandum or the articles to exclude article 74. On the contrary, if I had to construe clause 5 of the memorandum without the assistance of the contemporaneous articles, I should not say that there was anything in clause 5 inconsistent with the power of the directors to set aside out of the profits of the company such sum as they thought proper as a reserve fund. But if one must turn to the articles to construe the memorandum, a thing which I always do with very great hesitation, I think that article 74 in this case is not excluded, and if it is not excluded and is to be treated as written into the special articles, and then one turns to those articles to construe the clause in the memorandum, I think the case is *a fortiori*. I think, therefore, that there is nothing in clause 5 to prevent the directors setting aside out of the profits of the company such a sum as they think proper as a reserve fund, because I think that the word "profits" in clause 5 means profits after deducting all sums properly appropriated by the directors out of the profit balance shewn in the profit and loss account.

I wish to say that I am always sorry if one has to come to a conclusion which may possibly be a conclusion which business people would not arrive at, and I confess that I had some doubt as to whether business people might not read "profits" in clause 5 of the memorandum of association in a different way from that which I am reading it; and when I look at the report of the directors themselves in dealing with this very subject-matter, their language may give some colour to the view that they themselves — the directors who were making this reserve fund—thought that the profits available for dividend were the whole sum of 13,225*l.*; but whatever they may have thought, it is the province of the Court to determine what those words in the memorandum mean, and according to my view they do not mean the 13,225*l.*, but that sum less so much of it as the directors have, within their powers, properly decided to set aside as a reserve fund to meet future contingencies.

ROMER, L.J.—The point involved has been very well argued on both sides, and I cannot say that I have had much difficulty myself in coming to a conclusion upon it. In particular, I think that the arguments on behalf of the respondents could not have been better put than they were.

As we are differing from my brother Kekewich, I desire to state my reasons in my own language. I think that the words "available for dividend" in the memorandum of association following the word "profits" are intended in some shape or form to modify the word "profits," and I think the phrase "profits from time to time available for dividend" in the memorandum mean profits which, after making all proper deductions, remain for the purpose of paying dividends. One may arrive at the point of view I am taking in another way. What is the period of time you have to consider when you have to ascertain within the memorandum of association what are the profits available for dividend? I think it is the time after you have already properly ascertained the profits which are applicable for the payment of dividend, and not any prior time.

Then, is there any difficulty in the way of that construction by reason of the wording of articles 11 and 12? I cannot see any. In my view the word "profits" in articles 11 and 12 must be taken to mean the same profits as are referred to in the memorandum of association—that is to say "profits available for dividend"—just as much as if these words had been repeated in those articles. This is borne out by the fact that, after all, the payments mentioned in articles 11 and 12 are payments of dividends.

Then, with regard to the articles in Table A, this, at any rate, is clear, that articles 72, 73, and 74 are not expressly excluded, and it is to be borne in mind

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that when articles of Table A are intended to be excluded they are expressly so excluded in the company's articles of association; and I think it is a fair deduction that those who prepared the company's memorandum and articles of association must have had articles 72, 73, and 74 of Table A in their minds, and did not think it necessary to expressly exclude them, so that in my opinion these articles ought to be considered to be included unless there is some grave reason for excluding them by implication. I am bound to say that I see no such reason, but on the other hand I do see great difficulty in excluding them and especially in excluding article 74. I am of opinion, therefore, that article 74 is included in the company's articles of association.

There is only one point on which I think it right to say a word with regard to article 74. As at present advised, I do think that article 74 is modified to a certain extent—that is to say, that it could not be used for the purpose of creating a reserve fund to be applied for equalising dividends. That is my present opinion, though it is unnecessary to express any concluded opinion on the point, which is not now being raised before us; but I desire to point that out, as otherwise it may be thought to follow from our judgment that article 74 might be applied so as to work an injustice as between the owners of the founders' shares and owners of the ordinary shares. For these reasons I agree that the appeal ought to succeed.

Renshaw, Q.C.—Then, as we are agreed to treat this hearing as the trial of the action, the order appealed from will be discharged with costs of the appeal and the action dismissed. I do not press for the costs of the action.

RIGBY, L.J.—Then the appeal will be allowed with costs, and the action dismissed without costs.

Appeal allowed.

Solicitors—Dubois & Williams, for appellants; William Fisher, for respondents.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

BUCKLEY, J.
1901.
Jan. 11.

MONTEFIORE v. GUEDALLA.

Will — Forfeiture Clause — "Become vested in some other person"—Act of Bankruptcy—Adjudication—Title to Dividend—Apportionment — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 44, *and* 54.

Under a will by which a life interest in a fund is made forfeitable if the tenant for life "should do or omit to do or should suffer to be done any act whereby the income if payable to himself would become vested in some other person," the forfeiture, for the purpose of apportioning the income in the event of the bankruptcy of the tenant for life, takes effect from the date of the act of bankruptcy and not from the date of the adjudication.

Adjourned summons.

Judah Guedalla, who died on June 8, 1858, by his will dated December 21, 1839, gave one equal third part of his residuary estate to Sir Moses Montefiore, Moses Montefiore, and Abraham Mocatta upon trust to permit and suffer and authorise and empower his son Haim Guedalla to receive the dividends, interest, and income of such third part as the same should from time to time become payable until his son Haim should assign, charge, or otherwise dispose of the said dividends, interest, and income, or any part thereof, by way of anticipation, or should do or omit to do or should suffer to be done any act whereby the same if payable to himself would become vested in some other person or persons. And if his son Haim should assign, charge, or otherwise dispose of his dividends, interest, and income, or any part thereof, by way of anticipation, or should do or omit to do or should suffer to be done any act whereby the same if payable to himself would become vested in some other person or persons, then the trustees should during the remainder of the life of Haim Guedalla pay and apply such dividends, interest, and income for the maintenance, or otherwise for the benefit, of all or any one or more exclusively of the other or others of Haim Guedalla and the person or persons who under the trusts of the testator's will

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would for the time being be entitled thereto in case Haim Guedalla were then actually dead, as the trustees should in their uncontrolled discretion think fit.

In 1858 proceedings were commenced to administer the testator's estate, and by an order made in the action on January 18, 1860, it was ordered "that the dividends to accrue on 24,471*l.* 0*s.* 2*d.* New 3*l.* per Cent. Annuities, which after such carrying over as therein directed would be standing in the name of the Accountant-General in trust in the said cause to the separate account of the plaintiff Haim Guedalla and his family subject to duty, during the life of the said Haim Guedalla be paid as the same shall accrue due to the said Haim Guedalla until the further order of the Court."

The sum of 24,471*l.* 0*s.* 2*d.* New 3*l.* per Cent. Annuities mentioned in the order was now represented by the sum of 20,306*l.* 13*s.* 4*d.* India 3½ per Cent. Stock in Court to the credit of the action. The dividends on this stock, which were payable quarterly on January 5, April 5, July 5, and October 5 in each year, were paid down to July 5, 1900.

On July 8, 1900, Haim Guedalla committed an act of bankruptcy by making default in compliance with a bankruptcy notice; and on August 17 a receiving order was made against him upon a petition based on such act of bankruptcy.

On October 1 he was adjudicated bankrupt, and the official receiver became the trustee in the bankruptcy.

The quarterly dividend on the stock which fell due on October 5 was still in the hands of the Paymaster-General awaiting the decision of the Court in the present case.

The persons who under the trusts of the will would now be entitled to the trust fund if Haim Guedalla were now actually dead were the children of his late brother Moses Guedalla.

This was a summons by Sir Joseph Sebag Montefiore, the present trustee of the will, asking (*inter alia*) that the dividends accrued due and to accrue due on the India Stock standing in Court to the separate account of Haim Guedalla and his family, instead of being paid to him as provided by the decree of January 18, 1860, might be paid to the applicant or other the trustee or trustees for the time being of the will, to be applied by him or them according to the trusts of the will during the life of Haim Guedalla, or until further order.

It was admitted that the Apportionment Act, 1870, applied, and that the dividends must be treated as accruing *de die in diem*, and that the trustee was entitled to the dividends as from the date of adjudication.

The main question raised was whether the trustee or the official receiver, as the trustee in bankruptcy of Haim Guedalla, was entitled to the dividend which became payable on October 5, the trustee admitting the right of the official receiver to a proportionate part of the dividend which accrued between July 5 and 8.

E. Ford, for the summons.—The dividends ceased to be payable to the bankrupt on the commission of the act of bankruptcy on July 8. The bankrupt by omitting to comply with the bankruptcy notice on that date omitted to do an act whereby the dividends, "if payable to himself, would become vested in some other person or persons," and the forfeiture clause in the will thereupon took effect.

[He referred to *Throckmorton, In re; Eyston, ex parte* [1877],[1] and the Bankruptcy Act, 1883, ss 43 and 54.]

E. J. Elgood, for persons interested under the will, adopted the same argument.

A. H. Jessel, for the official receiver.—The forfeiture clause in the will does not come into operation until the adjudication.

The order in the administration action having been made so long ago, the discretion of the trustee ought not to be exercised to decide who should take the dividends without the leave of the Court. The powers of trustees after the making of an administration order are paralysed. The proper course is to direct an enquiry what sums ought to be allowed to other persons interested under the will and to the bankrupt for maintenance—*Page* v. *Way*

(1) 47 L. J. Bk. 62; 7 Ch. D. 145.

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[1840][2]—although the effect of making an allowance to the bankrupt might be that some portion of it would pass to his trustee in bankruptcy—*Coleman, In re; Henry* v. *Strong* [1888].[3]

On the main point, the commission of the act of bankruptcy has nothing to do with the forfeiture. On the adjudication the bankrupt did an act the necessary consequence of which was that the property was divested out of him. The commission of the act of bankruptcy was not an act the necessary consequence of which was that the property would "become liable to be divested." The clause in the will does not come into operation until an act is done or omitted to be done which must necessarily have the effect of vesting—*Dawes, Ex parte; Moon, in re* [1886].[4]

In *Loftus-Otway, In re; Otway* v. *Otway* [1895],[5] a distinction was drawn between the words "deprived" and "liable to be deprived." The making of a receiving order does not vest the property of a debtor in the official receiver—*Sartoris, In re; Sartoris* v. *Sartoris* [1891][6]; neither does a Scotch sequestration—*James, In re; Clutterbuck* v. *James* [1890].[7]

[BUCKLEY, J., referred to the Bankruptcy Act, 1883, s. 44, sub-s. (i.).]

Until the vesting section in that Act comes into operation the property vests in the tenant for life.

This is an attempt to apply the artificial doctrine of relation back to the construction of defeasance clauses in wills and settlements so as to divest an interest which was vested in the tenant for life up to the date of his adjudication.

Further, the Apportionment Act, 1870, applies. On October 5 the dividend was declared, and the official receiver is therefore entitled to an apportioned part of it up to the date of adjudication.

[He also referred to *Daintrey, In re; Mant & Mant, ex parte* [1899].[8]]

(2) 3 Beav. 20.
(3) 58 L. J. Ch. 226; 39 Ch. D. 443.
(4) 17 Q.B. D. 275.
(5) 64 L. J. Ch. 529; [1895] 2 Ch. 235.
(6) 61 L. J. Ch. 1; [1892] 1 Ch. 11.
(7) 62 L. T. 454.
(8) 69 L. J. Q.B. 207; [1900] 1 Q.B. 546.

No reply was called for.

BUCKLEY, J., stated the facts, and continued: The question I have to determine is who is entitled to the dividend which became payable on October 5. Neither party disputes that the income is to be treated as accruing *de die in diem*; and the applicant, who is the trustee of the will, does not dispute that the proportionate amounts of the dividend attributable to July 6, 7, and 8 are payable to Haim Guedalla, and therefore to the official receiver. But the applicant contends that as from July 8 the dividends ought to be dealt with by him as directed by the will during the remainder of the life of Haim Guedalla. In my judgment the applicant's contention is well founded.

I have to consider whether Haim Guedalla has, and if so when he has, done or omitted to do or suffered to be done any act whereby the dividends, if payable to himself, would have become vested in some other person or persons. Under section 54 of the Bankruptcy Act, 1883, the result of the adjudication on October 1, 1900, was that the property of the bankrupt immediately vested in his trustee in bankruptcy. Under section 43 of the Act "The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him"—in the present case on July 8. By section 44 the property of a bankrupt divisible amongst his creditors shall comprise (*inter alia*) the following particulars: (i.) "All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." Let us consider for a moment what would have been the result if the act of bankruptcy had occurred on July 8, the dividend had been payable on October 5, and the adjudication had taken place on October 10. There would then have vested in the trustee in bankruptcy all the property of the bankrupt from July 8 onwards, including the dividend of Octo-

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ber 5. By virtue of what act or omission by the debtor would the dividend of October 5 have vested in his trustee? It appears to me that it would have been by virtue of this act or omission that he failed on July 8 to comply with the bankruptcy notice. Did he then do anything whereby the dividend of October 5 became vested in some other person or persons? I answer Yes. The act which produced this result was not the act of the Court in adjudicating him a bankrupt, but his own act to which it related back. It would be because the act was before October 5 that the dividend would vest in the trustee.

I have in that illustration varied the dates, but the same thing appears to me to be true as to the apportioned parts of this income for each day. On the part of the official receiver it is not disputed that as from the date of the adjudication the clause in the will would take effect. It seems to me, however, that at an earlier date—namely, on July 8—there had taken place that event upon the happening of which the testator has provided that during the remainder of the life of Haim Guedalla the trustees of his will shall apply the dividends for the benefit of the other persons mentioned in his will. The remainder of his life means so much of it as is subsequent to the act which he did on July 8, and everything coming to him after that date passes to the trustees. Therefore, subject to the payment to the official receiver of the apportioned part of the dividend for the three days up to July 8, the remainder of the dividend and all future dividends during the life of Haim Guedalla will be payable to the trustee of the will.

Solicitors—Emanuel & Simmonds, for applicant; Guedalla & Cross, for parties interested under will; Edward Lee, for official receiver.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

FARWELL, J. 1900. Dec. 5, 6, 12, 13. } JACOBS v. MORRIS AND MORRIS.

Principal and Agent—Power of Attorney — Construction — General Power of Borrowing—Loan to Agent Secured by Bill of Exchange—Duty to Enquire as to Agent's Authority—Payment into Principal's London Banking Account—Money Had and Received to Use of Lender—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 25.

A power of attorney authorising an agent in England to purchase goods in connection with the business carried on by his principal in the colonies, and either for cash or on credit, and "where necessary in connection with any purchases made on my behalf as aforesaid or in connection with my said business" to make, draw, and accept bills of exchange, and to sign the name of the principal to any cheques on the London banking account of the principal, does not confer on the agent a general borrowing power.

Montaignac *v.* Shitta (15 App. Cas. 357) *distinguished.*

Money borrowed by the agent under the power secured by bills of exchange accepted by him in the name of his principal and paid into the London banking account, and then drawn out by the agent and applied for his own purposes, cannot be recovered from the principal in an action "for money had and received" to the use of the lender in the absence of proof by the lender that the principal knew or had the means of knowledge that the money, whilst it remained in the banking account, was the money of the lender and not of the agent, or else that the principal had the benefit of it.

Moses *v.* Macfarlan (2 Burr. 1005; 1 W. Bl. 219) *and* Marsh *v.* Keating (1 Bing N.C. 198) *discussed and applied.*

The plaintiff in this action, Louis Jacobs, was the sole partner in an Australian firm carrying on business under the name of Jacobs, Hart & Co. The firm had an agency in London since 1882. The defendants, Messrs. Morris, were cigar importers, and had dealt with the plaintiff's firm since 1889. The plaintiff

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was himself for about two months in 1888 the agent of the firm in London, his father having previously been the agent. In the same year the plaintiff became a partner in the firm, and in 1898 he became the sole owner of the business. In or about 1893 the defendant Leslie Jacobs, who was the plaintiff's brother, was appointed the London agent of the firm. By a power of attorney made on January 30, 1899, the plaintiff appointed the defendant Jacobs his attorney "in and throughout the United States and the continents of America and Europe, and all other parts of the world other than Australasia and New Zealand for me and in my name or in my said trading name to purchase and to make and enter into sign and execute any contract or agreement with any persons firm company or companies for the purchase of any goods or merchandise in connection with the business carried on by me as aforesaid or for the purchase or acquisition by me of any patent rights or the right to the exclusive or partial use of any patent or invention or for the purchase or acquisition of the right to act as the sole or partial agent of any person firm or company and to make such purchase or acquisition either for cash or on credit or partly for cash or partly on credit as my said attorney shall in his discretion think advisable." Then there was a power to modify or vary the terms and conditions of such contracts or to wholly cancel the same on such terms as he might deem advisable. Then it went on: "And for me and on my behalf and where necessary in connection with any purchases made on my behalf as aforesaid or in connection with my said business to make draw sign accept or endorse any bill or bills of exchange promissory note or promissory notes notes of hand or bills of lading which shall be requisite or proper in the premises and to sign my name or my said trading name to any cheques or orders for the payment of money on my banking account in London, England."

The banking account referred to in the power of attorney had since 1882 been kept in the name of the firm, but since 1893 it had been exclusively operated upon by Leslie Jacobs, and it appeared that he had used it partly for the firm's purposes and partly for his own. In June, 1899, Leslie Jacobs, purporting to act on behalf of the firm, applied to the defendants Messrs. Morris for a loan of 4,000*l.*, which they agreed to lend on condition that a large order was placed with them. Accordingly on June 12, 1899, they handed Leslie Jacobs two cheques for 2,000*l.* each drawn to the order of Jacobs, Hart & Co., and received from him four bills of exchange for that amount, accepted "Jacobs, Hart & Co., *per pro* Leslie R. Jacobs." The cheques were paid into the firm's banking account in London. On the same day Leslie Jacobs, purporting to act as agent for the firm, purchased from Messrs. Morris cigars at the price of 1,070*l.*, in payment for which he gave them two bills for 1,000*l.* and 70*l.* respectively, accepted in the same way. The 4,000*l.* was drawn out by Leslie Jacobs and used by him for his own purposes. In July, 1899, Messrs. Morris repurchased the cigars from Leslie Jacobs, and gave their bills in payment.

In November, 1899, the plaintiff commenced this action, in which he claimed an injunction to restrain the defendants from negotiating the bills of exchange accepted by Leslie Jacobs, on the ground that there was a fraudulent conspiracy between Messrs. Morris and Leslie Jacobs. Messrs. Morris counterclaimed against the plaintiff and Leslie Jacobs for payment of the sums due on all the bills, or alternatively for the 4,000*l.* as money had and received by the plaintiff to their use, and also for the 1,070*l.* for the price of the goods sold and delivered to the plaintiff.

A considerable amount of evidence was given dealing with the charge of conspiracy, after hearing which Farwell, J., held that the charge was wholly unfounded.

The argument then proceeded upon the counterclaim.

Lawson Walton, Q.C., Butcher, Q.C., and *A. L. Morris*, for the defendants Messrs. Morris.—The plaintiff is liable. In the first place, the power of attorney authorised Leslie Jacobs to draw bills "in connection with any purchases made on my behalf as aforesaid, or in connection with my said business." The first part

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of the clause covers the bills for 1,000*l.* and 70*l.* given in payment for the cigars. The second part implies a power to borrow; otherwise the words would have no meaning. Moreover, a power to buy "for cash or on credit" implies a power to borrow. The actual course of dealing in this case shews that it was necessary to borrow. It was the practice of Leslie Jacobs to draw bills on the firm and discount them at the bank, depositing at the same time the shipping documents. That was in effect a borrowing. The onus is not on Messrs. Morris, who dealt in good faith with Leslie Jacobs, to prove that the money was borrowed on behalf of the firm—*Bank of Bengal* v. *MacLeod* [1849].[1] When once a power to borrow is made out, the innocent lender is not obliged to shew the necessity for the particular loan—*Montaignac* v. *Shitta* [1890].[2] In *Bryant* v. *La Banque du Peuple* [1893][3] the general words were cut down on the *ejusdem generis* principle; but here there are two cases in which the authority to accept bills is conferred.

In the second place, the plaintiff is liable for money had and received. The 4,000*l.* went straight into the firm's banking account, and consequently it came into his possession and under his control. The account was started by his predecessors in 1882; it was continued by him, and it is described in the power of attorney itself as "my banking account in London." Although admittedly Leslie Jacobs used it for his own purposes, his only authority to draw on that account was conferred by the power of attorney given by the plaintiff. The authority might at any time have been withdrawn by the plaintiff, and, once withdrawn, nobody but the plaintiff could have claimed the money. Money paid into a man's banking account is "money had and received to the use of" the person paying it in—*Marsh* v. *Keating* [1834][4] and *Reid* v. *Rigby & Co.* [1894].[5]

Messrs. Morris are entitled to an account. They are entitled to judgment against Leslie Jacobs on his implied warranty of authority, should the plaintiff be held not to be liable.

Ellis J. Griffith, for the defendant Leslie Jacobs, submitted to judgment against him.

Sir E. Clarke, Q.C., *Upjohn, Q.C.*, and *Johnston Edwards*, for the plaintiff Louis Jacobs.—The plaintiff is admittedly liable on the bills for 1,000*l.* and 70*l.* With regard to the loan of the 4,000*l.*, Messrs. Morris had express notice of the limitation of the power, because they saw the document, although they did not read it, and implied notice by reason of section 25 of the Bills of Exchange Act, 1882. The power of attorney contains no authority to borrow, either express or implied. It must be construed strictly—*Bryant* v. *La Banque du Peuple*,[3] *Attwood* v. *Munnings* [1827],[6] and *Harper* v. *Godsell* [1870].[7]

As to the banking account, it was not the plaintiff's, but Leslie Jacob's account. The only person who can draw on an account of this kind is the person whose signature is deposited with the bank. There is no evidence that the plaintiff's signature was so deposited. But, however that may be, Messrs. Morris must, according to *Marsh* v. *Keating*,[4] shew further that the plaintiff knew, or had the means of knowing, that the money was there. In fact, he did not and could not know that, for the pass-book was never sent to him, but only statements shewing shipments. It is true that he knew that Leslie Jacobs had exceeded his authority in the past; but that was in respect of purchases, and not of borrowing. The onus is on Messrs. Morris to prove that the plaintiff had the money. On the balance of the account Leslie Jacobs is indebted to the plaintiff, and consequently no account ought to be directed. *Clayton's Case* [1816][8] has no application.

[FARWELL, J., referred to *Moses* v. *Macferlan* [1760][9] as shewing that equitable principles were to be applied in an action "for money had and received."]

FARWELL, J.—This is a case of some little difficulty. As regards the issue

(1) 5 Moore Ind. App. 1; 7 Moore P.C. 35.
(2) 15 App. Cas. 357.
(3) 62 L. J. P.C. 68; [1893] A.C. 170, 177.
(4) 1 Bing. N.C. 198, 219.
(5) 63 L. J. Q.B. 451; [1894] 2 Q.B. 40.
(6) 6 L. J. (O.S.) K.B. 9; 7 B. & C. 278.
(7) 39 L. J. Q.B. 185; L. R. 5 Q.B. 422.
(8) 1 Mer. 572.
(9) 2 Burr. 1005, 1010; 1 W. Bl. 219.

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of fraudulent misrepresentation, I have already held that the charge is entirely unfounded, and so far as that issue is raised the action will be dismissed with costs. As regards the bills for 1,000*l.* and 70*l.* given for the tobacco which was bought, those subject to ascertaining the exact balance are not contested by the plaintiff's counsel. They were given under the power of attorney, and there must be judgment for the amount.

Then there comes the question about the 4,000*l.* [His Lordship stated the facts, and read the material parts of the power of attorney, and continued:] The transaction was of this nature: Leslie Jacobs had a meeting with Messrs. Morris. He told them that his firm was going to make cigarettes, and he wanted cash for machinery for this purpose and to buy leaf-tobacco, and he asked them to lend him the money to enable him to do so. They were willing to lend him the money because they had had dealings with the firm, and because Leslie represented to them that they would get the benefit of the efforts of the Melbourne firm to push certain brands of cigars, of which they were the owners, in the colonies. I desire to say that, as regards Messrs. Morris, I think they are entirely free from any imputation of dishonesty, and that they acted quite honestly and openly and believed what Leslie told them. They had known him for some years, and they believed this was the true story. Then Leslie Jacobs gets the money, and pays it into the banking account of Jacobs, Hart & Co. That banking account was an old account which had been open for years—since 1882; and it was operated upon by cheques drawn by Leslie Jacobs under the power of attorney. It stood in the name of the firm, but Leslie Jacobs used it for his own purposes as well. The only accounts rendered to the plaintiff did not shew all the dealings on that banking account, but only such dealings as were properly attributable to the business of Jacobs, Hart & Co.

I now turn to the power of attorney to see whether Leslie Jacobs had under it any power to borrow the 4,000*l.* There is not a word from the beginning to end of this power of attorney about borrowing money. To begin with, there is an inherent improbability that a principal should give his attorney power to borrow money without expressly stating it. It is laid down in the cases cited to me that you do not construe general terms in such a way as to give a power of borrowing; if it is not expressly stated, the general words are confined to matters *ejusdem generis* with the specific matters already stated. The specific matters here stated are simply purchases. Stress was laid by the defendant's counsel on the words "or in connection with my said business," and it is said with some force that that points to something other than the purchases which have just been mentioned, which are the only matters specifically mentioned in the body of the power. In my opinion those words are not enough to give a general power of borrowing. I think they are satisfied by attributing them to such transactions as may be necessary to give effect to the modification or variation of the terms of the contract or the cancellation of the same; and I find in this very case an illustration of this: the contract for the sale of cigars, which I have already decided in favour of Messrs. Morris, was varied by a re-sale to them with bills of exchange for the purchase-money. That is, to my mind, within the power; it is not in connection with a purchase, but it is in connection with a re-selling which is a part of the powers given to the attorney by way of cancelling the contract of purchase on terms. It was not contested that that must be within the terms, and there are other matters of that kind which would be sufficient to give effect to those particular words "or in connection with my said business" without giving them the extraordinarily wide signification which the defendants desire to attribute to them of a general borrowing power.

I do not think I need refer to the cases, beyond perhaps the case of *Bryant* v. *La Banque du Peuple*,[3] where Lord Macnaghten, delivering the judgment of the Privy Council, says, "Nor was it disputed that powers of attorney are to be construed strictly—that is to say, that where an act purporting to be done under a power of attorney is challenged as being

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in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication." That accords with *Attwood* v. *Munnings*,[6] and also with the other case (*Harper* v. *Godsell*[7]), in which Lord Blackburn pointed out that a power of assigning property was not to be inferred from general words, which were to be restricted to matters *ejusdem generis* with those already stated. In the other case in the House of Lords (*Montaignac* v. *Shitta*[2]) the point was a different one; there was there admittedly authority to borrow, and the question was as to the extent and construction of that particular power of borrowing. It was argued here that the power of attorney admittedly authorised some borrowing. I do not think that is the true view: the so-called borrowings were described in Mr. Louis Jacobs's evidence, where the mode of paying for goods was detailed by him: "If Leslie"—that is the attorney—"bought for us, the practice was to take the shipping documents to our Australian bank, and get the cash from them under a letter of credit with which we furnished him and hypothecate the bills of lading." Now that is not to my mind a borrowing at all within the meaning of the borrowing powers which are claimed under the power of attorney. It was really a special mode of carrying out the power given to the attorney of buying goods and paying for them. It is one thing to give bills in exchange for or in payment for goods; it is quite another thing to do so in order to raise money generally for general purposes. A man may well be willing to entrust his attorney with power to give a bill of exchange for the specific goods that he purchases, but quite unwilling to give him a general power to borrow money on his mere statement that he is going to buy goods or is going to apply it in a particular fashion. I hold, therefore, on construction, that there is no power to borrow under this power of attorney which would authorise the borrowing of the 4,000*l*. That being so, so far as the counterclaim claims judgment on the bills of exchange it fails.

Then it is said: "But the 4,000*l*. was paid into the banking account of Jacobs, Hart & Co., and therefore was received by the plaintiff, the sole owner of that title"; and if the money had in fact ever come into his possession, or was there still, that no doubt would be so. It is claimed under the head of "money had and received." That is a well-known form of common-law action, and it is explained by Lord Mansfield in *Moses* v. *Macferlan*.[9] He points out that one of the distinctions between it and an action for debt is that debt implies contract, whereas this does not: "This brings the whole to the question saved at Nisi Prius, viz. 'Whether the Plaintiff may elect to sue by this form of action, for the money only; or must be turned round, to bring an action upon the agreement.' One great benefit, which arises to suitors from the nature of this action"—that is, for money had and received—"is, that the plaintiff need not state the special circumstances from which he concludes 'that, *ex æquo et bono*, the money received by the Defendant, ought to be deemed as belonging to him:' He may declare generally, 'that the money was received to his use'; and make out his case, at the trial. This is equally beneficial to the defendant. It is the most favourable way in which he can be sued: He can be liable no further than the money he has received; and against that, may go into every equitable defence, upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing which shews that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand, or to any part of it." I have therefore a case in which the money is paid in to the plaintiff's account. If it stopped there I should be in this difficulty—that the evidence has left me somewhat uncertain whether the plaintiff could draw on that account or not. Counsel for the plaintiff has contended that it is not sufficient to shew merely that the money was paid into the account of the plaintiff, but that it is necessary to go

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further and shew that he could draw on that account. That seems to me to be a question of the onus of proof. I find an account opened in the name of Jacobs, Hart & Co. nearly twenty years ago; the account is in that name throughout, drawn upon under the power of attorney to draw cheques upon any London bank that the donor of the power may have, and operated upon under that power by Leslie Jacobs. If it were necessary for me to determine it, I should hold that the onus would be upon Mr. Louis Jacobs to shew that he had not got the power to draw, because *prima facie* under those circumstances the man who owns the name in which the account is standing, and has been standing for years, has authority to draw upon it. But that is not the whole case. The point which I have to determine really goes a step further, and I ask myself the questions of fact suggested as material by the Judges in *Marsh* v. *Keating*.[4] In that case there was a firm of bankers, Marsh & Co., of which Fauntleroy was a member. Fauntleroy had forged the name of the plaintiff to a power of attorney under which he realised a sum of 9,000*l.* stock, and paid the proceeds of that sale into the account of Marsh & Co. with another banking firm of Martin & Co. The pass-book of Martin & Co. passed backwards and forwards between the house of Martin & Co. and the house of Marsh & Co. Fauntleroy took the precaution of getting hold of it and keeping it locked up, so that in fact his co-partners never saw it and never discovered the particular transaction. There was no entry of this dealing in the house-book, as it was called, of Marsh & Co. The partners in that case did not in fact know, but they certainly had the means of knowing if they had not somewhat blindly trusted Fauntleroy. The questions under those circumstances which the Judges submitted for consideration are "First, did the money actually come into the possession of the Defendants? Secondly, if it ever was in their possession, had the Defendants the means of knowledge, whilst it remained in their hands, that it was the money of the Plaintiff, and not the money of Fauntleroy?" Now the first question I have already said I shall have to answer in this case in the affirmative. I think the money did actually come into the possession of Louis Jacobs, because I consider it went into his banking account, on which he could have operated. I think if he had telegraphed or written a letter which reached the bankers the day after the 4,000*l.* had been paid in, and before it was paid out again, he certainly could have effectually prevented its payment out. In that case he certainly would now have the money in his hands—money belonging to Messrs. Morris; and I cannot see that he would have any defence to the action if the money were in fact in his hands. In that case it would both have actually come into his possession and would be in his hands. But then there comes the second question, which the Court considered it was necessary to answer in the plaintiff's favour before he could succeed: "Secondly, if it ever was in their possession, had the Defendants the means of knowledge, whilst it remained in their hands, that it was the money of the Plaintiff, and not the money of Fauntleroy?" Now I apprehend that this is really the application of those equitable principles which Lord Mansfield referred to in an action "for money had and received." It is not enough to shew that the money went into the account of Mr. Louis Jacobs without also proving that he had the means of knowing it or that he did know it, and this the defendants have failed to shew. Further, in considering whether Messrs. Morris ought *ex æquo et bono* to succeed, I have to bear in mind that they knew that Leslie Jacobs had no power to borrow under the power of attorney. I do not mean actual knowledge, because I accept their statement that the deed was not read to them; but they relied on Leslie Jacobs's assurance, and are fixed with knowledge of the contents of the deed. They therefore lent money not to Louis Jacobs, but to Jacobs, Hart & Co., knowing that Leslie had no power to borrow for Jacobs, Hart & Co. It is not therefore sufficient for them to prove that they paid the money into Jacobs, Hart & Co.'s account, on which they knew, or ought to have known, that Leslie Jacobs had the power to draw. They have to go further and

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shew that Louis knew of it—either that he had the benefit of it or that he knew of it and adopted it. He certainly never got the benefit of it. The account has been put in, and it is quite plain he never got the benefit of it, and he certainly never knew of it. His evidence on that is plain. He never knew that this was borrowed, nor did he know of any borrowing at all—I find that as a fact—by Leslie Jacobs, or of any misdealing with the power of attorney, except that which is stated in his re-examination. He says he had no knowledge of the transactions in June, 1899. He first heard of the transaction after he had revoked the power of attorney. He knew in 1896 that Leslie had misused his name and the power of attorney for Jay Brothers, who were brothers of Leslie and Louis Jacobs. This was the only instance of misuse of which he knew. That being so, I find an equity against Messrs. Morris, because they lend to a man who had not authorised anybody to borrow for him. On the other hand, I find no equity affecting Louis Jacobs to prevent him saying, "I did not want any money borrowed; it was never paid for my benefit; I never got the smallest part of it, and, so far as I am concerned, it had nothing to do with me from beginning to end." In my opinion that accords with the principle involved in *Marsh* v. *Keating*,[4] and on that issue I find in favour of Louis Jacobs. I think that the case of *Reid* v. *Rigby & Co.*[5] entirely bears this out, and, so far as I am aware, there is no authority to the contrary.

The result, therefore, is that as regards the action on the bills for 4,000*l.*, and the alternative claim for money had and received, the claim fails.

Solicitors—Robinson & Stannard, for plaintiff; Hollams, Sons, Coward & Hawksley, for defendants Morris; Edwards & Cohen, for defendant Leslie Jacobs.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

FARWELL, J. 1900. Dec. 7.
RIGBY, L.J.
STIRLING, L.J. 1901. Jan. 14, 15.

KERLY AND OTHERS, *In re.*

Practice—Appearance—Undertaking by Solicitor in Writing to Appear—Duration of Undertaking—Motion for Attachment—Rules of Supreme Court, 1883, *Order VIII. rule* 1; *Order IX. rule* 1.

Although, under Order VIII. rule 1, *a writ of summons is not available for service, unless renewed, for more than a year from the date of its issue, it is not intended by that rule that the writ is not to be in force for any purpose after the lapse of that time.*

The writ in an action was in February, 1899, *sent to the defendants' solicitors, and they, with the authority of their clients, indorsed it, "We accept service for the defendants . . . and will enter an appearance in due course." Negotiations for a settlement followed. The defendants' solicitors made an offer. The plaintiff's solicitors replied that they were prepared to stay further proceedings pending further instructions from their client. The defendants' solicitors wrote that their clients' offer remained open for two months. By consent the time for entering appearance was extended to April* 30. *Nothing further was done in the action until October* 24, 1900, *when the plaintiff's solicitors wrote definitely declining the defendants' offer, and calling on their solicitors to enter an appearance according to their undertaking. The defendants instructed their solicitors, having regard to the long delay, not to enter an appearance, and they accordingly declined to do so. The plaintiff moved to attach the solicitors:*—Held, *that, looking at all the circumstances of the case, the delay had not been so great as to deprive the plaintiff of the right of having the writ treated as still an effective writ as regards service; and that an appearance to it ought to be entered forthwith.*

Per FARWELL, J.—*An undertaking by a solicitor to enter an appearance to a writ*

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KERLY, IN RE, App.

of summons remains in force for a period of six years.

A defendant who has authorised his solicitor to enter an appearance for him is not at liberty to withdraw such authority after the solicitor has entered into an undertaking with the plaintiff to enter such appearance.

Motion.

This was a motion, under Order XII. rule 18, that Mrs. G. J. V. Anderson, the executrix of the will of the late W. A. B. Anderson, might be at liberty to issue a writ or writs of attachment against the various members of the firm of solicitors, Kerly, Son & Verden, by reason of their refusal to enter an appearance in the action of *Anderson* v. *Tarbutt and Quentin* in accordance with a written undertaking given by them on February 24, 1899. The object of the motion was purely formal to test the liability of the solicitors on their undertaking, and no allegation of any kind was made against their professional conduct as solicitors.

The writ was issued in the action of *Anderson* v. *Tarbutt and Quentin* on February 23, 1899, and by it the plaintiff claimed an account of profits made by the defendants in certain dealings connected with mining property in South Africa. On February 24 the defendants' solicitors, with the authority of their clients, indorsed the writ in the margin as follows: "We accept service for the defendants, Tarbutt and Quentin, and will enter an appearance in due course, (signed) Kerly, Son & Verden, 24 February, 1899." Various negotiations for a settlement followed between the solicitors on either side. The defendants' solicitors suggested that a sum should be accepted in settlement of all claims. The plaintiff's solicitors wrote that they were prepared to stay further proceedings pending the receipt of further instructions from their client. The defendants' solicitors wrote that their clients' offer remained open for two months. Finally, in March, 1899, the time for entering an appearance was extended by consent to April 30, 1899. Owing, however, partly to difficulties occasioned by the war in South Africa, and partly to other causes, the matter was allowed to drop for a period of more than eighteen months, and no further steps were taken for a time in the proceedings.

Subsequently, however, on October 24, 1900, the plaintiff's solicitors again wrote to the defendants' solicitors, stating that they were now in a position definitely to decline the proposed terms of settlement, and calling upon the defendants' solicitors to enter an appearance to the action in accordance with their undertaking of February 24, 1899. The solicitors accordingly communicated with their clients, the defendants to the action of *Anderson* v. *Tarbutt and Quentin*, as to entering appearances for them, and were informed that in view of the long delay of the plaintiff the defendants regarded the action as at an end, and they were instructed not to enter an appearance. Under these circumstances they now declined to fulfil their original undertaking.

The plaintiff thereupon moved the Court in the terms already mentioned.

It was alleged during the hearing of the motion that the plaintiff was not now in a position to issue a new writ in the matter, owing to the operation of the Statute of Limitations, the original cause of action in *Anderson* v. *Tarbutt and Quentin* having arisen in 1893 or the early part of 1894. The defendants to that action now professed themselves ready again to authorise their solicitors to enter an appearance, if the Court directed them to do so.

Upjohn, Q.C., and *Gore-Browne*, for the plaintiff.—The solicitors in this case, as the agents of their clients, have entered into an agreement to enter an appearance, and such an agreement is certainly good for at least six years. Nothing has occurred to release them from liability on their undertaking.

Jenkins, Q.C., and *Kerly*, for the solicitors. — Having regard to the terms of Order VIII. rule 1 and Order IX. rule 1,[1] there is now no writ to which to

(1) Order VIII. rule 1: "No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or

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appear. The writ endured only for a year, and the undertaking to appear to it must be similarly limited. The undertaking is partly in lieu of personal service of the writ, which must undoubtedly take place within one year. Here the plaintiff has allowed so great a lapse of time, that the solicitors are no longer authorised by their clients to appear, and are no longer, accordingly, entitled to do so. Their answer to the plaintiff is that they will fulfil their undertaking, if the plaintiff will put them into a position again to be able to do so.

Farwell, J., after stating the facts, continued: The first point taken by counsel for the solicitors is that there is now no writ to which to appear. For that proposition they rely on the provisions of Order VIII. rule 1. In my opinion that rule means that the original writ of summons shall be in force for the purpose of service for twelve months from the date of its issue, and no more—not that the writ is to lose all its efficacy altogether for every purpose after that time. For example, if the writ be issued and appearance be entered to it, and the parties arrange that the matter shall drop, or allow it to drop without arrangement, for, say, eighteen months, the writ still continues in force at the end of that period, and the statement of claim may still be put in—subject, of course, to the provision contained in Order LXIV. rule 13, as to giving a month's notice before taking further steps after allowing matters to remain dormant for a period of twelve months. The first point, therefore, in my opinion, fails.

The real question, then, that I have to consider, is, What is the effect of an undertaking to enter an appearance? Order IX. rule 1 was inserted because many persons do not like being personally served; and it was intended to provide by that Order that their solicitors—being duly authorised — might undertake to accept service for them, that is to say, as their agents, and to enter into a contract, on their behalf, to appear. Such a contract differs in this way—and, so far as I can see, in this way only—from an ordinary contract—namely, that the agent who makes such contract is liable under the provisions of Order XII. rule 18 to be imprisoned, if the Court think fit, for the non-performance by his principal or himself of the contract. The contract, of course, is the contract of the defendant; and the solicitor is his agent duly authorised to make the contract for him. If I am right in this view, it seems to me to follow that the contract remains a binding contract; and the only limit to its duration that I can see is that suggested by counsel for the plaintiff—that is to say, six years. Counsel for the solicitors suggested, it is true, that there was some sort of analogy to be derived from the necessity for the renewal of the writ after twelve months; and that the duration of the undertaking to appear ought to be, not six years, but one. I cannot see any reason for applying such a rule as that to what, in my judgment, is a mere contract. The solicitors contract to enter the appearance, and I see no reason why they should not do so. It is objected that the clients might say to their solicitors, "We no longer choose to employ you; and you must not now enter an appearance for us." The answer to that objection is, in my opinion, this—that the clients did at a certain date authorise those solicitors to act as their solicitors, and, as their solicitors, to enter an appearance for them. It is the clients' own contract to enter an appearance; and they cannot subject their agents, whom they have thus authorised to enter an appearance, to imprisonment because they now say: "True, we gave you originally authority to enter

a Judge for leave to renew the writ; and the Court or Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ . . . . and a writ of summons so renewed shall remain in force, and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

Order IX. rule 1: "No service of writ shall be required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance."

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into such a contract, but we now refuse to allow you to carry it out, although you will be imprisoned if you do not do so." If the defendants in this case had taken the course, which I am glad to find they do not now take, of still refusing to allow their solicitors to enter the appearance, their refusal would be ineffectual, because, in my judgment, the solicitors would be bound to enter the appearance, and the clients, on their part, would be bound by the authority they had already given and the contract they had already entered into. The real answer to the delay is that each party was equally in a position to put an end to it. If, after April 30, 1899, the defendants had chosen to write to the plaintiff and say, "This delay must either come to an end, or we must come to some special terms," they would then have been in a position to enter their appearance and to apply to dismiss the action for want of prosecution. I see no reason for saying there is any equity one way or the other. It seems to me to be a mere question of the construction of certain rules of the Court with which I have already dealt, and of the performance of a contract to enter an appearance to which the ordinary Statute of Limitations applies

The solicitors appealed.

Jenkins, *Q.C.*, and *Kerly*, for the appellants, repeated the arguments used in the Court below

Upjohn, *Q.C.*, and *Gore-Browne*, for the plaintiff, on the question of the liability of a solicitor to attachment on account of default in entering an appearance in pursuance of his undertaking, referred to *Lush's Practice of the Common-Law Courts* (3rd ed.), p. 384, note *k*. Upon the question of the effect of the lapse of time upon entering the appearance they referred to *Webster* v. *Myer* [1884] [2] and *Richardson* v. *Daly* [1838].[3]

Jenkins, *Q.C.*, replied.

RIGBY, L.J.—In this case the question is whether the Court has jurisdiction to proceed against solicitors on an undertaking given by them. It is agreed on both sides that there has been no unfair conduct on the part of the solicitors, and they are not in any position of difficulty, even if the position has been brought about by their own delay, because very fairly and very properly their clients say that if they are now held liable under their undertaking the clients will see that they do not suffer for it.

The indorsement of the writ by the solicitors was made with the authority of the clients. We are not in any way concerned with what would have been the case if the authority had been usurped by the solicitors, and the indorsement not sanctioned by the clients. It was made with the authority of the clients, and, in my opinion, all obligation from that moment as to service on the part of the plaintiff was waived—or, at any rate, the acceptance by the solicitors with the authority of the clients was equivalent to service upon the clients. That being so, the undertaking to enter an appearance at once became an unconditional undertaking. All these cases under the Orders are somewhat complicated, and one may be excused for having at first taken a view that was not in accordance with the facts. For a long time I was under the impression that there had been no service, and that the undertaking was an undertaking to this effect: "We will accept service, and we will appear." That would have raised very different considerations. I say nothing more about it, as that is not the fact; but I should not have been ready to conclude that, without service on the solicitors, the undertaking would have taken effect. The solicitors accepted service and then offered to compromise, and that offer was to last for two months. I do not think it was necessary on their part to intimate at the end of the two months that the offer was no longer a continuing offer; but I agree with counsel for the plaintiff that at the expiration of the two months they ought, in pursuance of their undertaking, to have entered an appearance. It is not suggested, and could not be suggested, that there was any impropriety in their not entering appearance then; but, at any rate, it was their place to enter an appearance and not the plaintiff's place to do anything in the way of service.

(2) 54 L. J. Q.B. 101; 14 Q.B. D. 231.
(3) 8 L. J. Ex 13; 4 M. & W. 384.

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Under these circumstances, I think that Order VIII. rule 1 has no application at all, and that these solicitors cannot complain and their clients cannot complain of delay, because the delay really has been caused by the defendants' solicitors not entering the appearance in accordance with their undertaking. I am of opinion, therefore, that they are now subject to the jurisdiction of the Court, and that they ought to enter an appearance. There is no wrong dealing at all. The clients very fairly say, "If they ought to do it, then we will permit them and authorise them to do it." It seems to me that the order that ought to be made is that the solicitors do forthwith enter an appearance to the writ. I do not apprehend that there will be any difficulty; but if there is a difficulty, the application, which is in form an application to commit the solicitors, should again be brought before the Court. We might make an order as to what should take place if appearance is not entered, but I conceive that if we say that appearance ought to be entered it will be entered.

I say nothing on the question of the contract entered into. It seems to me not to be involved in this application, which is an application in the matter of the solicitors. I think that the order which I have indicated should be made, and I do not know that anything more is necessary. The costs both here and below should be paid by the solicitors, who will get such indemnity from their clients as the clients think they are bound to give.

STIRLING, L.J.—I agree in the result which has been pronounced by the Lord Justice. I wish to say, speaking for myself, that I do not desire to decide anything in this case beyond what arises upon the particular facts which are brought before us. [His Lordship referred to the facts and the correspondence between the solicitors with a view to a settlement, and continued:] The position which is taken up by the defendants' solicitors is perfectly natural and intelligible. No one makes any complaint as to it. After the receipt of the letter of October 24, 1900, they applied to the defendants for their instructions as to entering appearance for them, and they were directed not to enter such appearance; and then, after the service of the notice of the present application, they again applied to the defendants for their instructions, and at their request the defendants have instructed them to do what the Court should think fit under the circumstances to direct. That is the position. The application before Mr. Justice Farwell was under the rule to attach the solicitors for not having performed their undertaking. Mr. Justice Farwell made an order expressing his opinion to be, and ordering, that the solicitors should in pursuance of their undertaking enter an appearance in the action. The question is whether or no that order ought to be upheld.

The main objection which has been pressed upon us is that, having regard to Order VIII. rule 1, the writ for purposes of service is spent, so to speak, and no doubt the rule has to be taken into consideration on this question. It is conceded that it does not mean that a writ is not to be in force for any purpose after twelve months, but that it is limited to being in force for that period for the purpose of service. Therefore if it is not served within the period of twelve months it is at an end; but then there is provision for an application by a plaintiff who has not served the writ for the renewal of the writ, and the Court or Judge may order that the original or concurrent writ of summons may be renewed for six months from the date of such renewal inclusive, and so from time to time; and a writ of summons so renewed is to remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons. Order IX. rule 1 provides that no service of writ shall be required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance. What has taken place here is not exactly in accordance with either rule. The defendants' solicitors indorsed the writ in the manner pointed out. The effect of that, it seems to me, is this: The defendants say, "You may treat us as served for the purpose of this action, and

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a proper appearance shall be entered in due course." It is in point of fact on the part of the defendants a dispensation from any further formal service. That being done, any further question of service might indeed arise, because the service has not taken place precisely in accordance with the provisions of Order IX. rule 1, but nevertheless, when dealing with the force of the writ under Order VIII. rule 1, it seems to me that it would be taken into consideration, and very serious consideration, by any Judge or Court which had to consider the question of the renewal of the writ or its efficiency. In my opinion, after a formal acceptance of service of a writ in that manner, it would require a very strong case to say that, at all events, the writ ought not to be renewed.

Here we are invited to say what, under all the circumstances of the case, is the proper thing to be done in this action. That is one circumstance which seems to me to be of very great weight. Another circumstance of very great weight is that the offer was only to remain open for two months, and that at the end of that period of two months the next step was to be taken in accordance with the undertaking of the defendants' solicitors to enter an appearance. That was not done. There has been a great delay—a delay of eighteen months—and that is a circumstance which the Court has to take into consideration; but it seems to me that, looking at all the circumstances of the case, the delay has not been so great as to deprive the plaintiff of the right to say that as regards service this writ ought to be held by the Court to be still an effective writ, and one to which an appearance ought to be entered. That is the view which was taken by Mr. Justice Farwell, and with that I agree.

The result therefore will be that the appeal will be dismissed.

Appeal dismissed.

Solicitors—Loughborough, Gedge, Nisbet & Drew, for plaintiff; Kerly, Son & Verden, for solicitors.

[*Reported by J. E. Morris and A. J. Hall, Esqs., Barristers-at-Law.*

BUCKLEY, J.
1900.
March 27, 28, 29, 30.
April 6. May 8.

SACCHARIN CORPORATION *v.* ANGLO-CONTINENTAL CHEMICAL WORKS, LIM.

Patent—Infringement—Patented Process—Sale in England of Article Manufactured Abroad by Use of Patented Process with Subsequent Use of other Processes—Costs—Validity of Patent Questioned in Previous Action — Certificate — Solicitor and Client Costs—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict.* c. 57), *s.* 31.

The importation and sale in England of a chemical product made abroad by subjecting a body prepared according to a process patented in this country to further chemical treatment so as materially to alter its chemical composition is an infringement of the English patent.

Elmslie *v.* Boursier (39 L. J. Ch. 328; L. R. 9 Eq. 217) *and* Von Heyden *v.* Neustadt (50 L. J. Ch. 126; 14 Ch. D. 230) *followed.*

An action commenced, but not determined at the time a certificate in another action is obtained is not a "subsequent action for infringement" within the meaning of section 31 *of the Patents, Designs, and Trade Marks Act*, 1883, *and the plaintiff cannot claim solicitor and client costs on the production of the certificate of the first determined action.*

Automatic Weighing-Machine Co. *v.* Combined Weighing-Machine Co. (6 Rep. Pat. Cas. 475) *followed.*

Action against the defendant company and Robert Reitmeyer, its managing director, to restrain the infringement of the plaintiffs' patent, No. 25,273 of 1894, for improvements in the manufacture of toluene-sulpho-chlorides, communicated from abroad by Prosper Monnet.

The plaintiffs by their statement of claim alleged that the defendants had infringed, and threatened to infringe, the patent, and that the same was valid and subsisting, and then owned by the plaintiffs. The plaintiffs by their particulars of breaches alleged—first, that the defendants had at divers times prior to the commencement of the action infringed the patent by importing into England and by selling,

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supplying, and using in England certain compounds sold by the defendants under the name of saccharin, "Tigress Brand," 555 times sweeter than sugar, and saccharin 300 strength, saccharin 350 strength, and saccharin 440 strength, manufactured according to or in manner only colourably differing from the invention described in the specification filed in pursuance of the said patent and claimed in the claiming clauses thereof; that the saccharin so imported and sold by the defendants was made and supplied to the defendants by Messrs. Grandjean, Zimmermann & Co. and their successors, Messrs. Zimmermann, Lüthy & Co., of Brugg, Canton Aargau, Switzerland, and by the Basle Chemical Works, Lim., of Basle, Switzerland, aforesaid, respectively; and secondly, that the defendants threatened to continue to infringe, and had issued advertisements inviting users of saccharin to purchase saccharin from them, the defendants, and offering to indemnify purchasers, and were in fact continuing to infringe by such sales.

The defendants by their defence denied infringement, and disputed the validity of the patent. Upon the question of validity all the usual defences in a patent action were relied on—want of novelty, no subject-matter, insufficiency of specification, non-utility, and anticipation.

Buckley, J., held upon the evidence—first, that the specification sufficiently described the invention; secondly, that the invention was useful in assisting the production of a useful commercial article; thirdly, that (following the decision of North, J., on this point in *Saccharin Corporation* v. *Chemicals and Drugs Co.* [1900] [1]) the invention was a proper subject-matter of letters patent; and fourthly, that the defendants had not made out the defence on the ground of want of novelty, and that the patent was valid.

The only matter calling for a report was with reference to the question whether the sale in England of a chemical product manufactured abroad from orthotoluene-sulpho-chloride by the use of the plaintiffs' patented process and subjected to certain other processes, constituted an infringement of the plaintiffs' patent.

(1) 17 Rep. Pat. Cas. 28.

The defendant company had admitted in its answers to interrogatories that it had imported and caused to be sent into this country certain saccharin supplied to it by the before-mentioned foreign firms with which, as manufacturers, the defendants had dealt.

Moulton, Q.C., *Cripps*, Q.C., *J. C. Graham*, and *Colefax*, for the plaintiffs.

Neville, Q.C., *Roger Wallace*, Q.C., *Lord Robert Cecil*, Q.C., *A. J. Walter*, and *Bucknill*, for the defendant company.—The saccharin which is imported and sold is not a thing which is made under the patent, but is something which is subsequently made out of the thing which is made by the patented process. There is, therefore, no infringement of the plaintiffs' patent.

Mark Romer, for the defendant Reitmeyer, adopted the same argument.

Moulton, Q.C., in reply.—The defendants have indirectly put in practice and used the plaintiffs' invention. The fundamental object of a grant of letters patent is to give the patentee the full benefit of the patent—*Elmslie* v. *Boursier* [1869] [2] and *Von Heyden* v. *Neustadt* [1880]. [3]

Cur. adv. vult.

May 8, 1900.—BUCKLEY, J., after holding that the patent was valid, continued: I pass then to the question of infringement. By their answer to interrogatories the defendants say the defendant company have imported and caused to be sent into this country certain saccharin, and that the saccharin referred to was supplied to the defendants by Grandjean, Zimmermann & Co. and the Basle Chemical Works at Basle, Switzerland, and the defendants dealt with those firms as the manufacturers. A question was raised by the defendant Robert Reitmeyer that there was no admission on his part that the saccharin was supplied by him, or that he dealt with the firms named. It appears to me that those facts are admitted, and that both defendants are responsible for the infringement, if there has been one.

I had better deal first with the contention

(2) 39 L. J. Ch. 328; L. R. 9 Eq. 217.
(3) 50 L. J. Ch. 126; 14 Ch. D. 230.

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that has been raised by the defendants to the following effect. The article which was imported and sold, they say, was saccharin. The plaintiffs' process is one for the manufacture of ortho-toluene-sulpho-chloride, and that product is not saccharin. From that they argue that they have not imported or sold in infringement of the patent. Now the facts are that after the ortho-toluene-sulpho-chloride has been manufactured, you have for the production of saccharin first to change the chloride for an amide group, and then to oxidise into saccharin and water. The article imported and sold, therefore, is produced by certain subsequent chemical operations from the article produced under the patented process. The article imported and sold is not ortho-toluene-sulpho-chloride, but ortho-toluene-sulpho-chloride is contained in saccharin. The defendants say that the importation of that article is not an infringement. Now the grant contained in letters patent is a grant to the patentee to make, use, exercise, and vend the invention, and to have and enjoy the whole profit and advantage by reason of the invention, and to the end that he may have and enjoy the sole use and exercise and the full benefit of the invention, all others are precluded from either directly or indirectly making use of or putting in practice the said invention or any part of the same, or in any way imitating the same. Accordingly, it was held in *Elmslie* v. *Boursier*[2] that the importation into and sale in England of articles manufactured abroad according to the specification of an English patent is an infringement, a decision which was followed by the Court of Appeal in *Von Heyden* v. *Neustadt*.[3] Lord Justice James, in giving the judgment of the Court, there said: "A person who makes, or procures to be made, abroad for sale in this country, and sells the product here, is surely indirectly making, using. and putting in practice the patented invention." Having regard to the facts of that case, the words "and sells" may be read "or sells." Neither this case nor *Elmslie* v. *Boursier*[2] entirely covers the point which I have to decide, but, in my judgment, their principle does determine it. If the patented process were the last stage in the production of the article sold, the importation and sale of the product would, in my judgment, plainly be an infringement. Does it make it any the less an infringement that the article produced and sold is manufactured by the use of the patented process which is subjected to certain other processes? In my judgment it does not. By the sale of saccharin—in the course of the production of which the patented process is used—the patentee is deprived of some part of the whole profit and advantage of the invention, and the importer is indirectly making use of the invention. In my judgment, therefore, this contention fails.

Evidence has been adduced as to the process used by Grandjean, Zimmermann & Co. and the Basle Chemical Works in producing the saccharin, which it is admitted has been introduced into this country. In my judgment, it is substantially the process covered by the patent. So soon as a certain result is obtained by the disclosure of a process, say, as in this case, the combinations of the proportions, temperature, and time as a means of arriving at a desired product, it is easy to vary it within limits and yet to achieve the same result. Experiments have shewn that in the case of this process in the matter of time a difference between five and a-half hours' and twelve hours' standing does not produce a large difference. I take it as a fact that in the matter of time the foreign firms are not shewn to have observed the limits which the patentee pointed out, neither have they precisely taken the proportion of four to one, nor precisely followed the directions as to temperature; but they have adopted the combination of directions which the patentee pointed out as the means to insure success, and in so doing they have, in my opinion, infringed the plaintiffs' patent.

As regards the Basle Chemical Works, the particulars of breaches named the Basle Chemical Works, Lim., while the answers to interrogatories admitted that the firm who supplied the saccharin was the Basle Chemical Works. It appears that on July 1, 1898, the limited company took over the works from a firm

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called the Basle Chemical Works, Bindschedler. As to this I gave leave to amend the particulars by striking out the word "Limited," the real question, in my opinion, being whether the persons named in the answers to interrogatories were or were not infringers.

In the result, therefore, I find that the defendants have been guilty of infringement, and I must grant an injunction to restrain the infringement of the patent No. 25,273 of 1894, according to the first claim in the statement of claim; and the defendants must pay the costs of the action.

Moulton, Q.C.—I ask for a certificate that the plaintiffs are entitled to costs as between solicitor and client under section 31 of the Patents, Designs, and Trade Marks Act, 1883.[4] Here the validity of the patent came in question in the action of *Saccharin Corporation* v. *Chemical Drugs Co.*,[1] on December 9, 1899, and North, J., so certified.

Lord Robert Cecil, Q.C., for the defendants.—Solicitor and client costs ought not to be allowed.

An action commenced but not determined at the time a certificate in another action is obtained is not a "subsequent action for infringement" within the meaning of section 31 of the Act of 1883, and the plaintiff cannot claim solicitor and client costs on the production of the certificate of the first determined action—*Frost's Patent Law and Practice* (2nd ed.), p. 625. I rely on the decision of Charles, J., in *Automatic Weighing-Machine Co.* v. *International Hygienic Society* [1889].[5] Here the present action was commenced on October 26, 1898, and the judgment in the action before North, J., was not delivered until December 9, 1899.

(4) The Patents, Designs, and Trade Marks Act, 1883, s. 31, enacts: "In an action for infringement of a patent, the Court or a Judge may certify that the validity of the patent came in question; and if a Court or Judge so certifies, then in any subsequent action for infringement, the plaintiff in that action on obtaining a final order or judgment in his favour shall have his full costs charges and expenses as between solicitor and client, unless the Court or a Judge trying the action certifies that he ought not to have the same."

BUCKLEY, J.—The question has already been decided by Mr. Justice Charles in *Automatic Weighing-Machine Co.* v. *International Hygienic Society*,[5] where, speaking of section 31, he says: "It says that in an action for infringement of a patent the Court or a Judge may certify that the validity of the patent came in question, and, if the Court or Judge so certifies, then, in any subsequent action for infringement, the plaintiff in that action, on obtaining a final order or judgment in his favour, shall have his full costs, charges, and expenses as between solicitor and client, unless the Court or Judge trying the action certifies that he ought not to have the same. Now, what do the words 'any subsequent action for infringement' mean? I cannot entertain a doubt that they mean actions subsequent to the certificate. It seems to me clearly so. First of all the Judge is to certify. Well, here is Mr. Justice Kekewich's certificate, dated December 13, 1888, that the validity of the plaintiffs' patent came in question before him. 'And if the Court or Judge so certifies'—and Mr. Justice Kekewich did so certify—'then in any subsequent action'—surely that must mean an action subsequent to that certificate. This action is not subsequent to the certificate; it was an action commenced before the certificate of Mr. Justice Kekewich was made." That seems to me to be a clear authority upon the point, and I accordingly certify for party and party costs only.[6]

Solicitors—J. H. & J. Y. Johnson, for plaintiffs; J. W. Asprey, for defendant company; Deacon, Gibson & Medcalf, for defendant Reitmeyer.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

(5) 6 Rep. Pat. Cas. 475, 480.

(6) The defendants appealed from the decision of Buckley, J. The appeal was heard by Lord Alverstone, C.J., Rigby, L.J., and Vaughan Williams, L.J., on November 20, 21, 22, 23, 1900, when judgment was reserved. Before judgment was given the reporter was informed that the parties had arrived at a settlement, and that consequently no judgment would be delivered by the Court of Appeal.

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COZENS-HARDY, J. 1900. Dec. 1, 8. } CONSETT IRON CO., *In re.*

Company—Memorandum of Association—Alteration—Sanction of Court—Verbal Alterations—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1 (5).

The power given to the Court by the Companies (Memorandum of Association) Act, 1890, *to sanction alterations in the memorandum of association of a company does not apply to mere verbal alterations in the language of the original memorandum of association.*

Petition.

The company, registered in 1864, had considerably extended its sphere of business, and now presented a petition under the Companies (Memorandum of Association) Act, 1890, for confirmation of alterations duly resolved upon in its original memorandum of association enlarging the objects for which it had been established.

The capital of the company had been increased from time to time, and entirely new businesses had been embarked upon, wholly different from those for which the company had been originally established.

Clause 3 of the memorandum was as follows: "The objects for which the company is established are the making, manufacturing, purchasing, selling, and disposing of iron, steel, coke, firebricks and lime, and the working of mines of coal, ironstone, iron ore, fire-clay and other clays, and of quarries of limestone, freestone and other stone, and the conversion, sale, and disposal of the produce of all and every such mines or quarries. The doing all such other acts, matters, and things as may be necessary, incidental, or conducive to the attainment of the above objects or any of them."

Macnaghten, Q.C., and *E. J. Elgood*, for the petition.

COZENS-HARDY, J.—As many of the proposed alterations are merely repetitions of the old objects of the company in different language, the petition had better stand over for a week, so that counsel may go through the clauses *seriatim*, and strike out what is superfluous or too wide. It is not within the scope of the statute simply to improve the language of a memorandum of association by rewriting it in modern form.

Dec. 8.—The petition again came before the Court, and clause 3 of the original memorandum was split up into two, the specific definition of objects becoming clause 1, and the part dealing with the incidental objects becoming clause 11, while the addition of nine entirely new clauses (2 to 10) was sanctioned.

Solicitors—Rowcliffes, Rawle & Co.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

WRIGHT, J. 1900. Dec. 19. } MELBOURNE BREWERY AND DISTILLERY, LIM., *In re.*

Company — Winding-up — Petition by Debenture-Holder—Default in Payment of Interest on Debentures— Waiver of Default —Creditor—Future Debt.

A debenture stockholder of a company to whom nothing is due for principal or interest has no locus standi to present a petition to wind up the company.

In 1895 *a company issued debenture stock which was secured by a debenture trust deed. The deed provided that the security should become enforceable (inter alia) in the event of default by the company in the payment of interest on the stock for a period of three months after such interest ought to have been paid. In* 1896 *the company made default in payment of the interest on the debentures. Thereupon a petition was presented by a debenture stockholder to wind up the company, but was withdrawn by him on certain terms which included the payment to him of the interest due on his debentures. A petition was now presented by the same debenture stockholder, who had received payment of all interest due on his debentures, to wind up the company, alleging that the company was only*

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able to pay the interest on the debenture stock by borrowing the amount required; that default had been made in payment of the interest on the debentures; and that the principal of his debenture stock had thereupon become due and was payable to him:—Held, *that the petitioner, by receiving the interest on his debentures, had waived the default by the company in* 1896, *and could not now take advantage of it, and that, as no interest was due to him and the debentures were not repayable until* 1994, *there was no debt presently due to him in respect of which he could petition, and that the petition must therefore be dismissed.*

Australian Joint-Stock Bank, *In re* (32 L. J. N.C. 264; W. N. (1897) 48), *distinguished.*

Petition by G. B. Wieland, a debenture stockholder in the above-named company, for the compulsory winding-up of the company.

The company was incorporated on July 27, 1894, with a capital of 160,000*l.*, divided into 10,000 7*l.* per cent. cumulative preference shares of 10*l.* each and 6,000 ordinary shares of 10*l.* each, and shares to the amount of 131,130*l.* had been issued and credited as fully paid up.

Between the years 1895 and 1898 the company raised or secured the repayment of money by the issue of 170,000*l.* 5*l.* per cent. debenture stock. Such debenture stock was secured by a principal and a supplemental trust deed dated respectively September 17, 1895, and August 6, 1896, and by debentures issued to the trustees of such deeds, certificates being also issued to the holders of such stock.

By the trust deed of September 17, 1895, the debenture stock to the amount of 150,000*l.*, and the interest thereon, was secured by a specific mortgage of the company's freehold properties and fixed plant, and by a floating charge on the company's assets. The debenture stock was, after the year 1910, redeemable at 5 per cent. premium, but became immediately payable at 5 per cent. premium in certain events.

The material clauses of the deed were the following:

Clause 7: "The security hereby constituted shall be enforceable in each and every of the events following:

"(1) If any default be made in the redemption of or the payment of interest on the stock for the period of three months after such redemption or interest ought to have been effected or paid.

"(2) If any order shall be made by any competent Court or (subject to the provision hereinafter contained relating to a sale of the company's undertaking or a reconstruction of the company) an effective resolution of the company shall be passed for the winding-up of the company.

"(3) If a distress or execution be respectively levied or sued out upon or against any of the chattels or property of the company or its assigns.

"(4) If the company or its assigns commits a breach of any covenant herein contained."

Clause 21: "The company will during the continuance of this security carry on and conduct the business of the company to the greatest possible advantage and will keep proper books of account and therein make true and perfect entries of all dealings and transactions of or in relation to the said business and certified copies of the accounts and all documents relating to the affairs of the company shall be kept at the registered office of the company or other place or places in England and the same shall at all reasonable times be open for the inspection of the trustees or trustee and such person or persons as they shall from time to time in writing for that purpose appoint. . . ."

Clause 32: "The company covenants with the trustees or trustee to do all such lawful assurances and things as may by local law be necessary for further or more perfectly assuring to the trustees or trustee the mortgaged premises or any part thereof."

Clause 33: "The company hereby covenants with the trustees or trustee that the company will duly perform and observe the obligations hereby imposed upon it."

Clause 35: "The company hereby covenants with the trustees or trustee that the company will pay to the stockholders the amounts respectively payable to them for principal and interest respectively as

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and when the same become due and payable by the company to the stockholders respectively and will observe and perform the several conditions agreements and provisions set forth in the third schedule hereto."

The debentures were stated on the face of them to be repayable on December 31, 1994, and to be subject to the conditions indorsed thereon. Condition 6 was as follows:

"The company or its assigns may without paying off any other debentures of this issue at any time on or after the 31st day of Dec. 1910 give notice to the registered holder of this debenture of its intention to pay off the moneys secured by this debenture or some part thereof not being less than 15,000*l.* and upon the expiration of 6 calendar months from such notice being given the principal moneys hereby secured to the extent named in the said notice of intention shall become payable."

The interest on the stock was payable by the company to the stockholders on January 1 and July 1 of each year.

The petitioner was the holder of 2,270*l.* of the debenture stock.

The greater portion of the residue of the stock was issued to and was still held by the London Bank of Australia, Lim. (which promoted the company), or its nominees, and 15,000*l.* had been issued as a security for a sum of 10,000*l.* due from the company to certain of its creditors.

On January 1, 1896, one half-year's interest became due to the petitioner from the company in respect of the debenture stock held by him (which included the aforesaid sum of 2,270*l.* debenture stock); but the company made default in the payment of such interest to the petitioner.

On February 13, 1896, the petitioner presented a petition alleging, amongst other things, the failure of the company to pay interest so due to him as aforesaid, and praying that the company might be wound up under the provisions of the Companies Acts, 1862 to 1890.

On August 11, 1896, the petitioner withdrew his petition upon certain terms agreed upon between him and the company, which terms included the payment by the company to the petitioner of the interest due to him upon his debenture stock.

On August 12, 1896, the supplemental deed was executed, by which the amount of the debenture stock was increased from 150,000*l.* to 170,000*l.*, and provision was made with the assent of the debenture-stockholders, including the petitioner, for the issue of certain prior lien bonds ranking in priority to the issue of the debenture stock for securing a total debt of 20,000*l.* At the same time the trustees of the deed, with the assent of the debenture stockholders, waived all interest on the original 150,000*l.* debenture stock which had accrued down to July 1, 1896.

The prior lien bonds had throughout been held by the London Bank of Australia or its nominees.

The petitioner by his petition alleged that the indebtedness of the company was steadily increasing, and that the company had only been enabled to pay the interest actually paid by the company upon the prior lien bonds and debenture stock (including the interest paid that accrued on July 1, 1900, on the petitioner's debenture stock) by borrowing the amount required to meet such interest from the London Bank of Australia, Lim.; (paragraph 17) that the directors of the company had paid such interest solely with a view to prevent the petitioner and the other holders of debenture stock upon which such interest was paid from enforcing their respective securities, and that the directors intended with the same object and with the same means to continue such payment; (paragraph 18) that "the trading of the company has up to the present time been unsuccessful, and it is impossible that the company should be carried on at a profit; the company is not in fact carrying on its business to the best advantage"; (paragraph 19) that "default has in fact been made by the company in payment of the interest on part of the said debenture stock issued by the company as aforesaid for a period of three months after such interest ought to have been paid, and your petitioner submits that by reason of

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such default and of other matters hereinbefore appearing the principal of his said debenture stock has become and is due and payable to him"; and (paragraph 21) that "the company is insolvent and unable to pay its debts, and under the circumstances it is just and equitable that the company should be wound up."

Alexander, Q.C., and *Austen-Cartmell*, for the petition.

Macnaghten, Q.C., and *R. J. Parker*, for the company.—We take the preliminary objection that the petition is demurrable on the face of it. The petitioner is the holder of debenture stock in the company which is not repayable till 1994, and upon which the petitioner has been paid all interest up to the present time. He is not therefore a creditor at all, and consequently has no *locus standi* to present a petition.

[They were stopped.]

Alexander, Q.C., and *Austen-Cartmell*.—The petitioner is a creditor *in futuro*, and as such is entitled to maintain a petition—*Palmer's Company Precedents*, Part II. (8th ed.), p. 52; *Australian Joint-Stock Bank, In re* [1897].[1]

[*Macnaghten*, Q.C.—In that case the petition was not opposed.]

That may be so, but the attention of the Court was directed to the fact that the debt was a future debt. On principle there is no possible reason why a person who is in the position of a future creditor should not present a petition. If he is to be prevented from so doing until his debt becomes due, the result may be that the property of the company may all disappear in the interval. Further, on the construction of the deed of September, 1895, the debentures are enforceable under clause 7 (1), because there has been default by the company in the payment of interest on some of the debentures held by persons other than the petitioner, and under clauses 7 (4) and 21 because the company has committed a breach of its covenant to carry on its business to the greatest possible advantage. The petitioner is therefore a creditor in respect of a debt presently payable.

(1) 32 L. J. N.C. 264; W. N. (1897), 48.

Macnaghten, Q.C., was not called upon to reply.

WRIGHT, J.—I need not say that the question involved in this case is one of importance. If persons could petition to wind up a company because they were holders of something which would give them a right to obtain principal moneys in a century's time it might be awkward. In bankruptcy one is familiar with the principle that if a person has committed an act of bankruptcy a petition in bankruptcy may be presented against him under certain circumstances by a person whose claim is not yet ripe, as, for instance, on a bill of exchange; but I do not think that even in bankruptcy the cases go so far as the petitioner here wishes me to go. No interest is in arrear, either to him or to any other debenture stockholder. The principal—if the word "principal" can be properly used—of his debenture stock cannot be claimed by him, except on certain defaults by the company until the year 1994, although the company itself has the option of redeeming stock—that is a better phrase than "paying off the principal of it"—in 1910. Apart from the conditions as to defaults by the company, it appears to me to be plain that a stockholder cannot petition in respect of a right to be redeemed in one hundred years' time, or in respect of future interest which has not yet accrued due at all—interest for years which are yet to come. I do not think any case has ever gone so far as that, either in bankruptcy or in company law.

Now I come to the part of the case where there may be some difficulty. Paragraph 7 of the deed under which these securities are constituted provides that the securities shall be enforceable in each and any of certain events, the only material ones being (for the present purpose) default in payment of interest for three months, or if the company commits a breach of any covenant therein contained. As regards the default in payment of interest, it does appear by the petition that there was a time in 1896 when there was a default in the payment of interest, such as would have entitled the debenture stockholder to treat the

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principal as payable if he had thought fit to do so; but in August of that year this present petitioner appears to have presented a petition based on that very default, and the dispute between him and the company was put an end to and settled by a compromise, and, as it seems to me, on that compromise being arranged the petitioner's right in respect of that default entirely ceased. Besides that, in fact ever since that time, August, 1896, he has regularly been paid, and accepted, the interest as it fell due from time to time, and, so far as can be gathered from the petition, so have all the other debenture stockholders; and I cannot conceive that under those circumstances any of them could make use of a default three or four years old for the purpose of claiming to be entitled to have the principal of the debenture stock redeemed.

The other point is a singular one. The same paragraph 7 of the deed, sub-section 4, makes the security enforceable if the company commits a breach of any covenant therein contained. Then it is said that the petitioner brings his case within that, because he alleges in paragraph 18 of the petition that the company is not in fact carrying on its business to the best advantage. Now I should say, first of all, that that is not a sufficient allegation of a default of that kind, and I might order that part of the petition to be struck out, unless the petitioner would amend it in such a way as to make a specific and definite case; but I do not rely mainly on that. It seems to me that on the construction of this deed, paragraph 7, sub-section 4, does not refer to a matter of this kind at all. It would be hardly possible to my mind so to construe this deed as to hold that the security should become enforceable upon a breach of any one of the most trifling obligations which the company has brought itself under by this deed. It has undertaken a great variety of obligations of various degrees of importance, and I do not think it could possibly be supposed that the security was to become enforceable whenever any one of the provisions of the deed could be shewn to have been disregarded. It seems to me that sub-section 4 of paragraph 7, where it speaks of "covenant," is referring to things which in the deed itself are called covenants. When I turn to the deed I find four consecutive covenants of very great importance—covenants expressly so called—and beginning with the words "the company hereby covenants with the trustees or trustee." Those are all covenants as to matters of importance, and they are covenants not with individual stockholders but with the trustees who are not parties to this petition and are not alleged to have elected to treat the covenant as broken. I do not think that the matter suggested in paragraph 18 of the petition is in itself enough to make paragraph 7, sub-section 4, attach, so far as the matters disclosed in the petition enable me to judge.

The only other matter that I have to notice is the case of *Australian Joint-Stock Bank, In re*,[1] decided by Mr. Justice Vaughan Williams, where there was a petition by a creditor whose debt was not yet payable, and a winding-up order seems to have been made upon it, but then he was a creditor—he was a creditor in the fullest sense, but payment of his debt was deferred under a scheme. Therefore his debt had been due and payable apparently, as I understand the case, and was due and payable, although actual payment of it was suspended under the provisions of the scheme. He was none the less a creditor, if the debt was due and had become payable, because payment had been suspended for a time; but here in the view that I take the petitioner is not a creditor at all—certainly not in respect of future interest, and with regard to the principal it seems to me that any right he once had has been waived. I think, therefore, this petition must be dismissed with costs.

Solicitors—Deacon, Gibson, Medcalf & Marriott, for petitioner; Hollams, Sons, Coward & Hawksley, for company and debenture stockholders opposing.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

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BUCKLEY, J. 1901. Jan. 17. } STANFORD, *In re*; STANFORD *v.* ROBERTS.

Settled Land — Application of Capital Money—Improvements—Additions to and Alterations in Buildings—"Dry rot"—Re-flooring—Settled Land Act, 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s.* (*ii.*)

By section 13, *sub-section* (*ii.*) *of the Settled Land Act*, 1890, *improvements authorised by the Settled Land Act*, 1882, *include "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let"*: —Held, *that the words "reasonably necessary or proper" refer to something which, although not absolutely necessary, is a thing which a reasonable and prudent owner of a house would, if he were absolute owner, do to enable the house to be let.* Held *also, that the section contemplates not necessarily an intention to let immediately but a present intention to let either at the present or a future time, as distinguished from an intention to occupy.*

Observations of CHITTY, J., *in* De Teissier, *In re*; De Teissier *v.* De Teissier (62 L. J. Ch. 552; [1893] 1 Ch. 153), *as to the necessity of there being a present intention to let before an application under section* 13, *sub-section* (*ii.*), *could properly be made, explained.*

On an application by a tenant for life of a building which was let out for offices that capital money might be applied in concreting and re-flooring the basement of the building, which was affected with dry-rot, the Court sanctioned the application, notwithstanding that the rooms were all let, on the ground that the proposed concreting and re-flooring was an alteration which was necessary to make the building habitable, and was one which a reasonable and prudent owner would make if he were absolutely entitled to the property.

Adjourned summons.

Summons by the plaintiff, the tenant for life, asking that so much of the New Consols in Court to the credit of the action as would raise the sum of 459*l.* 7*s.* might be sold and that the money to arise by such sale might be paid to the defendants as trustees of the will of William Stanford, deceased, the testator in the matter, they undertaking to apply the same for works already carried out and for other works required upon premises known as Copthall House, No. 13 Copthall Avenue, in the City of London, forming part of the Stanford settled estates.

In May, 1900, the leasehold premises known as Copthall House were purchased by the Stanford trustees for 32,650*l.*, under an order made in the action on April 6, 1900, out of capital money standing in Court to the credit of the action and forming part of the Stanford settled estates. The premises consisted of about one hundred and fifty rooms and other conveniences, which were let as separate sets of offices to various tenants, the majority of whom were stockbrokers or stockjobbers, on terms of different lengths, from monthly tenancies to a lease of forty-two years, but chiefly on yearly tenancies or for shorter terms, and the tenants of which were constantly changing. There were thirty-three rooms in the basement of the building, which were let at a gross rental of 892*l.* 10*s.* The floors of the basement were constructed over a bed of concrete with sleeper joists and floor boards in the ordinary way. The floors were, however, three or four feet below the level of the external area, and as a consequence had no ventilation, the result of which was that nearly all the floors of the basement were more or less affected with dry rot.

It had been found necessary from time to time to employ a builder to repair the floors by substituting new joists and boards for those which were decayed, and it appeared from the evidence that this was a state of things which must recur, and that it was quite possible that the dry rot, unless remedied, might extend to the floors above.

From the evidence of a surveyor it appeared that the only radical and satisfactory cure for this state of things was to take up the whole of the floors in the basement, and to substitute for them solid floors of concrete covered with wood blocks; that if the present floors were

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patched up and repaired as occasion might require, the dry rot was certain to return, and there was very considerable risk of its spreading through the building, which would be a very serious matter.

In September, 1900, in consequence of leakage in one of the drain pipes, it was found necessary to take up the floors in four of the rooms, and the existing floors were replaced with concrete and wood blocks at an expense of 59*l.* 7*s.* This was done in consequence of a threat by one of the tenants to leave. It was estimated that the cost of replacing the rest of the floors with concrete and wood blocks would amount to a further sum of 400*l.*

Wace, for the tenant for life.—The proposed repairs are, it is submitted, "alterations" in the building reasonably necessary or proper to enable the same to be let, within the meaning of section 13, sub-section (ii.) of the Settled Land Act, 1890, and ought to be allowed. The present case is distinguishable from *De Teissier, In re; De Teissier* v. *De Teissier* [1892],[1] *Gerard's Settled Estates, In re* [1893],[2] and *Gaskell's Settled Estates, In re* [1894],[3] on the ground that in those cases the tenant for life proposed to occupy the house himself. The interlocutory remarks of Chitty, J., in *De Teissier, In re*,[1] as to the necessity of there being a present intention to let before an application under section 13, sub-section (ii.), could properly be made, must be understood as referring to a present intention to let as distinguished from an intention to occupy.

As regards the 59*l.* 7*s.* already expended for repairs, those repairs were executed under a threat by the tenant that he would leave unless they were done, and were clearly necessary to enable the particular rooms to be let, and ought to be allowed.

S. O. Buckmaster, for the infant tenant in tail.—There are two questions here: First, whether what is proposed to be done is an addition or alteration within section 13, sub-section (ii.); and secondly, if it is, whether the fact that the property is now tenanted prevents the Court having jurisdiction to sanction the allowance asked. On the first point it is submitted that what is proposed to be done does not fall within the sub-section. The evidence is not sufficient to satisfy the Court that the scheme of repairs proposed is one that a reasonable and prudent landlord would adopt. Tenants could be found if the decayed joists and floor-boards were replaced by new ones as occasion required. The effect of what is asked is to relieve the tenant for life from the cost of constant repairs. The Court has a discretion in these matters, and will be careful to prevent the tenant for life obtaining payment for repairs out of the pocket of the remainderman. The alterations contemplated by the sub-section are those of a structural character, without which it would not be possible to let the property; secondly, the intention to let must be a present intention: an intention to let in the future is not sufficient. Here the property is already let, and the "alterations" therefore are not necessary in order to enable the property to be let.

[He also referred to the Settled Land Act, 1882, s. 21, sub-s. (iii.), and s. 26, sub-s. 2 (iii.); and the Settled Land Act, 1890, s. 15.]

E. F. Ball, for the trustees and the next tenant in tail, offered no opposition to the application.

Wace was not called upon to reply.

BUCKLEY, J.—Owing to the large application which section 13, sub-section (ii) of the Settled Land Act, 1890, has, and to the frequency of applications under it, it seems to me that the question which arises on the present summons is of considerable importance. [His Lordship stated the facts, and observed that it was clear upon the evidence that the property must have been acquired by the trustees as an investment for the purpose of obtaining an income by letting off the rooms of the building. He continued:] The first objection taken on behalf of the infant tenant in tail in remainder is that the execution of such works as these does not fall within the words "additions to or alterations in buildings" within section 13,

(1) 62 L. J. Ch. 552; [1893] 1 Ch. 153.
(2) 63 L. J. Ch. 23; [1893] 3 Ch. 252.
(3) 63 L. J. Ch. 243; [1894] 1 Ch. 485.

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sub-section (ii.) of the Settled Land Act, 1890. It appears to me that these works do fall within the word "alterations." By way of illustration suppose there is a house with walls so constructed of shingles that by reason of the exposed situation in which the house stands the wet drives in through the walls, and the house becomes uninhabitable. If those walls are pulled down and replaced by a double brick wall it is, I think, clear that that would be an alteration — a structural alteration — required to make the house habitable. It seems to me that the alteration proposed in this case is of the same nature. The basement floor is so constructed that dry rot has got in and is likely to spread. An enemy has invaded the floor. It not only injures that, but it may spread to the woodwork in the upper part of the house and do serious injury. A structural alteration is required to make the house habitable. The effect of what is proposed to be done will be to substitute for what I may call the lower horizontal wall of the house a new and better one, and it will be a substantial alteration to exclude the dry rot.

The second point is whether this is an alteration "reasonably necessary or proper to enable" this property to be let. I understand "reasonably necessary or proper" to mean something which, although not absolutely necessary, is something which a reasonable and prudent owner of property would, if he were the absolute owner, do to make his house habitable. Counsel for the infant tenant for life says that tenants will be found if the joists and floor-boards are replaced from time to time. I agree that the new floor is not absolutely necessary; but in my opinion it is what a reasonable and prudent owner would do if he were absolutely entitled to the property.

The third point is whether the alteration is proposed with a view to enable this house to be let. At the present moment all the rooms with one exception are let—substantially they are all let; therefore the alteration is not necessary or proper in order to find a tenant immediately; and in *De Teissier, In re*,[1] Mr. Justice Chitty in the course of his judgment says, "In my opinion there must be a present intention to let, if not an immediate prospect of letting, before any application under this sub-section ii. can properly be made." And in *Gerard's Settled Estates, In re*,[2] that sentence was read or referred to by each of the Lords Justices and approved, and I need hardly say that that is entirely binding on me. But I do not think that in using those words the learned Judge meant that there must be a present intention to find an immediate tenant. The facts in *De Teissier, In re*,[1] and in *Gerard's Settled Estates, In re*,[2] were that the tenant for life, who desired to have the money expended on the alterations, was in occupation of and intended to occupy the mansion-house and was a person who had no intention to let. And if one looks at the interlocutory remarks of Mr. Justice Chitty in *De Teissier, In re*,[1] it will be seen that he was using the expression "present intention to let" in contradistinction to a case where there was no intention to let. He says, "Additions and alterations such as these I usually consider proper, and allow under this sub-section ii.; but before this section can apply, there must be an actual letting in contemplation. In the present case, the tenant for life proposes to occupy the house." He is there contrasting the intention to let with the intention to occupy. And in his judgment he says, "I think it is clear, that if the tenant for life is residing in the mansion-house, or contemplates residence there, as this tenant for life does, he cannot under this sub-section ask for capital money to be spent in making any additions to or alterations in the buildings." In *Gerard's Settled Estates, In re*,[2] in the Court of Appeal, where the Lords Justices were approving of those observations, I find that interpretation of Mr. Justice Chitty's words approved by something in the judgments of each of their Lordships. Lord Justice Lindley, just before reading the sentence I have quoted from the judgment of Mr. Justice Chitty, says: "I also agree with the view which has been taken by the Courts of first instance in other cases, that where there is no question of letting, you cannot spend capital for such purposes. Here Lord Gerard is not

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going to let this property, he is going to inhabit it himself; and I cannot differ from the construction put upon that sub-clause ii. in *De Teissier's Settled Estates, In re*,[1] by Mr. Justice Chitty"; and then he reads the sentence. Lord Justice Lopes says, "There there is the case of *De Teissier's Settled Estates, In re*,[1] in which case Mr Justice Chitty held that the meaning of this section was this, that the thing in question must at the time be in contemplation to be let." I do not understand that to mean that it must be in contemplation to be let at the moment, but a thing to be let as distinguished from a thing to be occupied. The present Master of the Rolls says, "In my judgment, unless there is a present intention for a letting which does not exist in this case, sub-section ii. does not apply." I understand him to mean a present intention to let as distinguished from an intention to occupy. I am therefore of opinion that the true meaning of section 13, sub-section (ii.), is that the additions to or alterations in buildings must be reasonably necessary or proper to enable the same to be let where there is a present intention to let either at the present or at a future time, as distinguished from an intention to occupy. I am very far from saying that in every case where a tenant for life comes and says, "This house is occupied by me at present, but I may want to let it in future, and I want to have alterations made for the purpose of making it easier to get tenants in future," and applies that capital money should be expended in that way, the Court will entertain the application. The jurisdiction is discretionary, and in exercising it the Court will have regard to all the circumstances of the particular case. The most material circumstance here is that the trustees acquired this property eight months ago with a view to letting it, but in a condition in which this alteration was necessary or proper in order to make it fit for letting. Under these circumstances the Court will exercise its discretion by saying that the money may properly be spent on the work. I therefore hold that the works done constitute an improvement within the Settled Land Acts. A sufficient part of the funds to pay for the work will be sold, and the proceeds applied as asked, the amount to be ascertained in chambers.

Solicitors—Martyn & Martyn, for plaintiff; C. E. Jones, for infant tenant in tail; Attree, Johnson & Ward, agents for Hunt, Currey, Nicholson & Co., Lewes, for trustees and next tenant in tail.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

KEKEWICH, J.
1900.
Feb. 14.
LORD ALVERSTONE, C.J.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
Oct. 26, 29. Dec. 4.

MCCALLUM, *In re*; MCCALLUM *v.* MCCALLUM.

Statute of Limitations—Real Property—Possession—"Concealed fraud"—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4. *c.* 27), *ss.* 3 *and* 26—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.

The "concealed fraud" which under section 26 *of the Real Property Limitation Act*, 1833, *will prevent the running of the Real Property Limitation Acts against a plaintiff claiming real property must, according to the principles which have been always acted upon by Courts of Equity, be the fraud of, or in some way imputable to, the person setting up the statutes, or of some one through whom that person claims*: —So held, *by the* COURT OF APPEAL (LORD ALVERSTONE, C.J., *and* VAUGHAN WILLIAMS, L.J.), *reversing the decision of* KEKEWICH, J.; RIGBY, L.J., *dissentiente*.

Per RIGBY, L.J.—*Section* 26 *did not alter the old doctrine of the Courts of equity, which was that a suit might have been brought at any time in a case of concealed fraud, notwithstanding that the person sued and those through whom he claimed had not been party or privy to the fraud at the time when it was perpetrated.*

Per LORD ALVERSTONE, C.J., RIGBY

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McCallum, In re, App.

L.J., *and* Kekewich, J.—*The intentional concealment by a mother of a conveyance of property by her to her daughter is a "concealed fraud" against the daughter, whatever the mother's motive for concealment may have been.*

Action to recover possession of a freehold house known as Linden House, Cheltenham.

In 1884 General McCallum and his wife and daughter, the plaintiff in the action, were residing at the house, the subject-matter of the action, which was the property of the general.

By a voluntary deed dated September 3, 1884, the general conveyed the house in fee to his wife, who by a voluntary deed dated September 30, 1884, conveyed the house to the daughter in fee.

The wife, however, from the first concealed the deed of conveyance to the daughter and the fact of its execution, and in February, 1886, without the knowledge of the daughter, she put the two conveyances in an envelope, which she closed and sent to Mr. J. C. Asprey, a London solicitor (not the solicitor who had been concerned in the preparation and execution of the deeds), with instructions contained in a letter of February 22, 1886, to keep the inclosed papers unopened and retain the envelope until she required it. She directed further that after her death he was still to retain the envelope for her daughter until her father's decease, after which it was to be given to her provided she was not then the wife of a certain person therein named, a proviso which did not come into operation. The letter concluded by stating that for the present she did not want her daughter to know where the papers were. There was a memorandum indorsed on the envelope to a similar effect.

Mr. Asprey obeyed these instructions, and the envelope was delivered to the plaintiff after her father's decease, when she for the first time became aware of her title to the property.

Mrs. McCallum died on November 18, 1888. After her death General McCallum continued in occupation of the house until some time before his death, when he let it and received the rent. There was no evidence that he ever knew that the daughter was entitled to the house. He died on August 25, 1899, having by his will devised all the residue of his property to the defendant, who was his niece. Linden House was not specifically mentioned in the will, but the defendant assumed wrongly that it passed as belonging to the general, and retained the title-deeds (other than the two conveyances), and refused to account for the rents received by her.

The twelve years by the Real Property Limitation Act, 1874, fixed for bringing an action at law for recovery of the property expired in 1896, after the death of Mrs. McCallum, but before that of General McCallum.

On October 19, 1899, the daughter commenced this action to recover possession of the house. The defendant pleaded the Statute of Limitations, and the question arose whether the conduct of the mother in wilfully keeping from the plaintiff the knowledge that she was entitled to the property amounted to a "concealed fraud" within the Real Property Limitation Act, 1833, s. 26,[1] so that the statute did not begin to run until after the death of the mother.

Warrington, Q.C., and *Martelli*, for the plaintiff.

Renshaw, Q.C., and *A. St. J. Clerke*, for the defendant.

Kekewich, J., after dealing with the facts, said: It comes to this question, What is "concealed fraud"? Now it is strange that there are several cases on it, but at the same time it has not been defined in exactly the way to solve this question. The point was raised in a case of *Petre* v. *Petre* [1853],[2] before Vice-Chancellor Kindersley, and he says: "Firstly, what is meant by concealed

(1) The Real Property Limitation Act, 1833, provides by section 26: "in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered. . . ."

(2) 1 Drew. 371, 397.

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fraud? It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold." That seems to me to fit this case exactly, with one exception, that there the Vice-Chancellor is dealing with a fraud committed by a person benefitting himself by the fraud which enables himself to enter and hold; but, to my mind, that is not the essence of the definition. If the concealment is done in order to benefit some other person or to prevent the person exercising the right which but for the concealment would be exercisable, that seems to me to come within the substance of the Vice-Chancellor's definition, though not within the exact words. I find that that passage was cited by Mr. Justice Stirling in giving judgment in *Lawrance* v. *Norreys* (*Lord*) [1888, 1890],[3] which was a very special case and often quoted for another point. He says: "If that can be made out, it seems to fall within what Vice-Chancellor Kindersley, in the case of *Petre* v. *Petre*,[2] said"; and then he quotes that passage in a way which shews that he entirely approved.

Strange to say, when that case went to the House of Lords that definition was not apparently commented on. The Court of Appeal had affirmed Mr. Justice Stirling, though going to some extent on different grounds. The House of Lords affirmed the Court of Appeal and Mr. Justice Stirling, and, of course, must have had Mr. Justice Stirling's judgment before them. The case was fully argued by Mr. Warmington and Mr. Upjohn for the appellant, and the present Lord Justice Rigby and the present President of the Probate Division for the respondent; and I think I may fairly say that those learned counsel were not likely to leave anything unsaid which could help their client. Lord Herschell says: "It is not enough, therefore, to prove a concealed fraud; the person bringing the suit must shew that he or some person through whom he claims has been by such fraud deprived of the land which he seeks to recover, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought." I do not understand Lord Herschell to mean deprived of the land in the sense of "gone"—the land has not certainly gone away or actually become the property of another altogether—but deprived of the land by means of fraud, deprived of the possession of the land, the enjoyment of the land, and deprived of that which he was entitled to and which he now seeks to recover. It seems to me that explanation entirely harmonises with the definition given by Vice-Chancellor Kindersley and adopted by Mr. Justice Stirling, and that I may safely act upon it in this case. It seems to me that the mother in that sense, I will not use the words "was guilty of," but committed a concealed fraud. She did it intentionally. She intended, and she said she intended in writing in the clearest way, that her daughter should not know until the time that she did that she was entitled to this property which had been conveyed to her. She took the best means which occurred to her for concealing it, and she effectually did conceal it. That seems to me to come exactly within the definition. The result is that the daughter had not an opportunity, at any rate until the mother's death, of recovering this property, and I think the case falls within section 26 of the Real Property Limitation Act, 1833, and therefore is not governed by section 3, though, as I have already said, but for section 26, section 3 would have governed it. The result is the plaintiff is entitled to recover.

The defendant appealed.

Renshaw, *Q.C.*, and *A. St. J. Clerke*, for the appellant.—The evidence shews that the deed was delivered as a complete deed, so that it was not an escrow—*London Freehold and Leasehold Property Co.* v. *Suffield* (*Baron*) [1897].[4] The words of section 26 of the Real Property Limitation Act, 1833, are "concealed fraud."

(3) 59 L. J. Ch. 681; 39 Ch. D. 213; 5 App. Cas. 210.

(4) 66 L. J. Ch. 790, 793; [1897] 2 Ch. 608, 622.

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To come within that there must be first fraud and then concealment—*Armstrong* v. *Milburn* [1886][5] and *Rains* v. *Buxton* [1880].[6] Forgetfulness would not be sufficient. There was no fraud in this case. The deed itself cannot be said to have been a fraud, and that is all that was concealed. Any concealment that there was was by the mother, through whom the plaintiff claims. There is no evidence either of fraud or concealment by the father. The fraud of the mother, if any, would not prevent time running under the statute in favour of persons claiming under the father. Neither does ignorance prevent the operation of the statute—*Dawkins* v. *Penrhyn* (*Lord*) [1877].[7]

There is not much authority as to what is "concealed fraud" within the meaning of section 26. It was defined by Vice-Chancellor Kindersley in *Petre* v. *Petre*[2] as a designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold. That was cited in *Lawrance* v. *Norreys* (*Lord*),[3] and apparently accepted. The circumstances required to bring a case within the section are stated by Kay, L.J., in *Willis* v. *Howe* (*Earl*) [1893].[8] There is nothing of that kind here which affects the defendant, who claims through the father.

Apart from concealed fraud, the action has been brought too late. The father was in possession of the house during his life, and the plaintiff's right of action accrued, within the meaning of section 3 of the Real Property Limitation Act, 1833, and section 1 of the Real Property Limitation Act, 1874, more than twelve years before the action was brought.

Warrington, Q.C., and *Martelli*, for the respondent.—There was a concealed fraud on the part of the mother here, and time only begins to run from its discovery. It would be fraud within section 26, even if the mother was morally justified in what she did. The Court will not consider whether or not the motive was good. The intention was to deprive the daughter of what she took under the conveyance. Any artifice to deceive another as to property amounts to fraud. The statute does not say by whom the fraud must be committed. The section is framed with the view of protecting the rightful owner in any case of fraud. The house was in the mother's possession during her life—*Symonds* v. *Hallett* [1883].[9] There was fraud on the father's part. He, at any rate, knew of the conveyance to his wife, and yet he continued in possession after her death. In *Petre* v. *Petre*[2] Kindersley, V.C., was not dealing with this question. The fraud to take a case out of the statute need not necessarily be such conduct as an honourable man would repudiate—*Vane* v. *Vane* [1873].[10]

Renshaw, Q.C., in reply, referred to *Thorne* v. *Heard and Marsh* [1895].[11]

LORD ALVERSTONE, C.J.—I will briefly recapitulate the facts of this case so far as they are material. On September 3, 1884, General McCallum (since deceased), conveyed a house known as Linden House, Cheltenham, in which he was then residing, to his wife. On September 30 in the same year the wife by deed conveyed the same house to the plaintiff, and it must be taken, upon the evidence, that the deed was duly executed and delivered, and took effect. In 1886 the mother, Mrs. McCallum, deposited the deed with Mr. Asprey, a solicitor in London (not the same solicitor who prepared the deed), with a direction contained in a letter of February 22, 1886, which is set out in the statement of defence. In November, 1888, Mrs. McCallum died, having made a will in favour of her daughter, the terms of which are not material to be considered. General McCallum continued in occupation of the house until some time before his death, when he let it and received the rent. He died on August 25, 1899, having by his will in October, 1895, made the defendant his sole legatee.

(5) 54 L. T. 723.
(6) 49 L. J. Ch. 473; 14 Ch. D. 537.
(7) 48 L. J. Ch. 304; 6 Ch. D. 318; 4 App. Cas. 51.
(8) 62 L. J. Ch. 690, 693; [1893] 2 Ch. 545, 552.
(9) 53 L. J. Ch. 60; 24 Ch. D. 346.
(10) 42 L. J. Ch. 299; L. R. 8 Ch. 383.
(11) 63 L. J. Ch. 356; [1894] 1 Ch. 599. In H.L.: 64 L. J. Ch. 652; [1895] A.C. 495.

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McCallum, In re, App.

The question is whether the right of the plaintiff to recover possession of the house is barred by the Statute of Limitations. Upon the facts I come to the conclusion that there was on the part of the mother a "concealed fraud" within the meaning of section 26 of the Real Property Limitation Act, 1833. I think the mother intentionally concealed from the daughter that she had given her the house with the intention that the deed of conveyance should not become known to her except in certain events. In my opinion, however good was the motive which prompted her action, this was a "concealed fraud" within the meaning of section 26. I further find, however, that General McCallum was no party to the fraud. I draw the conclusion on the facts that he had forgotten all about the conveyance of September 3, 1884, and there is no evidence that he ever knew of the execution by his wife of the deed conveying the house to the plaintiff. I further find that he remained in possession of the house or dealt with it as his own down to the time of his death.

The question then arises whether or not the statute had run against the plaintiff, or whether the concealed fraud by the mother can be prayed in aid as an answer to the possession of General McCallum and the defendant. I am of opinion that, in order to prevent the operation of the statute, the fraud contemplated by section 26 must be the fraud of the person setting up the statute, or some one through whom that person claims. I think that this is the construction which I should have put upon the section if I had no other opinion to guide me. I read the words "may have been deprived by such fraud" as meaning to point to the action of the person who is seeking to rely upon the statute, but when the state of the law prior to the passing of the Act is considered, and the opinions of the Judges since that date are regarded, I do not think it is possible to come to any other conclusion. As I understand, the old jurisdiction exercised by the Court of equity rested upon the fact that the conscience of the party who was setting up possession as against the title of true owner was affected so that he ought not to be allowed to avail himself of the lapse of time. This is the reason given by the Lord Chancellor of Ireland in *Hovenden* v. *Annesley* (*Lord*) [1806],[12] and when Vice-Chancellor Kindersley, in *Petre* v. *Petre*,[2] was considering the meaning of the same section 26, he uses these words: "It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold." This passage was quoted *verbatim* in Lord St. Leonards' *Real Property Statutes* (2nd ed.), p. 98. It may be said, of course, that these statements of the law are not exhaustive; but I cannot think that such Judges would have used the words they did—namely, "by means of such concealment enables him to enter and hold"—if they had contemplated that this section of the statute was dealing with cases of the fraud of third persons (through whom the person in possession does not claim), of which fraud the persons claiming under the statute were wholly innocent. Similarly, in the case of *Willis* v. *Howe* (*Earl*),[8] Lord Justice Kay approves of the passage already cited from *Petre* v. *Petre*,[2] and adds these words: "But the word 'concealed' seems to indicate that there were facts known to the person who enters, and designedly concealed by him from the real owner, which facts, if known, would enable the real owner to recover. The deprivation of which the section speaks in such a case is by the fraudulent entry. But that which makes a wrongful entry fraudulent is not only the knowledge, but the concealment of those facts." And lastly, in the case of *Thorne* v. *Heard and Marsh*,[11] Lord Lindley in the Court of Appeal states the principle of the law in the way I have indicated, and refers to the authorities above mentioned; and Lord Davey, in the House of Lords, uses language which, though it was uttered with reference to another statute, in my opinion lays down the principle of construction

(12) 2 Sch. & Lef. 607, 634.

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that we ought to apply to this Act, an Act, be it remembered, which only laid down a uniform rule as to the length of time which must have elapsed since possession taken in order to oust the true owner.

For these reasons I come to the conclusion that the plaintiff's title is barred by the Real Property Limitation Acts, and that this appeal ought to be allowed.

RIGBY, L.J.—The question in this case is whether the plaintiff's right to recover a dwelling-house at Cheltenham is, or is not, reserved to her by section 26 of the Real Property Limitation Act, 1833. The main contention before us has been that, because the defendant and her alleged predecessor in title were personally ignorant of any fraud down to the time when, but for fraud, the statute would have run, the defendant is entitled to hold as against the plaintiff. A doubt has also been suggested whether the plaintiff was deprived of her land by the fraud. The words of section 26 appear to me not to be open to any doubt as to their meaning. They are applicable to every case of a concealed fraud which deprives the owner. Their generality is limited only by the proviso, which forms the rest of the section, in favour of *bona fide* purchasers for value without notice at the time of the purchase. This has no application (as there has been no case of purchase) to this case, though it may serve to rebut certain suggestions that have been made, in my judgment without foundation, as to the construction of that part of the section which is directly applicable. It is indeed difficult to see how an exception or proviso (in opposition to an equitable rule) in favour of innocent volunteers, which has been set up in this action and negatived by Mr. Justice Kekewich, can be implied side by side with the express proviso in favour of *bona fide* purchasers for value which only affirms the pre-existing equitable rule. [His Lordship then stated the facts, and continued :] It cannot be questioned that the scheme planned and carried out by the wife was a fraud upon the plaintiff. The wife wished, notwithstanding the conveyance to the plaintiff, to retain to herself a certain control over the property, and the scheme was contrived and intended to secure upon her death a life estate to her husband, and this scheme succeeded. By her contrivance her husband continued to hold possession until his death. That the fraud was a "concealed fraud" is plain from the above statement, and that it could not have been discovered by reasonable diligence is also plain. Was it a fraud that deprived the plaintiff of her land? By that fraud, and from no other cause, she was kept out of possession and enjoyment during the whole of her father's life. There is no evidence that the father knew anything of the conveyance to the plaintiff, and we must assume that he did not. But suppose that he had at any time been told of the daughter's title, as an honest man he could not have joined in the concealment of it from her, otherwise he would have become *particeps criminis*. There is no reason to suppose that he would have tried to do so, but, if she had become aware of her right, she might at any time before October, 1896, have recovered possession by action of ejectment, to which there could have been no defence. The fraud, therefore, and the concealment thereof were the sole and efficient cause of the deprival. The alternative that the plaintiff might have been deprived by the father's continuing in possession appears to me inadmissible. That did not deprive her of her land, but at most of the possession of it.

The Statutes of Limitation give no title whatever to trespassers or squatters before the determination of the time limited by the statute for bringing any action or suit, upon which determination section 34 of the Act of 1833 applies and extinguishes the right of the true owner. As to a suit in equity, section 26 must determine what the time is—that is to say, twenty (now twelve) years from the discovery of the fraud. Trespasser the father was, and trespasser he remained, after 1896 as well as before. In the judgment of the Court of Appeal (Lords Justices James and Mellish) in *Vane* v. *Vane*,[10] pronounced by Lord Justice James, there occur the following passages: "It was, indeed, attempted to be argued that, as the plaintiff's right was

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a clear legal right which became vested in him at his father's death, with no legal bar or impediment to prevent his taking possession of or recovering the estates, and the defendants' possession originating in a mere trespass, being, in point of law, mere squatting on the property, this Court would not interfere." And a little further on he says: "We are of opinion that the law gives no special privilege to the length of squatting possession. It must always be borne in mind that in all questions under the Statute of Limitations this Court has nothing to do with the nature, origin, or duration of the defendants' possession, but simply whether the plaintiff has or has not proceeded in due time after the accruer, or that which is to be taken to be the accruer, of his right of suit. An estate may have been enjoyed as a fee-simple estate for generations through any numbers of devolutions or dispositions, or may have been held by squatters successively for many years, without creating any bar to the proceedings of a rightful owner under a title newly accrued. And there is not, in our judgment, in this respect any difference whether the accruer is on the determination of a previous estate or on the discovery of a concealed fraud." The law here laid down, as to the discovery of a concealed fraud giving, as it were, a new right in equity, coincides with what was said again and again by Lord Redesdale (when Lord Chancellor of Ireland) in the course of his judgment of *Hovenden* v. *Annesley* (*Lord*).[12] I have carefully reperused the judgment in that case, and I find nothing in it inconsistent with the judgment which I am now pronouncing. It is true that in commenting on *Booth* v. *Warrington* (*Earl*) [1714][13] he uses the expression, "the conscience of the party being so affected, that he ought not to be allowed to avail himself of the lapse of time." It is true also that in that case Booth (the defendant) was himself the perpetrator and concealer of the fraud. But Lord Redesdale cannot reasonably be interpreted as implying (he certainly does not say) that in no case can a defendant be bound in conscience unless he knew of the fraud at the time of its perpetration, or afterwards before the statute created a legal bar. The important time to consider is when a suit is brought by the rightful owner to recover the property. If the defendant then knows, as he must do on the fraud being established by evidence, that he and all persons through whom he claims have held entirely by virtue of the fraud, it is (to use the expression of Lord Redesdale) against conscience for him to claim the continued benefit of the fraud.

In *Huguenin* v. *Baseley* [1807][14] Lord Chancellor Eldon, with reference to the case of the wife and children born or to be born of Baseley (all innocent of any fraud), citing with approval the case of *Bridgman* v. *Green* [1755],[15] decided by Lord Chancellor Hardwicke, and re-heard before Chief Justice Wilmot and the other Lords Commissioners in 1757, says: "Lord Hardwicke observes justly, that, if a person could get out of the reach of the doctrine and principle of this Court by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud" (that is, fraud by a stranger); and later on he says: "This was also the doctrine of Lord Thurlow in the case, that has been referred to, of *Lutterel* v. *Waltham* (*Lord*) [1787]."[16] He states that case as follows: "The object of the bill in that case was, that an estate should be enjoyed, as if a recovery had been suffered; upon the ground, that Lutterel had, while Lord Waltham was upon his death-bed, engaged in suffering a recovery, prevented it, with the view, that the estate should devolve upon the person, with whom he was connected. That estate was by law vested in that individual: a much stronger case therefore than the acquisition of property through imposition. Lord Thurlow, whatever might have been his final decision upon that case," (it was tried on demurrer and is very imperfectly reported), "had no doubt, that it was against conscience, that one person should hold a benefit, which he derived through the fraud of

(13) 4 Bro. P.C. 163.

(14) 14 Ves. 273.

(15) 2 Ves. sen. 627; Wilmot, 58.

(16) Sometimes cited as *Dixon* v. *Olmius*, 1 Cox, 414.

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another; and I have reason to know, that his Lordship would not have discussed the case so much at large, if it had been no more than that." Lord Eldon adopted the opinion of Lord Thurlow, and decided the case against the innocent wife and children on the strength of it. It is obvious that the principle was wide enough to extend to every case of an innocent person claiming where his right is shewn to depend upon a fraud committed by another. The case of *Scholefield* v. *Templer* [1859] [17] was a case of concealed fraud against a defendant who was innocent of the fraud, but had gained an advantage from it—namely, a release from his liability as surety, which the plaintiff by his suit sought to deprive him of on the ground of the fraud. He defended the suit on the ground of his innocence, but unsuccessfully, both in the Court of first instance and on appeal, and the release was set aside. The situation therefore was more favourable to the defendant than that of a defendant to an action to recover land on the ground of concealed fraud. The defendant was not claiming something which he had not got, but only to retain what he had already. The defendant in the suit to recover land claims to have a mere squatter's title turned into a fee-simple. Counsel for the plaintiff relied upon *Huguenin* v. *Baseley*,[14] and the defendant's counsel did not contest the applicability of that class of cases in general, but argued that the case of principal and surety was an exception to the general rule. The judgment of Vice-Chancellor Page-Wood contains the following passages: "This case is brought within the broad principle, that no one can avail himself of fraud. As it was held in *Huguenin* v. *Baseley*,[14] and the other cases cited in argument, where once a fraud has been committed, not only is the person who has committed the fraud precluded from deriving any benefit from it, but every other person is so likewise, unless there has been some consideration moving from himself." And further on: "The truth is, that, in all cases of this kind, where a fraud has been committed, and a third person is concerned, who was ignorant of the fraud, and from whom no consideration moves, such third person is innocent of the fraud only so long as he does not insist upon deriving any benefit from it; but when once he seeks to derive any benefit from it, he becomes a party to the fraud." He dismissed the argument founded upon the relation of principal and surety without hesitation. On appeal from this decision Lord Chancellor Campbell, in a judgment concurred in by Lord Justices Knight-Bruce and Turner, said: "I consider it to be an established principle that a person cannot avail himself of what has been obtained by the fraud of another, unless he not only is innocent of the fraud, but has given some valuable consideration." This adoption of the reasoning of the Vice-Chancellor plainly shews that the Court of Appeal intended to treat *Huguenin* v. *Baseley* [14] as part of the settled law of the Court.

It was, therefore, well established, by authoritative decisions binding on the Court of Appeal, and not to be questioned here, that, independently of the Real Property Limitation Act, 1833, a suit in equity might have been brought at any time in a case of concealed fraud, notwithstanding that the person sued, and those through whom he claimed as predecessors in title, had not been party or privy to the fraud at the time when it was perpetrated. It would be strange, indeed, if a statute intended for the limitation of actions and suits relating to real property should be found to contain such a substantive alteration in the law as a change when the Act came into force of the fundamental principles on which suits in equity in cases of fraud were theretofore tried. It has, however, always been treated as clear that no change in the substantive principles of equity was intended by the Act. I refer again to the facts of the present case, and for argument make the supposition that the fraud had been discovered and an action brought in the father's lifetime, but after 1896. The proof of the fraud and its concealment would have been simple, and the father could not in defence claim to have his squatter's title changed into a fee-simple by virtue of his wife's fraud committed for his benefit and known to him

(17) 28 L. J. Ch. 452; Johnson, 155. On app.: 4 De G. & J. 429.

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at the trial. The death of the father and the entry of the defendant could make no difference.

The appellant construes section 26 so as to exclude all cases in which the defendant by himself or his predecessors in title were not before the discovery of the fraud party or privy to it. No decided case has been cited in which this construction has been adopted and made the ground of decision. If such a case were produced we should have to consider whether it was binding on us sitting as a Court of Appeal. *Obiter dicta* of text-writers and Judges, not always correctly appreciated, have alone been relied upon. With regard to these it is sufficient to say that no *dicta* of text-writers or Judges, however eminent, if contrary to fixed principle or the words of a statute, can have the force of an amending Act of Parliament, or absolve us from the duty of ourselves applying the principle or construing the Act. All the *dicta* relied upon depend more or less on the explanation of concealed fraud given by Vice-Chancellor Kindersley in *Petre* v. *Petre*.[2] That explanation, treated as referring to the circumstances of that case, cannot be questioned. Treated as applying to all cases, whatever their circumstances, it becomes a mere *dictum*, and one that is irreconcilable with the doctrine of *Huguenin* v. *Baseley*.[14] There is no reason why the Vice-Chancellor, who certainly was not ignorant of what the Court of Appeal called in 1859 a well-established principle, should have meant it to be so treated. All such *dicta* must be interpreted, and if necessary limited, so as to accord with the fixed principle or the statute in question. One danger of treating such *obiter dicta* as authorities is that, if stated only in general terms, one may be applying them to circumstances which the authors never had in mind. In other words, we may be treating as exhaustive what the authors intended only to apply to special circumstances. All the *dicta* relied upon might be explained and brought into accordance with the whole line of authorities by interpreting "fraud by him or his predecessors" and similar phrases as including fraud properly imputable to him or them whether originally or at the trial. This might, without legal inaccuracy, be treated as fraud by him or them. *Thorne* v. *Heard and Marsh*[11] was a case in which the construction of the statute of 1833 did not come into question, directly or indirectly. It depended solely on the question whether under the Trustee Act, 1888, the trustees were party or privy to a fraud so as to bring them within the language of the exception contained in the Act.

In my judgment, the appeal ought to be dismissed.

Vaughan Williams, L.J.—I agree with the judgment of the Lord Chief Justice.

In my judgment a "concealed fraud," to bring into operation section 26 of the Real Property Limitation Act, 1833, must be the fraud of or in some way imputable to the person who invokes the aid of the Statute of Limitations. It seems to me that the words of section 26 sufficiently indicate that the intention of the Legislature was at the time when it enacted a legislative rule respecting the period within which relief might be granted to those seeking to recover any land or rent of which they might have been deprived, to reserve to Courts of equity that jurisdiction which those Courts had always exercised to relieve against "concealed fraud" when discovered. The right given by the section is a right to bring a suit in equity. The right to bring a suit in equity was before the statute based upon well-established principles—principles which, to my mind, clearly render it necessary that the plaintiff in such a suit should rely on and prove a "concealed fraud" which was the fraud of, or a fraud in some way imputable to, the defendant. The plaintiff had to prove facts so affecting the conscience of the defendant that he ought not to be allowed to avail himself of the length of time fixed generally by the Statute of Limitations.

I think also that the concealment must, according to the principles acted on by Courts of equity, have been a concealment by the defendant or imputable to him, and that the "concealed fraud" must have deprived the plaintiff or his prede-

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cessors in title of the estate. There is a good deal of authority as to this to which I will refer shortly. But, independently of these authorities, I am justified in the view I have taken by the fact that I have not been able to find a single case in which relief has been granted in which the interest or estate held by the defendant was not derived through the fraud. Thus in *Huguenin* v. *Baseley* [14] the wife and children of the defendant, although innocent of the fraud which procured the execution of the settlement, yet claimed to take the benefits of that settlement thus fraudulently procured. *Bridgman* v. *Green* [15] and other cases cited in the notes to *Huguenin* v. *Baseley* [14] are all cases where the defendants relied for their title on that which had been obtained by fraud. Thus in the case of *Scholefield* v. *Templer* [17] the ground of the decision was that the defendant, a surety innocent of the fraud by which the principal debtor obtained a release, could not in equity avail himself of the fact that the principal debtor had been thus released, because, if you avail yourself of fraud in order to obtain for yourself any benefit, you become *particeps criminis* In the present case it is the case not only that neither the defendant nor the general were parties to the fraud of Mrs. McCallum, but also that neither the general nor the defendant obtained or held possession of the land by availing themselves of that fraud. They were simply trespassers, and there is nothing against conscience in their availing themselves of the lapse of time during which the occupation has continued to the exclusion of the plaintiff, since such occupation was not due to fraud or in any way connected with it. It was, at worst, wrongful occupation which deprived plaintiff of her land, and not concealed fraud.

Amongst the older authorities as to the jurisdiction formerly exercised may be cited *Hovenden* v. *Annesley* (*Lord*) [12] and *Bowen* v. *Evans* [1848].[18] Upon fraud clearly established no lapse of time will protect the parties to it or those who claim through them against the jurisdiction of the Court of equity depriving them of their plunder.

(18) 2 H.L. C. 257.

Amongst modern authorities may be cited, first, *Petre* v. *Petre*,[2] in which Vice-Chancellor Kindersley says: "what is meant by concealed fraud? It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold." This case was a decision on section 26 itself. It is suggested that the language used by the Vice-Chancellor is accounted for by the fact that in that case he had to deal with a case in which that which was alleged as a "concealed fraud" was chargeable against the defendant himself; but I will observe that Lord St. Leonards, in his *Real Property Statutes* (2nd ed. 1862), adopts these words of the Vice-Chancellor as applying generally to the meaning of the words "concealed fraud" in this section; and Lord Justice Kay, in his judgment in *Willis* v. *Howe* (*Earl*),[8] quoting this passage from the judgment of Vice-Chancellor Kindersley, treats the proposition therein contained as a proposition of general application and not as referring only to the facts of the particular case before the Vice-Chancellor. He says: "It is not merely an 'unknown fraud.' But the word 'concealed' seems to indicate that there were facts known to the person who enters, and designedly concealed by him from the real owner, which facts, if known, would enable the real owner to recover. The deprivation of which the section speaks in such a case is by the fraudulent entry." Next comes the case of *Thorne* v. *Heard and Marsh*.[11] This was not a case decided on section 26 of the Real Property Limitation Act, 1833, but on the Trustee Act, 1888. It is provided by section 8 of that Act, sub-section 1 (*a*): "All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding"—namely, any action, except where the claim is founded on fraud to which the trustee was party or privy—"if the trustee or person claiming through him had not been a trustee." The action therefore directly

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raised the question, what the rights of the defendant were in respect of a Statute of Limitation (21 Jac. 1. c. 15), which contained no express reservation of the jurisdiction of equity; in other words, the case directly raised the question as to what were the limits within which a Court of equity, apart from statutory enactment, would restrain a defendant from setting up the defence of a Statute of Limitations or enforce the rights of the plaintiff, notwithstanding the lapse of the legal statutory time, and give effect to the rights in equity of the deprived owner. In this case Lord Davey said: "In my opinion, if fraud, or a non-discovery of fraud, is to be relied on to take a case out of the Statute of Limitations, it must be the fraud of or in some way imputable to the person who invokes the aid of the Statute of Limitations"; and Lord Chancellor Herschell, although he does not make a concise statement of principle like that made by Lord Davey, yet clearly decides the case on the same principle, because, after finding that there was fraud and concealment by one Searle, he decides that this did not prevent the defendant from raising the defence of the Statute of Limitations because he, the trustee, was not privy to the fraud or the concealment; and Lord Macnaghten says: "By a recent and I think a very beneficial change of the law, a trustee who has committed a breach of trust is entitled to rely on the Statute of Limitations as fully as anybody may do who is not a trustee, provided his conduct has been free from any taint of fraud, and provided he has not derived and is not in a position to derive any personal benefit from the transaction impeached as a breach of trust." It is true that in this case no part of the property taken by Searle ever came to the hands of the defendant, of whom Searle was neither the partner nor the agent acting within the scope of his authority, and that the only sense in which the defendant took the benefit of the concealed fraud by Searle was that he took advantage of the fact that Searle, by regularly paying the interest on the trust money which he had stolen, led the plaintiff to remain ignorant of the breach of trust and to abstain from taking proceedings against the defendant in respect of it. In this same case in the Court of Appeal Lord Lindley expresses himself in the same sense: first he says, "The point whether section 26 applies only to frauds committed by the defendant or those through whom he claims, or whether it extends to frauds committed by strangers, will be found alluded to by Lord Justice Kay" (in *Willis* v. *Howe* (*Earl*) [8]), "and he, following Vice-Chancellor Kindersley in *Petre* v. *Petre*,[2] expressed his opinion that the fraud, to avail the plaintiff, must have been committed by the defendant or some person through whom he claimed. This accords with Lord Redesdale's opinion in *Hovenden* v. *Annesley* (*Lord*).[12] He puts the doctrine of concealed fraud thus: He says that the defendant's conscience is so affected that he ought not to be allowed to avail himself of the statute or lapse of time." Again in the same case Lord Lindley says: "the equitable doctrine respecting concealed fraud is based on the moral injustice of allowing a man to take advantage of his own fraud and concealment."

Having dealt thus far with the basis of the equitable doctrine of concealed fraud and with judicial opinion as to the meaning of the words "concealed fraud," I wish to add that the view of Lord Justice Kay that the fraud must have deprived the claimant or his predecessors in title of the estate has already been fully established by the judgment of Lord Chancellor Herschell in *Lawrance* v. *Norreys* (*Lord*)[3]; and I wish here to point out two reasons why the case of *Scholefield* v. *Templer*[17] has no application in the present case—first, because in that case the defendant sought to take a benefit from the very fraud which he said deprived the plaintiff of his right of action against him the surety, whereas in the present case neither the defendant nor the general in any sense adopt or seek to take a benefit from the fraud of the plaintiff's mother; secondly, because the fraud of the plaintiff's mother had nothing to do with the possession of General McCallum or the depriving the plaintiff of her land: she was deprived of her land by the possession of her father, she was not deprived of the land by the fraud of her mother. The

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general's possession may have been wrongful as against his wife, and after his wife's death it may have been wrongful as against his daughter; but in neither case did he obtain or hold possession by fraud; and in my judgment wrongful possession by a trespasser is not concealed fraud within the meaning of the section.

As to the facts of this case I think we are all agreed—first, that the possession of the general was not the possession of his wife—at all events, it was not after her death; secondly, that neither the general nor the defendant was privy to the fraud of Mrs. McCallum. I think, therefore, that this appeal should be allowed, and judgment entered for the defendant.

I wish to add one word about Mrs. McCallum. I think that quite consistently with the evidence she may have been innocent of moral fraud; she may well have supposed that the conveyance to her daughter was of no effect until she communicated the fact of the conveyance to her daughter or delivered it to some one to hold for her. I am not sure that the fact that she did not disclose to her daughter the conveyance which she had executed to her would constitute "concealed fraud" if she honestly supposed that the conveyance was of no effect. Counsel for the respondent opened his case by disclaiming any charge of moral fraud. It is true that ultimately he contended that Mrs. McCallum must be judged by her acts, and that what she did was a fraud upon her daughter. I think I ought to say that I am by no means satisfied that she was guilty of a fraud. But, taking the view which I do of this case, it is unnecessary to determine whether the plaintiff's mother was guilty of concealed fraud within the meaning of section 26; but I should hesitate to come to that conclusion.

Appeal allowed.

Solicitors—Field, Roscoe & Co., agents for Bubb & Co., Cheltenham, for appellant; Joseph W. Asprey, for respondent.

[*Reported by A. J. Spencer, Esq., Barrister-at-Law.*

BUCKLEY, J. 1900. Dec. 13.

ELLIOT *v.* NORTH.

Will — Married Woman — Assent of Husband—Chose in Action—Title of Husband—General Probate of Will of Married Woman.

Under the old law as it stood before the Married Women's Property Act, 1882, *the assent by a husband to his wife's will might be given after her death. It was not necessary that it should be given in her lifetime.*

A woman married in 1863 *under a settlement made upon her marriage had a power of appointment over certain funds. In* 1871 *her son by a previous marriage died intestate without issue, and thereupon the married woman became entitled to a reversionary interest in certain personal estate expectant on the determination of the life interest of the son's widow, who was still living. In* 1874 *the married woman died, having by her will appointed the defendants executors and trustees thereof, and having in exercise of the power reserved to her by the settlement appointed the residue of the settlement funds and all other personal estate which at the time of her decease she had power to appoint or dispose of by will to be equally divided between the defendants. The will did not expressly refer to the reversionary interest. The husband signed a consent to letters of administration with the will annexed being granted to the defendants. The executors of his will brought an action against the defendants to determine whether the plaintiffs or the defendants were entitled to the reversionary interest:*—Held, *that although the husband had consented to the wife's will the reversionary interest did not pass under it to the defendants, and that the effect of the grant of general administration to them was merely to constitute them trustees for the husband and his personal representatives of the reversionary interest.*

Squib *v.* Wyn (1 P. Wms. 378) *followed.*

Trial of action.

On February 10, 1863, John Lettsom Elliot married the Right Honourable Harriet Countess of Guilford, widow of

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the Right Honourable Francis Earl of Guilford.

By an indenture of settlement on the marriage, dated February 6, 1863, certain funds, chattels, and other personal estate, the absolute property of the Countess of Guilford, were settled upon such trusts and for such interests and purposes as she should, notwithstanding coverture, by deed or will appoint.

On November 10, 1871, the Hon. Charles North, a son of the countess by her first marriage, died intestate and without issue, and thereupon the countess became entitled as one of his next-of-kin to a reversionary interest in certain personal estate expectant upon the determination of a life interest in the son's widow.

On April 8, 1872, the countess made her will, by which she appointed the defendants, the Hon. Frederic Henry North and Henry Jeffreys Bushby, executors and trustees thereof, and after reciting the settlement she in exercise of the power therein contained appointed and bequeathed to her husband, J. L. Elliot, certain specific funds. Then, after making various other appointments in exercise of the power, she appointed the rest, residue, and remainder of the settlement funds "and any balance I may have at my banker's and all ready money and all and singular other the personal estate which at the time of my decease I shall have power to appoint or dispose of by this my will and which I have not hereby disposed of (but not including any furniture or effects which at the time of my marriage were in or about the leasehold house in Grosvenor Street then belonging to me) unto and equally between" the defendants.

On April 16, 1874, the countess died.

On May 19, 1874, J. L. Elliot signed a general consent to the grant of letters of administration with the will annexed. The document recited that the countess died on April 16, 1874, having during her coverture with J. L. Elliot, by virtue of certain powers and authorities given to and vested in her by an indenture of settlement and of other powers and authorities her enabling, made and executed her last will and testament and thereof appointed the defendants executors, and proceeded as follows: "And whereas I the said John Lettsom Elliot as the lawful husband of the said deceased am the sole person entitled to her personal estate and effects over which she has no disposing power and concerning which she is dead intestate. Now I the said John Lettsom Elliot of No. 70 Connaught Place Hyde Park in the County of Middlesex Esquire do hereby declare that I expressly consent that letters of administration with the will annexed of all and singular the personal estate and effects of the said deceased be committed and granted to the said Frederic Henry North and Henry Jeffreys Bushby the executors named in the said will."

On June 2, 1874, administration with the will annexed was granted to the executors by the Court of Probate. The grant was "of all and singular the personal estate and effects of the said deceased," and contained the following statement: "The said John Lettsom Elliot having consented."

On September 17, 1898, J. L. Elliot died, without having taken any step to reduce the reversionary interest into possession, having by his will dated June 8, 1892, appointed the plaintiffs executors thereof.

The widow of Charles North was still living.

This was an action brought by the plaintiffs as the executors of J. L. Elliot against the defendants as the administrators *cum testamento annexo* of the countess, claiming a declaration that the defendants, as such administrators *cum testamento annexo*, held all or any the share of the Countess of Guilford in the personal estate of Charles North, commonly called the Honourable Charles North, deceased, and all or any rights she might have had thereto, subject to the life interest therein of the widow of the said Charles North, in trust for the said J. L. Elliot, deceased, and now held the same in trust for the plaintiffs as his executors, and for an order in such terms as to the Court should seem proper under the circumstances directing the defendants to assign, convey, and make over unto the plaintiffs all the said share and rights of the Countess of Guilford, deceased, in

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the personal estate of the said Charles North, subject to the life interest therein of his widow.

W. F. Hamilton, Q.C., and *J. W. Brodie Innes*, for the plaintiffs, the legal personal representatives of J. L. Elliot.—The husband never gave his assent to the will of his wife dealing with the reversionary interest. Under the old law as it stood before the Married Women's Property Act, 1882, on the death of a wife leaving her husband her surviving the whole of her personal property vested in him, although in order to enable him to give a good discharge for it it was necessary that he should take out administration to her estate. To enable a married woman to make a will it was necessary that her husband should consent during her lifetime to the particular will, and, as that consent was revocable, it was also necessary that he should consent to the will after her death or to probate being granted to the executors, otherwise the beneficial interest in the property vested in him in equity at her death. But assuming in the present case that the subsequent assent of the husband to the will was sufficient, then inasmuch as the husband during her lifetime had given no consent to her disposing of the reversionary interest, the married woman had no power at the time of her death to dispose of it, and therefore on the construction of the will the gift by her of all residuary property over which she had any disposing power at her death did not pass the reversionary interest. That being so, the consent of the husband to the grant of administration with the will annexed to the executors of the wife did not deprive him of the beneficial interest in the reversionary interest. The effect of the grant to the executors was to constitute them trustees of the reversionary interest for the husband—*Squib* v. *Wyn* [1717],[1] *Humphrey* v. *Bullen* [1737],[2] *Elliot* v. *Collier* [1747],[3] *Smart* v. *Tranter* [1890],[4] *Brook* v. *Turner* [1676],[5] and *Maas* v. *Sheffield* [1845].[6] It is true that in *Fane, Ex parte* [1848],[7] a married woman made a will disposing of a fund which she had a power so to dispose of, and of another fund as to which she had no such power, and appointed her husband executor, who proved the will generally, and it was held that the will was valid as being made *ex assensu viri*. But that case is very shortly reported, and no facts are given.[8]

Prior to 1887 the practice of the Probate Court with reference to the granting of probate of the will of a married woman was to make a general grant to the husband, if he assented to the will, of all the deceased's property; but if he did not, then to grant probate to the executors of the will limited to the property over which the married woman had a disposing power, and to grant to the husband, if he desired it, administration *cæterorum*—see *Coote's Practice of the Court of Probate* (3rd ed. 1860), p. 41. That practice was, however, altered in 1887, and under the present practice a grant to a husband of probate of the will of his wife does not necessarily operate as an assent to the will as a disposition of property which she had no right to dispose of by will without his assent—*Atkinson, In re; Waller* v. *Atkinson* [1899].[9]

[On this point they also referred to *Willock* v. *Noble* [1875][10] and *Price, In the goods of* [1887].[11]]

But assuming that the consent of the husband to a general grant of administration with the will annexed to the executors amounted to an assent to the will, such assent no more affected the beneficial interest than a grant of general probate of a will would do under the present practice.

Hughes, Q.C., and *Gregson*, for the defendants, the executors of the wife's will.—The assent by the husband to a general

(1) 1 P. Wms. 378.
(2) 1 Atk. 458.
(3) 3 Atk. 526.
(4) 59 L. J. Ch. 363; 43 Ch. D. 587.
(5) 2 Mod. 170.
(6) 1 Rob. Ecc. 364; 10 Jur. 417.
(7) 16 Sim. 406.
(8) A certified copy of the petition in that case was produced in Court, from which it appeared that the husband assented to the will in the lifetime of the wife, and took a benefit under it.
(9) 67 L. J. Ch. 349, 350; 68 L. J. Ch. 404, 406; [1898] 1 Ch. 637, 641; [1899] 2 Ch. 1, 5.
(10) 44 L. J. Ch. 345; L. R. 7 H.L. 580.
(11) 56 L. J. P. 72; 12 P. D. 137.

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grant of administration with the will annexed to the executors was an assent to the will, and they are entitled to the reversionary interest as part of the wife's estate. The wife had a disposing power by will with the assent of her husband, and that assent might be given at any time up to the date of probate. The material assent was the assent after the wife's death, as an assent given during her lifetime might be revoked. And it has been held that the death of the husband during the lifetime of the wife operated as a revocation of the assent—*Willock* v. *Noble*.[10]

[BUCKLEY, J.—The wife's will took effect because the husband was content to stand aside.]

The effect of the husband's assent was so put by Lord Selborne in *Noble* v. *Willock* [1873],[12] when that case was before the Court of Appeal.

The most conclusive form of consent by the husband is where he either proves the wife's will himself or, as in this case, consents to other persons doing so.

The reversionary interest was property of which she had power to dispose with certain consent. It is a perfectly accurate use of language to say that a person has power to dispose of property which he has power to dispose of with certain consent. There is little doubt here that the countess intended to dispose of property not covered by her power of appointment.

[They referred to *Chappell* v. *Charlton* [1887],[13] *De Pradel, In the goods of* [1867],[14] and *Hawkins on Wills*, p. 28]

BUCKLEY, J., stated the facts, and continued: The question in this action is whether, as between the plaintiffs, as the legal personal representatives of J. L. Elliot, and the defendants, as the legal personal representatives of the Countess of Guilford, the plaintiffs or defendants are entitled to the reversionary interest in question.

Apart from the will, and the construction of the will, one or two things in the outset I apprehend are plain. When the Countess of Guilford died on April 16, 1874, entitled to this reversionary interest, the right to it vested in her surviving husband, and he was entitled to take it, and was master of it, and could give a discharge for it, if he took out letters of administration to his wife s estate. This also, I think, is plain: that if he did not take out administration to his wife's estate, but somebody else did, the person who so took out administration would be a trustee for him. After the Statute of Distributions (22 & 23 Car. 2. c. 10) had been passed a doubt seems to have arisen as to what was the effect of that statute upon the rights of surviving husbands in respect of their wives' personal estate, and accordingly there was appended to the Statute of Frauds (29 Car. 2. c. 3)—a place where one would scarcely expect to find it—a section (section 24) which provided that for the purpose of explaining the Statute of Distributions, it was declared "That neither the said Act, nor anything therein contained, shall be construed to extend to the estates of *femecoverts* that shall dye intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act." There are authorities, beginning with *Squib* v. *Wyn*,[1] and extending to *Humphrey* v. *Bullen*[2] and *Elliot* v. *Collier*,[3] from which it is quite plain that the reversionary interest of the wife vests in the surviving husband immediately upon her death, even before he has taken administration to her; that her next-of-kin have no right under the Statute of Distributions to it at all; that the husband is the person entitled; and that, whether he or somebody else takes out administration, the beneficial interest in the wife's personal estate is vested in him. Those cases were reviewed, and the last authority upon them is to be found in *Smart* v. *Tranter*.[4]

Now, that proposition I do not understand to be disputed, but say the defendants: A wife, under the old law, could always make a will of personal estate with the assent of her husband, and the husband in this case has assented by signing

(12) 42 L. J. Ch. 681, 683; L. R. 8 Ch. 778, 789.
(13) 56 L. J. P. 73.
(14) 37 L. J. P. & M. 2; L. R. 1 P. & D. 454.

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the consent of May 19, 1874. Against that counsel for the plaintiffs have sought to argue that the assent of the husband must be given in the lifetime of the wife. I do not think that any such proposition can be maintained. I think that the doctrine rests upon this, that the wife under the old law, being a person incapable of disposing of her personal property, was nevertheless treated as being a person who could dispose of it if the husband, who was absolutely entitled if she did not dispose of it, was content to stand aside. He could stand aside by a consent given in her lifetime if he were so minded; but he might revoke that consent at any time he liked, and if he did revoke his consent, the will would not have any effect. Up to the very time when the wife was *in extremis* he could revoke the consent if previously given, or could refuse to give it. If she was dead he could, by taking certain steps, treat her will as being an effectual will so as to pass the property adversely to him, although he could have taken up a different attitude. Now that, I think, is plain, not so much from *Fane, Ex parte*,[7] as reported, as from the way in which, I understand, that authority has ever since been used. I need not go further than to state that in the case of *Atkinson, In re; Waller* v. *Atkinson*,[9] the law was treated as being such, and I need scarcely say that it is binding on me. In that case Mr. Justice Stirling said this: "The question under these circumstances is, Does the probate by the husband of this will operate as an assent by him?"—the probate by the husband of the will was of course an act done after the death of the wife—"Under the old practice I think it was settled that it did so operate. The case of *Fane, Ex parte*,[7] is an authority to that effect. There the husband, having the option of having the will proved so far as it was an effectual disposition of property and taking the grant of administration *cæterorum*, chose to prove the will generally, and it might very well be held that that was an assent to the will." In the Appeal Court Lord Lindley, who was then the Master of the Rolls, put it even more plainly. He said: "as I understand the authorities, the husband is at liberty during the life of his wife to license her to make a will and to revoke that licence, but if after her death he has really assented to her will he cannot revoke it. Now, before Mr. Justice Stirling the case was argued upon the question whether the husband had assented, and the plaintiffs relied mainly upon the ground that he had proved the will in general form in May, 1892, and no doubt under the old law that would have been an assent to the will." Lord Lindley did not mean an assent to the will, which could have no effect, but an effectual assent to the will so as to give validity to a disposition made by the wife which otherwise would have been invalid. I consider, therefore, that here an assent given by Elliot, after the death of the countess, to her will, if it were a will disposing of this reversionary interest, would have been such as to constitute that an effectual disposition. But now what took place was this: The will in question was proved on June 2, 1874. At that time the practice of the Probate Court was different from what it now is. Under the then existing procedure the Court of Probate would grant probate of a married woman's will limited to property over which she had a power of disposal, and then would make a grant of administration *cæterorum* to the husband. That practice was altered in April, 1887. The practice is now to make one grant. On May 19, 1874, however, the practice then being such as I have stated, Elliot signed this consent, and this is what is relied upon as being his consent to his deceased wife's will so far as it was a disposition of property of which she could not dispose except with his consent. [His Lordship then referred to the terms of the consent, and said that the recital that J. L. Elliot as the lawful husband of the deceased was the sole person entitled to her personal estate and effects over which she had no disposing power, and concerning which she was dead intestate, plainly meant that he was the person entitled to property of which she died intestate—namely, property over which she had no disposing power under that settlement which had been mentioned. He continued:] Upon that consent a grant of administra-

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tion with the will annexed was made by the Probate Court. [His Lordship read the grant, and continued:] Now, what was the consent? It seems to me that it was a consent by the husband, who would otherwise have been entitled to a grant *cæterorum*, to a general grant of administration to the defendants of all and singular the personal estate and effects of the deceased—namely, both those over which she had a testamentary power and those to which he was entitled as the sole person entitled to her personal estate and effects over which she had no disposing power, and concerning which she died intestate. In other words, so far as regards the property that was not included in the power, it was an assent by the person who was entitled, according to the practice of the Probate Court, to take administration—namely, the husband—to a grant of administration to somebody else. If that is so, it falls within *Squib* v. *Wyn*,[1] and those cases to which I have referred, and the person who does so get administration is a trustee for the husband, who is the person beneficially entitled.

Then it is said that as matter of construction the will has a larger effect than that which I have attributed to it. [His Lordship referred to the will, and stated that it was pleaded and admitted that the testatrix had a balance at her banker's which formed part of her separate estate, and of which she could dispose; and continued:] It has been argued for the defendants that the residuary gift was a disposition purporting to be made by the lady of property not included in the settlement, but property of which she could only dispose with the consent of her husband. In my opinion, that is not the true construction of this will. It is "all and singular other the personal estate which at the time of my decease I shall have power to appoint or dispose of and which I have not hereby disposed of"; that is to say: "I have made certain dispositions under my testamentary power, and if I have not exhausted the whole of that, or disposed of all my separate estate, then I dispose of anything else which I can dispose of by this my will." Now, as regards this reversionary interest, was it property which at the time of her decease she could dispose of by that her will? I answer, no. The husband had given no assent in his lifetime to her disposing of it, and she could not sit down and make her will disposing of this as property which was within her powers of disposition at the time of her decease. Whether her will could operate or not must depend upon whether *ex post facto* the husband chose to do an additional thing—namely, to divest himself of his right to have that property, and say, "Notwithstanding that it is mine I agree to its being treated as if it were yours and as if you could dispose of it by your will." I do not think that falls as matter of construction within this will.

I notice that Lord Lindley, in the case, to which I have referred, of *Atkinson, In re; Waller* v. *Atkinson*,[2] after the passage which I have read, where he says that under the old law a probate by the husband of the will would be an assent to the will, goes on to say this: "It could not of course affect the construction, but it would have been an assent." Now it appears to me that what I am asked to do here by the defendants is to say that the fact that the husband subsequently assented to somebody having administration of the whole estate—which, for the purposes of my judgment, I treat as being the same thing as if he proved the will himself—was, for the purpose of construction, a thing which enlarged the words of disposition in his wife's will. I do not think it can have that effect. If she had, in so many words, said, "I dispose of the reversionary interest to which I am entitled expectant on the decease of my son's widow," and then the husband had assented to that, to my mind the question would have been an entirely different one. It appears to me that here there has been no assent by the husband to this will as disposing of the property of which, but for his assent, there would have been an intestacy by the wife, because the form of consent excluded that, and also, as matter of construction, I think the will itself does not include it. It appears to me, therefore, that the plaintiffs are right. What they ask is a declaration that the defendants, as the

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wife's legal personal representatives, held this reversionary interest in trust for the husband, and now hold it in trust for the plaintiffs because he is dead. I think they are entitled to that declaration.

Then as to costs. The defendants are administrators, but it is not suggested that there are any debts. The estate is clear, and the defendants are here not as administrators, but as residuary legatees, claiming this fund as their own. I have held that they are wrong, and that the plaintiffs are right. The costs must follow the event, and the defendants must pay the costs of the action.

Solicitors—Paice & Cross, for plaintiffs; Boodle, Hatfield & Co., for defendants.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

FARWELL, J. 1900. Nov. 15, 16, 20. } COOK v. MITCHAM COMMON CONSERVATORS.

Metropolitan Common—Land Included in Scheme—Claim of Alleged Owner—Lapse of Time—Metropolitan Commons Act, 1866 (29 & 30 *Vict. c.* 122), *and* 1869 (32 & 33 *Vict. c.* 107)—*Metropolitan Commons* (*Mitcham*) *Supplemental Act*, 1891 (54 & 55 *Vict. c. xxvi.*), *s.* 37.

Where a certain piece of land was included in a scheme (*made in* 1890 *under the Metropolitan Commons Acts*, 1866 *and* 1869, *and confirmed by Act of Parliament in* 1891), *and in the plan embodied with the scheme, as portion of the common subject to such scheme, and a person nine years afterwards brought an action against the conservators claiming to be entitled to the piece of land in fee-simple, it was held that the inclusion of such land in the scheme and plan was conclusive that the land formed part of the common, and that the alleged owner was debarred from asserting any title to the land.*

Section 14 *of the Metropolitan Commons Act*, 1866, *which requires every scheme to state the rights affected by it, refers to all rights of property claimed in respect of land comprised in a common, and not merely to rights in or over the common as such.*

The plaintiff in this action claimed to be the owner in fee-simple of a small piece of land at Mitcham which had been conveyed to him on November 14, 1899. The defendants had been constituted Conservators of Mitcham Common by a scheme under the Metropolitan Commons Acts, 1866 and 1869, which was sanctioned by the Board of Agriculture on December 31, 1890, and confirmed by the Metropolitan Commons (Mitcham) Supplemental Act, 1891, which received the Royal assent on May 11, 1891. The piece of land in question had originally formed part of the waste of the manor of Tamworth and Biggin, and had been granted to the predecessors in title of the plaintiff in 1855, and was included in the scheme and the plan embodied therewith as a portion of the common subject to the scheme. The plaintiff alleged that such inclusion was wrongful and *ultra vires*, and that the defendants had recently erected notice-boards in derogation of his rights, and he claimed "a declaration in assertion and maintenance of his title as freehold owner of the pink-coloured piece of ground in the pleadings mentioned, and in particular a declaration that the said piece of ground, although ostensibly comprised in and subject to the regulation scheme in the pleadings mentioned, is not in fact comprised in or subject to that scheme," and "an injunction against the defendants, the conservators, their servants and agents, restraining them from continuing the notice-boards in the pleadings mentioned (and the stays and supports thereof) upon and in the soil of the plaintiff's said piece of land; an injunction against the defendants and their solicitors or other their agents restraining them from continuing to cloud the plaintiff's title by permitting their said scheme (or the map or plan attached thereto) to represent that the plaintiff's said piece of land is comprised in or subject to the said scheme."

The defence was that even if the plaintiff or his predecessors at any time had any title to the piece of land he was not

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entitled to relief, because the piece of land was at the date of the scheme, and still was, a common within the meaning of the Acts of 1866 and 1869, and that the effect of those Acts and of the scheme was to debar the plaintiff from asserting any title to the piece of land.

The action now came on for trial, and a number of witnesses were called to prove acts of ownership on the part of the plaintiff's predecessors in title.

Upjohn, *Q.C.*, and *Archibald Brown*, for the plaintiff.—The plaintiff's property is not affected by the scheme. He is within the protection of the saving clause, clause 37.

Butcher, *Q.C.*, and *Austen-Cartmell*, for the defendants.—According to the scheme the land in question forms part of the common. The scheme being confirmed by Parliament is conclusive, and overrides any rights which the plaintiff may have in respect of the land. The plaintiff has mistaken his remedy. Under clause 37 of the scheme, which is founded upon and must be read with section 15 of the Act of 1866, the remedy is by way of compensation for any rights of a profitable or beneficial nature over or affecting the common which may be interfered with by the scheme. If the plaintiff can prove that he has a freehold interest in the land he will be entitled to compensation. Section 15, which is absolutely general in its terms, is not in any way limited by section 14, those sections being quite independent of one another. Private rights are most carefully protected by the Act, which requires the utmost publicity in the framing and confirmation of every scheme. In the present scheme the rights of certain persons who claimed freehold sites are reserved to them—clauses 38 and 39. The Act was passed for the benefit of the public, and no scheme could possibly be effective if the conservators had to make good their title to every piece of land included in the scheme and the map or plan embodied therewith. When once the scheme has been confirmed by Parliament it is too late for any person to claim that land included in such scheme does not form part of the common. The Act is express in its terms. A private Act of Parliament will not be construed so as by mere general terms to take away the property of any person, unless the provisions of the Act have been brought under his notice prior to the passing of the Act—*Bradford Corporation* v. *Pickles* [1895].[1] That has been done in this case. The plaintiff is in effect asking the Court to restrain the defendants from doing what the Act requires them to do—that is to say, to preserve the common from any trespass or encroachment.

The case is covered by *Chislehurst Common Conservators* v. *Newton* [1887].[2]

(1) 64 L. J. Ch. 759; [1895] A.C. 587.
(2) 1887. July 15. } CHISLEHURST COMMON CONSERVATORS *v.* NEWTON.

CHITTY, J.—The plaintiffs, the conservators, complain of a wrongful (as they say) encroachment upon a part of the Chislehurst Common which is placed under their care by virtue of an Act of Parliament; and the defendant, who admits in point of fact that he has done what he is alleged to have done, says that the ground on which he has placed the encroachment is his own private property. To that the conservators say that, according to the terms of the Act of Parliament, this property is included within the area of the common of which they are conservators.

The question turns upon the Act of 1886, which is "An Act to confirm a scheme under the Metropolitan Commons Amendment Act, 1869, relating to Chislehurst Common." The Act contained the usual recitals: First, that the Land Commissioners for England have under their Acts duly certified a scheme for the establishment of local management with respect to Chislehurst Common; that the scheme is set forth in full in the report made by the Commissioners on December 31 previously; and that it had been duly laid before the Houses of Parliament. The Act itself which I am reading was passed on June 4, 1886. Then the Act recites that by the Metropolitan Commons Act, 1866, it is provided "That any scheme shall not of itself have any operation, but shall have full operation when and as confirmed by Act of Parliament, with such modifications, if any, as to Parliament seem fit." Then there is the usual recital that it is expedient that the scheme should be confirmed, subject to certain modifications; and the 1st section is to this effect: that the scheme for the establishment of local management with respect to the common shall be modified "so as to be in the terms specified in the schedule to this Act, and so modified shall be hereby confirmed."

The first clause of the scheme in the schedule is in these words: "The pieces of Land, with the ponds thereon, commonly called or known

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The scheme in that case was practically identical with the scheme in question,

by the name of Chislehurst Common and Scadbury Common and including Place Green and Shepherd's Green (hereinafter called "the Commons") situate in the parish of Chislehurst in the County of Kent, as the same are delineated in a plan deposited with the Land Commissioners for England, shall henceforth, for all the purposes of this scheme, be regulated and managed by a body of Conservators." The next important section to read in connection with this section, which is one as to the area of the common, is the 15th, which runs thus. [His Lordship read the section, which was in terms almost identical with those of clause 17 of the Mitcham Common scheme, and continued:] Now it was made a question, at the commencement of the defendant's argument, whether the plan did shew that the piece of ground in question was intended, according to the plan, to be included in the commons. [His Lordship then dealt with that question and examined the plan referred to in the scheme, and came to the conclusion that the piece of ground in question was intended by the plan to be included in the common, and continued:] Then comes the question, which has been argued at considerable length, as to the construction of the Act of Parliament. It is said that the scheme ought to be read in this way: that only those lands which, first, were commonly known as part of the common; and secondly, which were to be found situate in the parish of Chislehurst, in the county of Kent; and thirdly, are delineated in the plan—that those lands and those only are within the scheme. In other words, in order to be within the scheme the lands must fulfil all those three qualifications. The force of the argument on this point for the defendant consisted in the consideration of the circumstances I am about to state. It was said, and said truly, that the Commissioners have no power to determine as between adverse claimants what is and what is not part of the common that is proposed to be dealt with under these Acts of Parliament; and consequently it must be presumed that they would not attempt in the scheme to deal with anything that was not part of the common; and therefore, in construing this Act of Parliament, I must bear that in mind, and hold that the Legislature did not intend to include anything in the scheme which was not shewn to be, and could not in a controversy arising be shewn to be, part of the common, taking the term "common" in the usual sense of that word—that is, part of the waste of the manor. Those are no doubt considerations of considerable importance. But then, on the other hand, there is this—and this consideration appears to me of even greater importance. The object of these Acts of Parliament is to establish a scheme of local management with respect to the common, and the schemes (of which this is only an illustration) are full of provisions of a more or less minute character with regard to the regulation of the area which is included in the scheme; and it would be at least a very unwise thing to do to appoint a body of conservators with all these powers conferred upon them and upon the police with reference to this area, and not to tell them what the area is. Just by way of illustration I mention one of the provisions upon which my eye happens to rest. "Any Constable or any officer of the Conservators . . . . may without any other warrant than this scheme, seize and detain any person offending or having offended against any bye law of the Conservators." The bye-laws of the conservators then made are contained, amongst others, in clause 19; and, amongst other things, the regulations of games to be played, the prevention of bird-catching and setting traps, and various matters of that class, are dealt with—squatters, gipsies, and so forth; and the result would be that, if the defendant is right, and this is his own private property as he says it is, the policeman who detained him or any person or stranger who was offending against one of the bye-laws would be told first that he was a trespasser in coming on there at all; and secondly, that the scheme did not give him any warrant to seize. There would be infinite confusion in the execution of all the powers conferred upon the conservators if that were the result of the Act of Parliament, because they might be called upon, according to this view, to contest every square inch of ground throughout the space which is delineated upon the plan. These are merely considerations upon which I approach the exact question I have to decide. I think that the right way to decide on Acts of Parliament is to take the grammatical meaning, unless there is something in the context or in the nature of the provisions which is sufficient to displace the ordinary rule. Now here clause 15 appears to me to be of the highest importance: "The Conservators shall maintain the Commons, as delineated in the plan." I think, then, the Legislature intended that the plan should govern it—that the plan is that to which the conservators who are to maintain the commons are to have regard. That is the area that is entrusted by this Act of Parliament to their conservation. I do not agree with the argument on the part of the defendant that the words in clause 1, "as the same are delineated," are merely words of additional description. I think these words were intended to throw the Court that might have to construe this clause upon the plan as the guiding instrument.

That being my opinion, for these reasons, which I have given shortly, I think the plaintiffs are entitled to the order.

and Chitty, J., held that the scheme and the plan embodied therewith were conclusive as to the land included therein.

Upjohn, Q.C., in reply.—In *Chislehurst*

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Common Conservators v. *Newton* [2] the saving clause was almost a nullity; it was subject to the rest of the scheme, and was very different from clause 37 of the scheme now in question. This latter clause is absolute. It is not a question of compensation. There is no provision for compensation where freehold land belonging to a private person has been included in the scheme *per incuriam*. Clause 37, if construed strictly, operates in the plaintiff's favour.

FARWELL, J., after stating the facts, continued: I will assume for the purpose of my decision that the plaintiff has proved his title to the fee-simple, starting with the grant by the lord of part of the waste of the manor in March, 1855. Then I have to determine on the provisions of the Act of Parliament, the scheme, and the Act confirming the scheme, what the rights of the parties are. The general Act of 1866, section 3, defines "common" to mean "Land subject at the passing of this Act to any right of Common." It then proceeds to enact that the Commissioners shall not entertain an application for the enclosure of a metropolitan common or any part thereof, the object being to preserve for the public open spaces in the neighbourhood of the metropolis. Section 6 provides for the establishment of a scheme of local management, "with a view to the expenditure of money on the drainage, levelling, and improvement of a Metropolitan Common, and to the making of bye laws and regulations," and so on. For that purpose Parliament enacted sections 7, 8, 9, 10, 11, 12, and 13, all of which provide for the greatest possible publicity in the settlement of the scheme, and in the consideration of its contents before it is finally adopted. It is printed and published. Objections and suggestions are received for two months after the first publication. The Commissioners are authorised to send an assistant commissioner to hold an enquiry, and he is empowered to receive any evidence or information offered, and to hear or enquire into any objections or suggestions made or to be made during the sitting or sittings respecting the scheme or the common, with power to adjourn. Then there is a report made by the assistant commissioner to the Commissioners. Section 13 provides: "after the expiration of the said two months, or the receipt by the Commissioners of the Report of the Assistant Commissioner (as the case may be), the Commissioners shall proceed to consider any objections or suggestions made to them in writing respecting the scheme, and the report (if any), and thereupon they shall, if they think fit, finally settle and approve of the scheme in such form as they think expedient." The Act further provides (section 14) that the scheme is to "state what rights (if any) claimed by any person or class of persons are affected by the scheme, and in what manner and to what extent they are affected thereby, and whether or not the scheme has been in relation thereto consented to by that person or class of persons, or any of them." That is an exceedingly comprehensive statement, and refers to all rights—that is to say, not merely rights in and over the common as such, but the right to claim that a portion of the land said to be common is not so, but belongs in fee-simple to another person. Down to this point it will be observed that every step is taken under the direction of the Legislature for the fullest publicity and the fullest possible enquiry. It is, of course, essential to the success of a scheme of this nature that the limits of the property affected by the scheme should be once for all settled. Then section 15 is a provision for compensation. I will read it later on with reference to a clause in the scheme. Then section 16 provides for the possibility of a person being aggrieved by a decision of the Commissioners, either made or implied in or by the scheme, "concerning any estate, interest, or right in, over, or affecting the Common," by enabling him to obtain a decision thereon in an action at law in the manner pointed out by the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 56. The next provision is that the scheme is to be printed. Then it is to be certified by the Commissioners, sealed with their common seal, and published, and it is to be comprised in a report laid before Parliament. It is to be laid before both Houses within

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fourteen days after the sealing thereof, or, if not, within fourteen days after the next meeting of Parliament. The scheme down to this point has no operation at all, but section 22 provides that it "shall have full operation when and as confirmed by Act of Parliament, with such modifications, if any, as to Parliament seem fit." The scheme in question was approved by the Board of Agriculture on December 31, 1890; and, having compared it with the scheme before Lord Justice Chitty,[2] I find that it is practically a common form with provisions adapted to the circumstances of each particular case; and inasmuch as it has been confirmed by the Act it is of statutory validity, and I am, in fact, now reading an Act of Parliament. Clause 1 enacts: "The pieces of land with the ponds and roads thereon commonly called or known by the names of Mitcham Common, Upper Green and Lower Green, Figgs Marsh, and Beddington Corner (hereinafter referred to as the Commons)" —that is to say, "the Commons" in this Act means those four commons I have mentioned—"situate in the Parishes of" so and so "as the same are delineated in a plan deposited with the Board of Agriculture and thereon coloured green, shall henceforth for all the purposes of this scheme be regulated and managed by a body of Conservators." That is a clear statement of the extent and limit of the land affected by the scheme, and, as Mr. Justice Chitty pointed out in the judgment[2] which has been read to me, it is perhaps one of the most material, if not the most material, provision made in order that the scheme might work properly. The next clause I need refer to is clause 17: "The Conservators (subject to the provisions of clause 39 of this scheme) shall maintain the commons as delineated in the plan deposited with the Board of Agriculture free of all encroachment, and shall not permit any trespass on or partial or other enclosure of any part thereof," and so on. That is a positive enactment directing the conservators to do that which I am asked to restrain them by injunction from doing—namely, to maintain the commons as delineated in the plan free from all encroachment, and not to permit any trespass or enclosure upon them. That is made expressly subject to the provisions of clause 39; it has some materiality in respect to the argument which counsel for the plaintiff has addressed to me, which I will refer to presently. Clause 18 enables the conservators to set apart portions for games. Clause 19, to make by-laws for the prevention of encroachments, and so on. And then clause 37 is a saving clause, on which counsel for the plaintiff relies. It is a saving clause in general terms, and it is followed by two special clauses shewing the reservation of other rights in special terms. Clause 37 is in these words: "Saving always to all persons and bodies politic and corporate, and their respective heirs, successors, executors, and administrators, all such estates, interests, or rights of a profitable or beneficial nature in, over, or affecting the Commons or any part thereof as they or any of them had before the confirmation of this scheme by Act of Parliament, or could or might have enjoyed if this scheme had not been confirmed by Act of Parliament." Referring back to the Act of 1866 and the section I did not read when I was referring to that Act, it is plain that that is founded on section 15. The words are identical. Section 15 of the Act provides that "no estate, interest, or right of a profitable or beneficial nature, in, over, or affecting a Common shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme, without compensation being made." Clause 37 to my mind refers to those rights which are what counsel for the plaintiff has rightly described as rights of a profitable or beneficial nature in, over, or affecting the common, and is not intended to be a reservation of any right such as arises in the present case—namely, a right to deny that any given piece of land is within the limits of the common, as defined by the Act of Parliament. The Act of Parliament has said in terms what the limits of the common dealt with by the scheme shall be, and it has in terms expressly provided that the conservators shall keep that particular common as delineated on the plan free from encroachment. This is a reservation of rights of a profitable or beneficial nature in, over, or affecting that common, referring to

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the provisions for compensation in section 15, and refers to rights over it as a common, as defined by the Act, and that construction is to my mind confirmed by the provisions of clauses 38 and 39, which deal expressly with claims made not only by the lord of the manor—which, of course, are claims to the soil of that particular common—but also the claims of persons who allege that certain pieces of land are their own freehold property and not subject to rights of common at all. That is a matter which it was open to the Commissioners to consider, and which they were bound to state under section 14 of the Act, if any such right was claimed. In accordance with that provision they do state in clauses 38 and 39 what rights were claimed contrary to the general scheme as affecting the extent and limits of the commons. As regards those, it was open to persons raising them either to bring an action under section 16, or to do what I infer they did by reference to clause 42 of the scheme—namely, settle with the Commissioners on terms, or leave it open for Parliament when the matter came before the House to deal with, either by way of express provision or by passing over *sub silentio* and disregarding the claims of the persons so stated. The contention really comes to this—that, although I find an express statement in the scheme that these particular rights of persons who do make claims are reserved for them in a special manner in accordance with the terms of the Act, it was wholly unnecessary because it was already provided for in clause 37; and I am also asked to hold that a person who lies by and takes no step at all and takes no advantage of these provisions of the Act of Parliament to which I have referred, giving publicity to the scheme, is in a better position than persons who are alive to their interest and do take the steps—that nine years after the scheme has received statutory confirmation it is open to a person who bought last year to come in and raise a claim such as the plaintiff raises in the present case. To my mind, on the construction of this Act no injustice is done at all. There is a saving clause for such rights as counsel for the plaintiff called profits *à prendre* in or over the common, treating it as a common, and there is clause 40 to the same effect; if there are any claims to be raised to rights limiting the extent of the common, they are provided for by the Act of Parliament and have to be brought before the Commissioners, and have to be stated in the scheme expressly under section 14. If any person chooses to lie by disregarding the notices and the advertisements, and takes no heed of what is going on at his very door, it appears to me that the Act of Parliament was passed on the footing of the maxim *Vigilantibus non dormientibus jura subveniunt.*

I have the assistance of a decision of Lord Justice Chitty, when Mr. Justice Chitty,[1] on an Act and a scheme which are with one exception on all-fours with this. The exception is that although clause 15 in *Chislehurst Common Conservators* v. *Newton*[2] is in the same terms as clause 17 here, clause 17 in the present case is made expressly subject to the provisions of clause 39, but this was necessary, and accords with the view I take, because the claims under clause 39 were claims to freehold land alleged not to be within the limits of the common at all, and not to rights in and over the common. It was also argued that clause 37, the saving clause here, contains no exception, whereas the saving clause in the Chislehurst scheme is made subject to clauses 14 to 19 of the scheme; but to my mind that is a distinction without a difference. The exception to the provision of clause 39 is, as it seems to me, strong evidence to shew that the saving clause 37 does not apply to clause 17 at all. Therefore I have the same reason as Mr. Justice Chitty had to guide me in deciding the case.

On these grounds the plaintiff's case fails, and the action must be dismissed with costs.

Solicitors—Ward, Perks & McKay, agents for Streeter & Howe, Croydon, for plaintiff; Edridge & Newnham, for defendants.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

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FARWELL, J. 1900. Dec. 11.

WALKER, *In re*; SUMMERS *v.* BARROW.

Trust and Trustee — Appointment of New Trustee—Validity—Trustee Remaining Abroad for More than Twelve Months —Short Visit to England during that Period—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 10, *sub-s.* 1.

Where a trustee who went abroad in April, 1899, *paid a visit to England in November*, 1899, *for about a week, during which visit he attended to the trust matters, and his co-trustee in June*, 1900, *purported to appoint a new trustee in his place under the power contained in section* 10 *of the Trustee Act*, 1893, *it was held that the original trustee had not remained "out of the United Kingdom for more than twelve months," and that consequently the appointment of the new trustee was invalid.*

This was an originating summons for the determination of the question whether the defendants, Mrs. Walker and the Rev. Alfred Henry Barrow, were in the events which had happened the present trustees of the will of John Walker, deceased.

By his will made in August, 1879, the testator, who died in September, 1882, appointed the defendant Mrs. Walker and the plaintiff trustees. The will contained no provision for the appointment of new trustees. In April, 1899, the plaintiff went on the Continent, and remained abroad up to the date of the deed hereinafter mentioned, having only visited England in November, 1899, for about a week. On the occasion of this visit he attended to the trust matters.

On June 1, 1900, Mrs. Walker, without any communication with the plaintiff, and in purported exercise of the power conferred on her by the Trustee Act, 1893, by deed appointed the defendant Barrow to be a trustee of the will in the place of the plaintiff.

H. Fellows (*Jenkins, Q.C.*, with him), for the plaintiff.—The question here is who are the present trustees of the will, and that depends on the construction of section 10 of the Trustee Act, 1893.[1] The provision as to a trustee remaining out of the United Kingdom for more than twelve months appeared for the first time in section 31 of the Conveyancing and Law of Property Act, 1881. That section has been repealed and, in effect, re-enacted in section 10 of the Act of 1893.

The statutory power of appointment only becomes operative when the trustee remains out of the United Kingdom for more than twelve consecutive months. On the evidence the plaintiff has not done so, and consequently he is still a trustee.

In *Stamford (Earl), In re; Payne* v. *Stamford* [1895],[2] where an appointment was held to be good, the power was exercisable in case a trustee should "be abroad."

[He also referred to *Hood & Challis's Conveyancing and Settled Land Acts* (5th ed.), pp. 102 and 343, and *Farwell on Powers* (2nd ed.), p. 649.]

Upjohn, Q.C., and *Christopher James*, for the defendants, and also for certain beneficiaries who were defendants.—The appointment of the new trustee is good. There is no authority on the point. In the case of *Moravian Society, In re* [1858],[3] a deed of charitable trusts contained a disqualification of trustees on departing from the United Kingdom, and it was held that temporary absence abroad was not within the proviso.

So here, a merely temporary presence in the United Kingdom is not sufficient to prevent the operation of the section.[1] It must be a *bona fide* and substantial returning. During the twelve months in question the plaintiff had no residence in this country.

[FARWELL, J.—I do not think that is necessary.]

(1) Section 10, sub-section 1 of the Trustee Act, 1893, provides that "Where a trustee . . . remains out of the United Kingdom for more than twelve months, . . . then the surviving or continuing trustees or trustee for the time being . . . may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee . . . remaining out of the United Kingdom, . . . as aforesaid."

(2) 65 L. J. Ch. 134; [1896] 1 Ch. 288.

(3) 26 Beav. 101.

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WALKER, IN RE.

It may be material if the Court should be of opinion that the language of the section ought to be construed in some such way as the will was construed in *Arbib & Class's Contract, In re* [1891].[4] There a testator appointed his son one of his executors and trustees if and when he should return to England. The son came to England on a visit for six months, and it was held that the condition was fulfilled by his residence for a substantial period in this country.

FARWELL, J.—Section 10 of the Trustee Act, 1893, in effect repeating a repealed enactment contained in the Conveyancing and Law of Property Act, 1881, provides for the appointment of a new trustee "Where a trustee . . . remains out of the United Kingdom for more than twelve months." In this case the plaintiff, Mr. Summers, was out of the United Kingdom for twelve months prior to June 1, 1900 (the date of the deed by which Mrs. Walker purported to appoint some one else in his place), with the exception of one week. During that week he attended at the office of the solicitors of the trustees and transacted part of the trust business. I have to find as a fact before I can apply the section that he did remain out of the United Kingdom for more than twelve months. Inasmuch as he did not, I can only answer the question by saying that the power did not arise, and therefore the appointment of the new trustee is not good. The plaintiff and Mrs. Walker remain and are the trustees of the will.

Solicitors—Stibbard, Gibson & Co., for plaintiff; Druces & Attlee, for defendants.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

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(4) 60 L. J. Ch. 263; [1891] 1 Ch. 601.

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
ROMER, L.J.
1901.
Jan. 11.

ASHTON VALE IRON CO. *v.* BRISTOL CORPORATION.

Compulsory Purchase of Land—Notice to Treat—Withdrawal—Fresh Notice in Respect of Same Land—Lands Clauses Consolidation Act, 1845 (8 *& 9 Vict. c.* 18), *s.* 18, 92, *and* 123.

Where promoters of an undertaking with compulsory powers of purchase of land have validly and properly withdrawn a notice to treat given by them under the Lands Clauses Consolidation Act, 1845, *they can, provided that the time limited for the exercise of their powers has not expired, give a fresh notice to treat in respect of the same land.*

Appeal from a decision of Byrne, J.

On May 2, 1899, the Corporation of Bristol, acting under the powers of the Bristol Dock Act, 1897 (60 & 61 Vict. c. ciii.), with which was incorporated the Lands Clauses Consolidation Act, 1845, served on the plaintiffs notice to treat for certain portions of their land. The plaintiffs served on the corporation a counter-notice dated May 18, 1899, requiring them to purchase the whole of the Ashton Vale Rolling Mills and their appurtenances, on the ground that they constituted with the premises specified in the notice to treat one manufactory; and on June 2, 1899, they gave notice of their desire to have the amount of compensation settled by arbitration. The corporation on November 28, 1899, served on the plaintiffs a notice dated the 27th, requiring them to appoint an arbitrator on their part to assess compensation in respect of the premises comprised in the notice to treat. The plaintiffs on December 8, 1899, commenced an action for the determination of the question whether the corporation were entitled to take the part only of their property comprised in the notice to treat.

On December 12 the corporation served on the plaintiffs a notice withdrawing their notice to treat, and on December 16 they served on the plaintiffs a fresh notice to treat, dated December 12, in respect of the same premises as were comprised in

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the former notice to treat. The plaintiffs, without prejudice to their rights under the former notices, served on the corporation a counter-notice dated January 4, 1900, requiring them to take the whole of their works. On February 9 the corporation gave notice of intention to issue a warrant for a jury to assess the compensation, and on February 19 the plaintiffs served on the corporation notice of their desire to have the compensation settled by arbitration. The plaintiffs moved in the action for an order restraining the corporation from taking any part of their lands without taking the rolling mills. Before the matter was dealt with the corporation on March 6 served on the plaintiffs a notice dated March 5 withdrawing their notice to treat of December 12, 1899, and on the same day they served a fresh notice to treat, also dated March 5, in respect of the same premises as were comprised in the former notices except certain portions thereof numbered 12 and 15 on the deposited plan. On March 26, the plaintiffs, without prejudice to their rights, served on the corporation a counter-notice, dated March 22, requiring them to take the whole of their works.

Byrne, J., when dealing with the motion in the action, refused it, not being satisfied on the evidence before him that the rolling mills were part of the property required to be taken. The plaintiffs on May 11 commenced a second action against the corporation for the determination of the question whether they were entitled to take part only of their manufactory without taking the whole.

On May 23 the corporation gave notice of their intention to issue their warrant summoning a jury to assess the compensation to be paid under the notice of March 5; and on June 2, 1900, the plaintiffs gave notice of their desire to have the compensation settled by arbitration. On July 3 the corporation appointed an arbitrator, and on the 6th they gave notice of this to the plaintiffs, and requested an appointment by them. On July 19 the plaintiffs appointed an arbitrator, still under protest. On July 28 the plaintiffs commenced a third action against the corporation for a declaration that the corporation had not, and never had, power to purchase the land of the plaintiffs compulsorily under any of their notices to treat, on the ground that they were not the proper body to exercise the compulsory powers under the special Act. The plaintiffs gave notice of motion for an interim injunction to restrain the corporation from proceeding under their notices to treat. The motion was made in all three actions.

Byrne, J., on August 11, 1900, granted an injunction. And at the request of the parties he dealt with the question of the withdrawal of the first and second notices to treat, and held that, having regard to the terms of the counter-notices, the corporation had a right to withdraw their notices, and no arbitrator having been appointed, and no warrant for a jury having been put into the hands of the sheriff, the withdrawals were valid, and it was within the power of the corporation to give the third notice, and the third notice was consequently a good notice.

The corporation appealed from this decision. The plaintiffs gave cross-notice that they intended to contend that the order should be varied, and that the defendants should be restrained from taking any further proceedings under the alleged notice to treat of March 5, 1900.

Upon the appeal of the corporation, the majority of the Court of Appeal, Lord Alverstone, C.J., and Rigby, L.J. (Vaughan Williams, L.J., dissenting), on December 17, 1900, allowed the appeal. That part of the case calls for no report. The cross-appeal, which raised the question of the validity of the withdrawal of the notices to treat, was now heard.

A. T. Lawrence, Q.C., and *J. Leslie*, for the plaintiffs.—The corporation had no right to withdraw their notice and re-exercise their powers. As a general rule, a notice to treat cannot be withdrawn, but if after notice to treat the landowner gives a counter-notice, the promoters have a right to withdraw. If, however, they elect to do so the election is final, and they cannot give another notice in respect of the same land. Their compulsory powers are then at an end.

In other words, they cannot take, withdraw, and retake—*Haynes* v. *Haynes*

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[1861],[1] *Harding* v. *Metropolitan Railway* [1872],[2] *Tawney* v. *Lynn and Ely Railway* [1847],[3] *Comyn's Digest*, vol. iii (5th ed. 1822), tit. "Election" (C) (1) (2), *Pinchin* v. *London and Blackwall Railway* [1854],[4] *Clough* v. *London and North-Western Railway* [1871],[5] *Scarf* v. *Jardine* [1882],[6] and *Reg.* v. *London and South-Western Railway* [1848].[7]

The power to take land is, in effect, given to the promoters once, and once only. Those words are not used in section 18 of the Lands Clauses Act, but neither is any expression used which would lead to the inference that the powers can be exercised from time to time. Promoters must prove from the Act the powers which they claim to exercise—*Simpson* v. *South Staffordshire Waterworks Co* [1865][8] and *Webb* v. *Manchester and Leeds Railway* [1839].[9] The powers of the promoters being exhausted, they cannot proceed upon their third notice.

Under section 29 of the special Act, owners may be required to sell parts only of their property, but only if such portions can be severed from the remainder without material detriment thereto; and whether or not that can be done without such detriment is a matter for arbitration. The plaintiffs say that it cannot be done without detriment to the rest of their property.

The corporation have taken a step which ties them down to their first notice. Their notice of November 27, 1899, required the plaintiffs to appoint an arbitrator to assess the compensation. That was given after the counter-notice, and they cannot go back upon that.

Cripps, *Q.C.*, *Freeman*, *Q.C.*, *Alfred Lyttelton*, *Q.C.*, and *E. S. Ford*, for the corporation.—The question is whether the corporation can proceed under the third notice to treat. There is nothing in section 18 of the Lands Clauses Consolidation Act, 1845, to prevent it; and the time within which the compulsory powers can be exercised has not expired. There is really no second notice to treat, nor any first notice. They have been withdrawn, and have ceased to exist altogether. It cannot be that whenever any technical defect in a notice is discovered, and the notice is in consequence withdrawn, the powers of the promoters are in effect taken away. To succeed, the plaintiffs must shew that whenever a notice to treat is withdrawn at the instance of the landowner the promoters can never give another notice. Section 123, by limiting the time within which the compulsory powers may be exercised, protects the owner from being unduly vexed with notices.

A. T. Lawrence, *Q.C.*, replied.

RIGBY, L.J.—The conclusion at which I have arrived in the matter is this: The first notice to treat was a valid notice. It may or may not have been so advantageous for the corporation as the best notice that they could have given under the Act, but it was a valid notice. It was met by a counter-notice requesting them to take the whole of the property, including, of course, a very large amount of property which was not comprised in the notice. That entitled the corporation to withdraw their notice. I do not think it necessary here to consider what the exact meaning of withdrawing a notice may be in all possible cases—whether in some cases it might not be satisfied by declining to proceed—but at any rate, they were entitled to withdraw their notice, and they did so. It seems to me that in that state of circumstances they are relegated to the position in which they were before the first notice to treat was served; and if so—and so far as regards this motion I hold that it was so—they had the right to serve the second notice. The second notice in like manner was met by a counter-notice which entitled the undertakers (the corporation) to withdraw, and that was followed by a withdrawal. The result was the same as in the first instance, and the third notice was given, which is now, as I understand the matter, the only notice in existence having any force or

(1) 30 L. J. Ch. 578; 1 Dr. & Sm. 426.
(2) 41 L. J. Ch. 371; L. R. 7 Ch. 154.
(3) 16 L. J. Ch. 282; 4 Ry. Cas. 615.
(4) 24 L. J. Ch. 417; 5 De G. M. & G. 851.
(5) 41 L. J. Ex. 17; L. R. 7 Ex. 26.
(6) 51 L. J. Q.B. 612, 620, 621; 7 App. Cas. 345, 360, *per* Lord Blackburn.
(7) 17 L. J. Q.B. 326; 12 Q.B. 775.
(8) 34 L. J. Ch. 380, 387.
(9) 4 Myl. & Cr. 116, 120.

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value whatsoever. The other notices have been swept away by the acts, first with regard to one and then with regard to the other, of the persons who served them. I do not see why the corporation should not be able to go on with this notice.

I am of opinion, as we have had to consider it, that with reference to the small pieces, Nos. 12 and 15, there is no notice in existence, because notice No. 3 does not comprise those small portions. How that will be dealt with ultimately I cannot say, but I think it clear that there is now no notice in existence with regard to those pieces. The result is that there is a valid notice, which valid notice I think may be proceeded with for the benefit of, and of course at the risk in every way of, the corporation, it being understood and decided that Nos. 12 and 15 are not being dealt with.

Romer, L.J.—The only point that I am concerned with, as I did not form part of the Court which decided the main appeal, is that arising on the cross-notice of appeal. That raises the simple question whether or no the defendants ought to be allowed to go on with their third notice to treat. It is said, in the first place, that they ought not to be allowed to do so, because their powers to give any notice to treat were exhausted when they gave their first notice; and after they had given their first notice and withdrawn that, their powers to take the land at all were at an end, and they could no longer exercise any powers whatever as against the plaintiffs. In my opinion, that argument is not well founded. It is quite true that if promoters give a landowner notice to treat with regard to his land they cannot go back from that notice if the landowner insists upon holding them to it; but if the landowner for any good reason either chooses to allow them to withdraw the notice, or admits that it is informal or bad in any way, then I can see no reason why, if the notice can be validly withdrawn, and is validly withdrawn, and the time is still running within which the promoters can exercise their right of taking the land, they should not exercise that right merely because they had previously served a notice which was validly withdrawn.

It is admitted that in one case where promoters have given a notice to treat they can validly withdraw that notice as against the landowner, and that is, if, having given a notice to treat for certain specified lands, the landowner gives a counter-notice requiring them to take other premises as being part of the lands included in the notice to treat. It is settled law that in that case the promoters are entitled to withdraw their notice. In the present case, with regard to their first notice to treat, the promoters were met by a counter-notice of the kind I have mentioned. The defendants were therefore in the position of being able to withdraw their first notice, and they did so. The effect of that is, to my mind, to put them in the same position as if no such notice had been given. It cannot be said that the promoters, by withdrawing the notice, have elected during the remainder of the time during which they have the power to take the lands never again to exercise their powers. In my opinion, no such election can be inferred from the fact of withdrawal. At the most, all that could be said is this—that the promoters had elected not at that time to go on with the purchase of the lands at the risk of having to take the lands included in the counter-notice. I can see no reason why they might not say at a later time, within the time limited for their taking these lands, "We are now in a position to give a fresh notice to take the same lands, because we are willing to run the risk of having to take the extra lands if we are obliged to do so." To my mind, it is reasonably clear that the argument of the plaintiffs cannot be sustained, for, pushed to its fullest extent, it would amount to this—that where a notice to treat has been given by promoters, and has been stated by the landowner to be informal or invalid, and that statement has been accepted and acted upon by the promoters, then the promoters' power to take the lands is absolutely gone, although it should turn out that the parties were mistaken, and that the original notice was in fact valid. I think that shews

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that the argument must be unsound, leading as it would to such a ridiculous result as that. The fact is, that wherever the promoters are in a position to withdraw their notice, and they have done so, they are in the same position as if no notice had been given at all. That that is so is seen when we consider what in fact a notice to treat is: it is merely an intimation by the promoters that they intend to take the lands and want the money payable to the landowner to be duly ascertained, so that the purchase may be completed.

That being the position of the promoters here with regard to the first notice to treat, how do matters stand with regard to the second notice? That seems to me to be covered by what has already been said with regard to the first notice. The plaintiffs again required the promoters to take under the provisions of the Lands Clauses Act the whole of their rolling mills and ironworks (or parts of them) On receiving that counter-notice, it appears to me the defendants were in the same position as they were with regard to the counter-notice given to their first notice—that is to say, they were entitled to withdraw their second notice, and that in fact they did. Then they served the third notice, and I cannot see that there is any reason why that third notice should not be held a perfectly good notice. I observe for what it is worth that the third notice does not contain any reference to the pieces of land Nos. 12 and 15, and does not cover them. I think that is clear, but, assuming that, I see no sufficient reason why the corporation should not be allowed to proceed upon that third notice.

There was a further point taken on behalf of the plaintiffs to which I ought to refer. It was said that with regard to the first notice a step had been taken by the corporation which recognised the validity of the counter-notice that the plaintiffs had given to that first notice. In my opinion that is not so. By the notice of November 27, which is the one which is relied upon, the corporation, far from recognising the counter-notice, treated it as wholly bad and proceeded to take a step on that footing. So that in no way could it be said that by serving the notice of November 27 the corporation had taken any step with regard to the counter-notice which rendered it impossible for them to resile from the position, or to withdraw their first notice to treat.

I think I have now dealt with all the points that were taken on behalf of the plaintiffs, and I agree with my Lord in thinking that the cross-appeal fails and should be dismissed.

Appeal dismissed.

Solicitors — Robbins, Billing & Co., agents for Abbot, Pope, Brown & Abbot, Bristol, for plaintiffs; Robins, Hay, Waters & Hay, agents for Daniel Travers Burges, Bristol, for defendants.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
ROMER, L.J.
1900.
Dec. 19.

ATTORNEY-GENERAL *v.* WILSON.

Practice—Transfer—Information "ex relatione"—Prerogative of Crown—Selection of Division in High Court—Rules of Supreme Court, 1883, *Order XXXVI.*

The Court has jurisdiction to order the transfer of an action ex relatione from the Chancery Division to the Queen's Bench Division where, according to the usual practice of the Attorney-General, the choice of the division in which the action was originally brought was left entirely to the relator and co-plaintiff. The co-plaintiff in such a case cannot assert the prerogative of the Crown to choose its own tribunal.

Appeal against a decision of Kekewich, J.

This was an action commenced in the Chancery Division, brought by the Attorney-General at the relation of the Corporation of Sunderland, who were also co-plaintiffs, against a firm of timber merchants, alleging that excavations made

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ATTORNEY-GENERAL *v.* WILSON, App.

by the defendants or their predecessors had caused subsidence of a highway, and claiming a mandatory injunction to restore the surface to its former condition.

The defendants applied to have the action transferred to the Queen's Bench Division for trial at the Durham Assizes.

The main ground for the application was that it was desirable that there should be a view of the *locus in quo*.

Kekewich, J., while considering that on the balance of convenience the case was a proper one to be transferred to be tried at the assizes, held that the Attorney-General had deliberately in the exercise of his discretion chosen to commence the action in the Chancery Division, and that his discretion ought not to be interfered with, and dismissed the application with costs.

The defendants appealed, and on the opening of the appeal counsel for the appellants stated that they were authorised to say that when the Attorney-General granted his *fiat* he had exercised no discretion as to the division in which the action should be brought; that it was not the practice of the Attorney-General in such cases to exercise any discretion of the kind, but, on the contrary, the selection of the Court was that of the co-plaintiffs; and that the Attorney-General entirely disclaimed the burden of exercising any such selection.

Renshaw, Q.C., and *Shortt*, for the appellants.—The Judge below was in our favour on the merits, but decided the case on the view that the Attorney-General had, in the exercise of his discretion, selected the Chancery Division. That view is now shewn to be founded on a mistake. The Attorney-General has done no more than issue his *fiat*, and unless and until he intervenes further the relators are the real plaintiffs in the proceeding, and are subject to the ordinary rules of procedure, including those relating to the place and mode of trial in the Rules of the Supreme Court, Order XXXVI. *Jenkins* v. *Bushby* [1891] [1] shews that the local venue is the right one in such a case as the present. The relative positions of the co-plaintiff and of the Attorney-General in an information *ex relatione* is shewn by *Mitford on Pleading*, c. 1, s. i., *Att.-Gen.* v. *Vivian* [1826],[2] and *Magdalen College* v. *Att.-Gen.* [1857].[3] A relator cannot say that he is invested with the prerogative of the Crown in such proceedings. The Crown Suits Act, 1865 (28 & 29 Vict. c. 104), s. 2, has no application, since it does not apply to suits which before the Judicature Act were commenced by bill or informations in the High Court of Chancery — Rules of Supreme Court, 1883, Order I. rule 1.

A. Glen (with him *Warrington, Q.C.*), for the respondents.—It is the prerogative of the Crown to choose its own Court, and before the Judicature Act the Court had no power without the approbation of the Attorney-General to transfer a Crown action from one Court to another, or from one side of a Court to another side, where, as in the old Court of Exchequer, there were two sides—*Att.-Gen.* v. *Barker* [1872].[4] The Judicature Act has made no alteration in this respect—*Att.-Gen.* v. *Constable* [1879] [5] and *Dixon* v. *Farrer* [1886].[6] In a note to Order V. rule 9 it is stated in the *Annual Practice*, 1901, p. 33, that "in the case of an action brought by the Attorney-General on behalf of the Crown, the Attorney-General has the right to choose his own Judge."

The case of *Magdalen College* v. *Att.-Gen.*[3] was a charity case. The present case concerns a right of the public at large, and corresponds to proceedings by indictment, and the Crown sues as *parens patriæ—Att.-Gen.* v. *Cockermouth Local Board* [1874].[7] The relator represents the Crown for the purpose of insisting on the prerogative right. At any rate it is the duty of the defendants asking to change the venue in such a case to shew affirmatively that the Attorney-General himself thinks it proper to make the change.

[He also argued that on the merits no sufficient ground was shewn for the transfer.]

No reply was called for.

(1) 60 L. J. Ch. 254; [1891] 1 Ch. 484.

(2) 1 Russ. 226, 236, *per* Lord Gifford, M.R.

(3) 26 L. J. Ch. 620, 624; 6 H.L. C. 189, 209, 210, *per* Lord Cranworth, L.C.

(4) 41 L. J. Ex. 57; L. R. 7 Ex. 177.

(5) 48 L. J. Ex. 455; 4 Ex. D. 172.

(6) 55 L. J. Q.B. 497; 17 Q.B. D. 658.

(7) 44 L. J. Ch. 118; L. R. 18 Eq. 172.

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ATTORNEY-GENERAL *v.* WILSON, App.

RIGBY, L.J.—In this case the learned Judge below, as I read his judgment, has thought that on the merits properly so-called he would have sent the case for trial to the Queen's Bench Division. But he felt himself hampered because he supposed that, as her Majesty's Attorney-General had elected the Chancery Division as the tribunal in which he chose to have the case tried, he was exercising the prerogative right of the Crown, and therefore the Court had no right to interfere. Now, with regard to that point, it is perfectly plain now—because we have it from the Attorney-General—that he never intended to exercise any such prerogative right, and he does not wish to interfere with the discretion of the Court in any way. Even if he had not given us that information I should have arrived at precisely the same conclusion, for from all that I know of the practice of the Attorney-General, and I will add from the reason of the case, I think it never has been the practice for the Attorney-General to exercise in that manner the prerogative of the Crown, assuming him to have it. All that he does is by his *fiat* to authorise the relators to proceed with the prosecution of the right involving public interest so long as he thinks it right that they shall be permitted to do so. He does not clothe them with the prerogative of the Crown, nor has he any intention of doing so. They take the step which they think right and proper, and they take it with no greater sanction and no greater solemnity than they would do if they were only acting as plaintiffs. I therefore come to the conclusion that the Attorney-General has not expressed his election, and that therefore the question of election by him is altogether out of the case. That conclusion seems to me to resolve the question in the present case, without going into questions which may be of importance as to what would take place if the Attorney-General had expressed his election. I think, therefore, that we are at liberty, and we are bound, to treat the case as if it were only an election by the plaintiffs, who are also relators, to bring this action in the division in which it has been brought. That being so, I see no reason to differ from the opinion which I understand to be held by Mr. Justice Kekewich on the merits of the case, and I think we ought to make the order for the transfer which he would have made if he had not felt himself hampered by the prerogative of the Crown. The appeal must be allowed and the action transferred to the Queen's Bench Division simply. The appellants are entitled to the costs of this appeal, and the costs in the Court below will be costs in the action.

VAUGHAN WILLIAMS, L.J.—I agree. Assuming that the Attorney-General was an actor in this case—that is assuming that he had to be treated as a party to these proceedings, and assuming that he had chosen his Court—which I take it the Attorney-General in a case in which the Crown was interested would have a right to do—it still seems to me quite plain that he has disclaimed any right of the Crown to raise any such objection.

ROMER, L.J.—I agree, and I have nothing to add.

Appeal allowed.

Solicitors—Crossman, Pritchard, Crossman & Black, agents for Kidson, McKenzies & Kidson, Sunderland, for appellants; Johnson, Weatherall & Sturt, agents for F. M. Bowey, Sunderland, for respondents.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

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BYRNE, J. 1901. Jan. 18, 24. } KELLY'S DIRECTORIES, LIM. *v.* GAVIN AND LLOYD'S.

Copyright — Infringement — Agreement to Print for Another for Profit—Partnership — Diary for Shippers — Printer of Infringing Part Employed by Other Party —"Cause to be printed"—Agent—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *s.* 15.

Lloyd's agreed with G. to print and publish in their own name a diary for merchant shippers in consideration of certain payments and commission on profits. G. obtained certain lists of merchant shippers which were an infringement of the plaintiffs' copyright. By agreement with Lloyd's, and to save time in publication, G. employed another printer, who was paid by him to print the pirated portion, and Lloyd's, without any knowledge of the piracy, included the infringing portion in the diary, which bore on the title-page the words "Printed at Lloyd's, Royal Exchange, London":—Held, *that there was no partnership between Lloyd's and G., and that the printer of the pirated portion of the diary was not Lloyd's agent, and consequently that Lloyd's had not "caused to be printed" the diary within section* 15 *of the Copyright Act*, 1842.

Principle of Russell *v.* Briant (19 L. J. C.P. 33; 8 C. B. 836) *and* Lyon *v.* Knowles (32 L. J. Q.B. 71; 3 B. & S. 566) *applied.*

This was an action by the plaintiff company, who were the proprietors and publishers of the "Post-Office London Directory" and numerous county, trade, and other directories, for an injunction to restrain the defendants W. A. Gavin and Lloyd's, their managers, servants, printers, publishers, and agents, from printing, publishing, selling, delivering, or otherwise disposing of any copy or copies of a book or publication called "Lloyd's Diary for Merchant Shippers and Foreign Buyers for 1900," or causing or permitting any such copy or copies to be so printed, published, sold, delivered, or otherwise disposed of, and from copying or pirating from any edition of the plaintiffs' directory called "Kelly's Directory of the Merchants, Manufacturers, and Shippers of the United Kingdom, and Guide to the export and import shipping and manufacturing industries of the world," or any part or parts thereof, and from otherwise infringing the plaintiffs' copyright in their said directory. The plaintiffs also claimed an account of profits made by the defendants, damages, and delivery up to the plaintiffs of all unsold copies of the defendants' publication.

The plaintiffs' directory contained a list of the names of the leading merchants, manufacturers, and shippers in the various towns in Great Britain, Ireland, the Colonies, and foreign countries. The names for insertion in this directory were obtained by the plaintiffs by independent enquiries made through canvassers and other agents specially employed by the plaintiffs for that purpose, and at a very large expense. A new edition was brought out each year, the edition for 1899 having been published in March of that year.

The defendant Gavin had recently published the diary in question, and it was published, according to the plaintiffs' allegation, under the supervision of and in conjunction with the defendant corporation known as Lloyd's, and printed at Lloyd's, Royal Exchange, London. The diary contained a list of colonial and foreign importers and also of export commission merchants, and the plaintiffs alleged that such list had been compiled by copying and pirating the names and other particulars therein contained from the plaintiffs' directory, and that such copying had taken place without the leave or licence of the plaintiffs.

The circumstances under which the diary was brought out were as follows: The defendant Gavin having conceived the notion of bringing out a book of the nature of the book that was actually brought out—namely, a diary of merchant shippers and foreign buyers, giving the names and addresses of various merchants, negotiated with Lloyd's in order that the book might be published, to use (as his Lordship remarked) a neutral expression, in connection with Lloyd's. The result was an agreement which was embodied in a letter dated May 25, 1899, signed by Gavin but agreed to by Lloyd's: "In

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reply to your favour of the 17th respecting the printing and publication of a work to be called 'Lloyd's Diary for Merchant Shippers,' I agree to the following terms: 'For the use of Lloyd's name I will pay the committee a subsidy of 100*l.* a year, 5 per cent. upon all moneys received by me for advertisements appearing in the diary, and 5 per cent. upon all moneys which accrue to me from the sale of the publication . . ."

2. "I will pay the committee for printing the diary 25 per cent. of the actual cost of composition and machinery, the cost referred to not to be exorbitant or excessive."

3. "I guarantee that the total minimum profit to the committee from the printing, commission on advertisements, and sales and subsidy referred to shall not be less than 200*l.* per annum, and it is understood that when the sum of 500*l.* is reached I shall be free from any payment, in such year of the 100*l.* subsidy referred to." Clause 4 provided for making monthly payments for the cost of printing. Clause 5 contained an undertaking by Gavin as to the quality of the paper employed; and clause 6 stated that the diary should be about the same length as "Lloyd's Shipping Diary." Clause 7 was as follows: "The information in Lloyd's Diary for Merchant Shippers shall be the same as is now inserted in Lloyd's Shipping Diary with the exception that the International Ports Directory shall not be included in the Merchant Shippers' Diary; but in the event of any new literary features being introduced for the purpose of rendering the work more attractive to merchants, they shall not add to the clerical labour involved in the compilation of the Shipping Diary, and shall be submitted to you"—that is, to Lloyd's—"for approval; such approval, it is understood, however, is not to be unreasonably withheld." 8. "The same clerical labour shall be performed by Lloyd's for the Merchant Shippers' Diary as is now performed for Lloyd's Shipping Diary." Clause 9 contained an undertaking by Gavin as to the binding. 10. "The Committee [of Lloyd's] shall be entitled to refuse the insertion of any advertisements which may be of an objectionable kind; but beyond this all matters relating to the form in the character of the advertisements, reading matter, sale price of the work, &c., shall be decided by me." Clause 11 provided for forwarding advertisements. 12. "I will pay all expenses incidental to the production of The Merchant Shippers' Diary, such as paper, binding, postage, &c." 13. "This agreement to continue for 14 years (fourteen issues) but if after two issues it is found that the Merchant Shippers' Diary does not pay I shall have the right to discontinue the publication of the same."

The case was on the question of infringement confined to the Hamburg portion of certain lists prepared by Gavin, and upon that part evidence was given on behalf of the plaintiffs. For the purposes of the book Gavin wrote to the secretary of Lloyd's, "I send you herewith a copy of the letter I would suggest your writing to the agents"—that is, Lloyd's agents abroad. "If you will send me over the paper I will have it manifolded, and send them back for you to sign. The other paper you request I will let you have tomorrow." The enclosure as originally drawn purported to shew an intention on the part of the committee of Lloyd's to publish the book, and put themselves forward in fact as being the intended publishers and the persons to give the advertisements. That was altered, and the letter ran as follows: "It is the intention of the Committee to sanction the publication of a diary for 1900, intended to circulate amongst British merchant shippers. The information which you have been good enough to supply in connection with the Shipping Diary has been, I understand, greatly appreciated by shipping firms in this country, and I would deem it a favour if you would kindly supply for the new Diary the information in the enclosed form. In recognition of the trouble thrown upon you I am informed that it is the intention of the publishers of the Merchant Shippers' Diary to give you an advertisement amongst the reading matter in connection with your port, and also to forward you a complimentary copy of the work immediately it is published." That document was manifolded, and as manifolded was signed by Lloyd's and was

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made use of for the purpose of obtaining from Lloyd's agents abroad the information required by Gavin. In order to get on with his book Gavin sent out the lists above referred to. These lists were not produced, but it was clearly shewn on behalf of the plaintiffs that whatever lists were supplied abroad, or however Gavin got the information for that particular portion of the work, there was a clear copying from the plaintiffs' book. At a certain period it became apparent that it would be impossible for Lloyd's by the end of the year to do the printing of the whole of the book. They printed up to page 83, where the portion complained of commenced, and then they did not print any more matter except a certain portion of the advertisements at the end of the book. An agreement was come to apparently at Gavin's request that he was to be at liberty to get such portion of the book as could not be printed by Lloyd's printed elsewhere. Gavin thereupon employed another printer and paid him, and got that portion of the book printed. The sheets so printed by the other printer were sent to the binders, as also the portion of the book printed by Lloyd's. The front page of the book contained the full title, and also at the foot the words "Printed at Lloyd's, Royal Exchange, London."

The defendant Gavin did not appear.

Lloyd's, as was admitted at the trial, had no knowledge of the infringement of the plaintiffs' copyright; they had never sold any copies of the diary, and in view of the piracy they had no intention of doing so, and they were willing to deliver up to the plaintiffs the infringing parts of such diaries as might be in their possession.

Levett, K.C., and *E. Ford*, for the plaintiffs.—Lloyd's "caused" the pirated matter to be printed within section 15 of the Copyright Act, 1842, and are liable for the costs of the action.

Scrutton and *F. D. MacKinnon*, for the defendants, Lloyd's.—These defendants are not liable under section 15, which deals with two classes of persons: those who "print or cause to be printed" or who "import" any book or part of a book, even though they may act innocently, are liable, but persons are not liable for publication unless they have knowledge of the infringement. Lloyd's had not such knowledge. They did not print the infringing part of the book. The use of the words "Printed at Lloyd's," &c., is not an estoppel as against them, and there is no evidence that they published this part or that they caused it to be printed.

[BYRNE, J.—Lloyd's would have had the power to prevent the actual printing being done by any one else.]

There is no difference between selling and causing to be sold and printing and causing to be printed. The latter act in each case must be done through an agent. The printer here was the agent of Gavin, and not of Lloyd's. Causing must be the ordering through an agent; it does not include allowing. The selling or the printing, as the case may be, would be personal. The words are common form throughout the Copyright Act.

In the Dramatic Copyrights Act, 1833 (3 & 4 Will. 4. c. 15), s. 2, the words are "represent or cause to be represented." There are two decisions on that Act—*Russell* v. *Briant* [1849][1] and *Lyon* v. *Knowles* [1863][2]—which shew that the latter words have reference to agency and not to a mere permission, and that the merely supplying a person with the means of doing the thing complained of and the sharing in the profits are not sufficient to establish liability under that Act. In the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), the words are "cause to be copied."

Levett, K.C., in reply.—2 & 3 Vict. c. 12, s. 2, which, although repealed, has been re-enacted by the Newspapers, Printers, and Reading-Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), imposes on every person printing a book the duty of printing his name on the book.

Lloyd's having put their name on the diary must be taken to have accepted the publication, and are liable. They sold their name and they took a share in the profits. By the agreement with Gavin

(1) 19 L. J. C.P. 33; 8 C. B. 836.
(2) 32 L. J. Q.B. 71; 3 B. & S. 556.

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they were to print and publish the book. *Russell* v. *Briant*[1] and *Lyon* v. *Knowles*[2] were cases of landlord and tenant, and in neither case was there any agreement that the thing complained of should be done. Further, Lloyd's were to share in the profits in three different ways: Beyond their subsidy they were to receive 5 per cent. on all advertisements and on all money received for the sale of the book. There could be no profits from these sources until the whole book was printed; consequently the printing was essential. No similar action was essential in the cases relied on. A person causes a thing to be done when he makes a bargain that it shall be done. In addition, Lloyd's actually assisted Gavin to obtain the materials for the book: they signed a letter which accompanied the list sent to their Hamburg agents, without which the information could not have been obtained. They were consequently the prime cause of the piracy being committed. The inception of the whole transaction was due to them. The printer in this case was not Gavin's agent. Between a man and his printer there is no agency. The action by the printer would be for work and labour done. If a man pays another to sing for him and does not exercise any control over the singer, but allows him to sing a song in infringement of copyright, the employer is liable—*Monaghan* v. *Taylor* [1886].[3] In *Russell* v. *Briant*,[1] if the tavern had been let for the performance of the particular piece, the result would been different. In *Lyon* v. *Knowles*[2] there was no connection between the lessor and the particular piece, and the Court considered that the defendant could not stop the performance. Here, but for the agreement, the list could not have been printed, and Lloyd's had power to revoke the authority to print. There was joint action and control; and although it may be that there was no partnership, there was a participation in profits.

BYRNE, J., after stating the facts, continued: It has been proved to my satisfaction as against the defendant Gavin, and it is not disputed by the defendants Lloyd's, that as to a portion of this work there has been a clear case of copying and infringement of copyright. The real point as between the plaintiffs and Lloyd's is whether they are responsible in the circumstances for the pirated portion of the work. The question that has been argued before me is whether under these circumstances Lloyd's have made themselves liable under section 15 of the Copyright Act, 1842. That section provides: "That if any person shall, in any part of the British Dominions, after the passing of this Act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright" —"book" including, of course, part of the book under the interpretation clause (section 2)—"without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession, for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid," the offender is to be liable to certain penalties. Very properly in the argument it was admitted, or if not admitted it was not otherwise argued, that Lloyd's were not guilty of an offence under the second branch of this section. It is not suggested that they knew the book to have been unlawfully printed. The fraud committed was committed by Gavin, and it is not suggested that the committee of Lloyd's or any of their officers were aware of any such fraud. And it is clear, if not conceded, that as to this portion of the work the printing was done by another firm of printers, and not by Lloyd's. But it is said that, having regard to the agreement existing between Lloyd's and Gavin, and having regard to the fact that they had supplied the means of assisting Gavin to obtain the information required for his book through their agents abroad, it ought to be held that they have within the meaning of the Act caused this pirated portion of the book to be printed.

So far as I know, no case has been decided under this particular section, but

(3) 2 Times L. R. 685.

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there are authorities that have been decided under a section having somewhat similar words in another Act; and the first case that was cited to me was *Russell* v. *Briant*.[1] The Act in question there was the Dramatic Copyright Act, 1833, which was extended to musical compositions by the Copyright Act, 1842, and the words used in that Act are words imposing a penalty upon any person who shall "represent" or "cause to be represented" without the consent in writing. Change the words "represent" and "represented" for the words that we have here, "print" and "printed," and the words so far are exactly alike. What happened in that case was this: There had been a letting by the proprietor of a certain tavern of a place where dramatic entertainments could be performed, and where the person taking it from him performed a piece called "The Ship on Fire." He was the only performer in the piece, and the room was hired for several nights by Smith for the purpose of giving public, vocal, and musical entertainments. He paid the defendant so much a night. The further connection that the landlord of the tavern had with reference to the matter was that he furnished the platform, benches, and lights, and allowed placards, describing the intended performance, to be stuck up in and about the tavern; that bills or programmes of the entertainments were circulated by Smith, and tickets or cards of admission sold by him, and also by a servant of the defendant at the bar of the tavern, one ticket being sold by the defendant himself. The Court came to the conclusion that the evidence was not sufficient to shew that the proprietor of the tavern had caused to be represented the musical composition in question within the meaning of the Act; and in the course of giving judgment Chief Justice Wilde said: "we are of opinion, after consideration, that there was no such evidence; and that therefore the rule must be made absolute for entering a non-suit." After stating the facts, he says: "we think,—having regard to the object of the Act, and the language of the 2nd section,—that no one can be considered as an offender against the provisions of it, so as to subject himself to an action of this nature, unless, by himself, or his Agent, he actually takes part in a representation which is a violation of copyright. And, if it were to be held, that all those who supply some of the means of representation to him who actually represents, are to be regarded as thereby constituting him their agent, and thus causing the representation, within the meaning of the Act, such a doctrine would, we think, embrace a class of persons not at all intended by the Legislature." The second case referred to was the case of *Lyon* v. *Knowles*,[2] in which case the proprietor of a theatre had entered into a certain arrangement with a Mr. Dillon whereby Dillon had the use of the theatre for dramatic representations. Under that arrangement Dillon provided the company, selected the pieces, had the management of the representations and exclusive control over the persons employed in the theatre. The defendant—that is, Knowles—on his part, paid for printing and advertising, furnished the lighting, doorkeepers, scene-shifters, and supernumeraries, and hired the band, music being a necessary part of the performance. The money taken at the door was taken by servants of the defendant, who retained one-half of the gross receipts for his remuneration, and handed the other half over to Dillon. In that case the Court came to the conclusion that, inasmuch as there was no partnership constituted between the proprietor of the theatre and Dillon, there was no liability by reason of the agreement to share in the gross takings, or by reason of the agreement that the landlord had entered into with Dillon as to what he should provide, to constitute that a causing of the representation by him.

Of course these are only illustrations of what may be considered as "causing a representation" within the Act in question there, but they do help to this extent—that in reference to representation the Courts came to the conclusion that the expression "causing" to do the acts complained of meant either by the person himself or his agent. Now what I have to do here is to say whether—the whole of the order for

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the printing which is complained of having been given by Gavin with the sanction of Lloyd's, it is true by agreement with Lloyd's, he being allowed to give the order notwithstanding the terms of the original agreement—I can fairly regard the printer who actually did the work as being an agent of Lloyd's for the purpose of printing this book. First of all, there was no partnership between Gavin and Lloyd's. It is true that there was an agreement between them for the printing and publication of a certain work. It is true that Lloyd's were to receive profits by reason of the publication of the work contemplated. It is true they were to allow the use of their name as a sort of authority for the book—that is to say, they allowed it to be stated that it was published under their supervision, and they were content to allow it to go forth to the world with the title-page stating that it was printed by Lloyd's, of the Royal Exchange, London. I have said no partnership was constituted by that agreement, and I do not think, having given it careful consideration, that I should be justified in holding that the printing by the third party not a party to the agreement—that having been done in consequence of orders given by Gavin and paid for by Gavin—was something done by an agent of Lloyd's. Of course I need hardly say that Lloyd's have never supposed, nor have they ever had it called to their attention, that there was this copyright. They say they never did publish, and as a matter of fact they did not publish. It has never been suggested that they had been in any way parties to the fraud. On the contrary, they repudiate any such thing as handing about copies of this work or reprinting anything of the kind. On the other hand, I do think that, as their counsel said, not unfairly, it is rather by a happy accident in this case that by allowing their name to appear on the title-page they have not made themselves liable as the actual printers of the book; and I am bound to say, having regard to that fact, and to the fact that it is only when the whole of the facts come out that one comes to the conclusion which I have come to, that I do not think I ought to give them any costs of the action. I think the plaintiffs are entitled to an injunction against Gavin with costs, but are not entitled to costs as against Lloyd's.

Solicitors—Scott, Spalding & Bell, for plaintiffs; Waltons, Johnson, Bubb & Whatton, for Lloyd's.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

COZENS-HARDY, J. 1901. Jan. 22, 26. } GASSIOT, *In re*; FLADGATE *v.* VINTNERS' CO.

Will—Construction—Condition—Charity—Gift without Reference to Age or Poverty—Perpetuity—Mortmain and Charitable Uses Act, 1888 (51 *& 52 Vict. c.* 42), *s.* 13.

The testator made the following gifts: "I bequeath to the Vintners' Company . . . the portrait of" a named person "to be hung up by them in a conspicuous part of their common hall and always retained in that position. And upon condition that they accept the said bequest of the said portrait with the obligation aforesaid I bequeath to the said company the sum of 4,000*l.* . . . *enjoining the said company out of the income of the said sum of* 4,000*l. to keep in due and proper repair the said portrait, cleaning and re-gilding its frame not less than once in every four years, the surplus of the said income to be applied . . . for the benefit of individuals" answering a particular description without any reference to age or poverty, "and if applied by way of annuity, no single annuity to exceed* 50*l. per annum":*—Held, *that the gift of the picture was valid, the condition imposed being a condition subsequent, but that no part of the gift of the* 4,000*l. legacy could be supported as a charitable gift, and it therefore failed wholly, as infringing the rule against perpetuity.*

The testator in the cause by a codicil to his will, amongst other provisions, made the following gifts: "I bequeath to the

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GASSIOT, IN RE.

Vintners' Company of the City of London the portrait of my late friend and partner Don Sebastian Gonzalez Martinez to be hung up by them in a conspicuous part of their common hall and always retained in that position. And upon condition that they accept the said bequest of the said portrait with the obligation aforesaid, I bequeath to the said company the sum of 4,000*l.*, free from legacy duty, such sum with the legacy duty thereon to be paid out of such part of my personal estate as may by law be bequeathed for charitable purposes, enjoining the said company out of the income of the said sum of 4,000*l.* to keep in due and proper repair the said portrait, cleaning and re-gilding its frame not less than once in every four years, the surplus of the said income to be applied by the Master and Wardens for the time being of the said company to the best of their discretion for the benefit of individuals who have been engaged in the Oporto Red or Port St. Mary's White Sherry Wine Trade, and if applied by way of annuity, no single annuity to exceed 50*l.* per annum, and to be held only during the pleasure of the Master and Wardens for the time being of the said company."

The trustees took out a summons for the purpose of having the opinion of the Court whether both or either of these gifts failed. The hearing of the summons was adjourned into Court.

Eve, *K.C.*, and *Austen-Cartmell*, for the plaintiffs.

Vernon Smith, *K.C.*, and *Mark Romer*, for the Vintners' Co.—The provision must be construed as a whole, and if the gift answers the requirements of the statute there is a good charitable gift—*Wall, In re; Pomeroy* v. *Willway* [1889],[1] and *Hunter* v. *Att.-Gen.* [1899].[2] It is not necessary that there should be a direct reference to poverty—*Att.-Gen.* v. *Comber* [1824].[3] The annuities are so small as to point to poor recipients.

Ashworth James, for the residuary legatees.—Both gifts fail. The picture is given upon a condition precedent which cannot be disregarded, although the effect is to defeat the gift—*Robinson* v. *Wheelwright* [1856].[4] The legacy fails altogether—*Hunter* v. *Att.-Gen.*[2]

Vernon Smith, *K.C.*, in reply.—As to so much of the legacy of 4,000*l.* as is not required for the maintenance of the picture and frame the legacy is good, on the authority of *Att.-Gen.* v. *Comber*.[3] The fund can be apportioned—*Mitford* v. *Reynolds* [1842].[5]

Cur. adv. vult.

COZENS-HARDY, J., after stating the facts to the effect above stated, continued: It is contended on behalf of the residuary legatees that the bequest of the picture is bad, because the condition which is sought to be imposed upon the company is one which the law cannot recognise or enforce; but in my view the condition is a condition subsequent, and not a condition precedent. I think, therefore, that the gift of the picture is valid.

With reference to the 4,000*l.*, the first part of the trust is admittedly bad; the second part of the trust is also bad, unless it can be supported as a charitable gift. Now there is no reference to age or to poverty in the description of the recipients of the bounty, and, having regard to the authorities, I do not think I am justified in saying that there is on the face of this will any sufficient indication of a charitable intent to enable me to support the gift. I cannot see my way to limit the trust to retired wine merchants who are in poverty or who are aged. That being so, I must hold that the 4,000*l.* legacy fails.

Solicitors—Fladgate & Co., for plaintiffs; Frank Richardson, for Vintners' Co.; Waltons, Johnson, Bubb & Whatton, for residuary legatees.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

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(1) 59 L. J. Ch. 172; 42 Ch. D. 510.
(2) 68 L. J. Ch. 449; [1899] A.C. 309.
(3) 2 Sim. & S. 93.
(4) 25 L. J. Ch. 385; 6 De G. M. & G. 535.
(5) 12 L. J. Ch. 40; 1 Ph. 185.

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[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
ROMER, L.J.
1900.
Dec. 10.

MARLBOROUGH (DOWAGER DUCHESS) *v.* MARLBOROUGH (DUKE).

Settlement — Power of Jointuring — Construction—Appointment of Jointure on First Marriage—Divorce—Appointment to Second Wife—Public Policy.

By a resettlement of family estates a tenant for life was empowered "at any time or times either before or after his marriage with any woman by any deed or deeds . . . . to appoint to any woman whom he may so marry for her life or for any less period any yearly rentcharge or rentcharges by way of jointure," not exceeding in the events which happened the yearly sum of 2,500*l.*, *and it was declared that the power of jointuring might be exercised as often as he should marry. The tenant for life under this power appointed a yearly sum of* 2,500*l. to a lady whom he married in* 1869. *She obtained a divorce from him in* 1883, *and he married a second wife in* 1888, *and purported to appoint to her under the same power a yearly sum of* 2,500*l. On the death of the tenant for life the validity of the jointure to the second wife was disputed:*—Held, *that the appointment of the second jointure was authorised by the power in the resettlement, and that that power was not invalid as being against public policy, notwithstanding that it enabled the tenant for life to appoint a jointure after a dissolution by divorce of his first marriage.*

Cartwright *v.* Cartwright (22 L. J. Ch. 841; 3 De G. M. & G. 982) *distinguished.*

Appeal from decision of Byrne, J.

The action was by Lily Dowager Duchess of Marlborough, widow of the eighth Duke of Marlborough, against Charles Richard John, ninth and present Duke of Marlborough, the present Duchess, their infant son John Albert Edward Spencer Churchill, the present Marquis of Blandford, and certain trustees, claiming a declaration (in effect) that a jointure rentcharge over the Duke of Marlborough's settled estates, other than those settled by Act of Parliament, appointed to the plaintiff by her late husband, the eighth duke, was validly appointed, and for consequential relief. The question arose in consequence of the dissolution of the marriage of the eighth duke with his first wife, and his subsequent marriage to the plaintiff.

The power of jointuring was given by an indenture of resettlement dated July 14, 1866 (hereinafter called the resettlement of 1866), and made between John Winston, seventh Duke of Marlborough, of the first part, the then Marquis of Blandford, afterwards eighth Duke of Marlborough, of the second part, and George Graham and George Henry Robert Charles Earl Vane, of the third part, whereby certain freehold hereditaments in the counties of Oxford, Bucks, Berks, and Wilts were appointed (subject to a jointure rentcharge of 2,500*l.* to the wife of the seventh duke) to the use of trustees for a term of 1,300 years upon trusts for raising certain sums of money, and subject thereto to uses for securing certain rentcharges, and subject as aforesaid to the use of the seventh duke during his life, without impeachment of waste, with remainder to the use of the eighth duke during his life, without impeachment of waste, with remainder to the use of his first and other sons successively in tail male, with remainders over. And the resettlement empowered the eighth duke "at any time or times either before or after his marriage with any woman by any deed or deeds with or without power of revocation and new appointment, or by will or codicil, but subject and without prejudice to the uses preceding the estate hereinbefore limited" to him for his life, and to the powers and privileges to such uses annexed or exerciseable during the continuance thereof respectively (with an exception not material to be here stated), and to the uses, estates, and interests limited or created in exercise of such powers or any of them, "to appoint to any woman whom he may so marry for her life or for any less period any yearly rentcharge or rentcharges by way of jointure not exceeding in the whole the yearly sums following (that is to say)," If the eighth duke (then Marquis of Blandford) should

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die in the lifetime of the seventh duke, then during the life of the seventh duke "the yearly sum of 1,500*l.*, and from and after his death the yearly sum of 2,000*l.*," but if the eighth duke should survive the seventh duke, "the yearly sum of 2,500*l.*, such yearly rentcharges of 1,500*l.* 2,000*l.* or 2,500*l.* as the case may be, to be charged upon all or any of the premises hereinbefore expressed to be hereby appointed, without deduction except succession duty, and to be paid at such times and in such manner" as to the eighth duke should seem meet; and to appoint to such woman the usual powers and remedies for recovering and enforcing payment of the rentcharge or rentcharges. And it was thereby declared that "the said power of jointuring hereinbefore contained may be exercised as often as" the eighth duke "shall marry." And after giving a similar power of jointuring up to 2,000*l.* per annum to each male tenant for life under the limitations thereinbefore contained subsequently to the limitation to the first and other sons of the eighth duke, with a similar declaration that the last-mentioned power of jointuring might be exercised as often as the person entitled to exercise the same should marry, the resettlement of 1866 provided that the premises thereinbefore appointed should not by means of the jointure rentcharge of 2,500*l.* limited to the wife of the seventh duke, "or by means of jointure or jointures created under the powers of jointuring hereinbefore contained or either of them, be at any one time subject or liable to the payment of any annual sum or annual sums for jointures exceeding in the whole the sum of 4,000*l.*, so that if in consequence of any exercise or exercises of the powers of jointuring, or either of them, the same premises or any part thereof shall, for the time being, be charged with a greater annual sum for jointures in the whole than 4,000*l.*, the annual sum or annual sums which shall form the excess, or such part thereof respectively as shall form such excess shall, from time to time during the continuance of such excess, absolutely sink for the benefit of the person for the time being entitled, under the limitations hereinbefore contained, to the receipt of the rents and profits of the said premises" thereinbefore appointed, and the said jointure rentcharge of 2,500*l.* limited to the wife of the seventh duke should take effect to the full extent in preference to any charge made under either of the powers of jointuring thereinbefore contained, and every charge made by a prior tenant for life (including the eighth duke) should take effect to the full extent of the annual sum limited by him for such charge or for so much thereof as should be charged in preference to any charge or charges by a posterior tenant for life or posterior tenants for life. And the same resettlement empowered the eighth duke and each tenant for life, subject and without prejudice to any jointure rentcharge or rentcharges which might have been or might thereafter be created under the power of jointuring thereinbefore limited to him, to charge the premises thereinbefore appointed with portions for his younger children by any wife whom he might marry to the amounts therein mentioned, together with annual sums for the maintenance of such children.

By a marriage settlement dated November 6, 1869, and made between the eighth duke (then Marquis of Blandford) of the first part, his first wife, then Lady Albertha Frances Anne Hamilton (hereinafter called Marchioness of Blandford) of the second part, John Charles Marquis Camden and Thomas George Earl of Lichfield of the third part, and Henry Charles Keith Marquis of Lansdowne and James Hamilton Marquis of Hamilton of the fourth part, the eighth duke demised all the hereditaments which were subject to the uses limited by the resettlement of 1866 unto the Marquis Camden and Earl of Lichfield for the term of ninety-nine years, to commence from the death of the seventh duke, if the eighth duke should so long live, without impeachment of waste, upon trust to secure the payment to the Marchioness of Blandford of the sum of 600*l.* a year by way of pin-money; and the eighth duke, in exercise of the power for that purpose by the resettlement of 1866 given to him, appointed to and to the use of the Marchioness of Blandford and her assigns during her life (in case she should survive him) the yearly rentcharge or rentcharges following—(that was to say),

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if he should die in the lifetime of the seventh duke, then during the life of the seventh duke the yearly sum of 1,500*l.*, and after his death the yearly sum of 2,000*l.*, but if the eighth duke should survive the seventh duke the yearly sum of 2,500*l.*; such yearly rentcharges of 1,500*l.*, 2,000*l.*, and 2,500*l.* to be respectively charged upon all the premises thereinbefore demised, and to be in full for the jointure of the Marchioness of Blandford, and in bar of all dower and freebench.

The seventh duke died on July 4, 1883.

On the petition of the Marchioness of Blandford a decree *nisi* for the dissolution of her marriage with the eighth duke was made on February 10, 1883; which decree was made absolute on November 20, 1883.

The eighth duke intermarried with the plaintiff on June 29, 1888.

By an indenture of settlement dated December 5, 1888, and made between the eighth duke of the first part, the plaintiff of the second part, and the plaintiff and the defendant Spencer Whitehead of the third part, after reciting the resettlement of 1866 and the powers of the eighth duke thereunder to charge jointures and portions for children by his first taken or any other wife, and also reciting a charge of portions made by the eighth duke's first marriage settlement, and that there had been issue of his first marriage three children and no more other than an eldest son, the eighth duke, in exercise of the power vested in him for that purpose by the resettlement of 1866, limited and appointed to the use of the plaintiff and her assigns during her life, in case she should survive him, a yearly rentcharge of 2,500*l.* by way of jointure, to be charged upon and issuing out of all the hereditaments which were subject to the uses limited by the resettlement of 1866, to be payable quarterly as therein mentioned, with all such powers and remedies for recovering and obtaining payment of the rentcharge as are conferred by section 44 of the Conveyancing and Law of Property Act, 1881. And (after a charge of the same hereditaments with portions in favour of his children by the plaintiff, which did not take effect, as no such child was ever born) the eighth duke, in further exercise of the powers vested in him by the resettlement of 1866, appointed all and singular the premises thereinbefore charged with the said jointure and portions to the use of the plaintiff and the defendant Spencer Whitehead for the term of 500 years, to commence from the death of the eighth duke, without impeachment of waste for further securing the same jointure and portions.

The eighth duke died on November 9, 1892. The Dowager Duchess of Marlborough (widow of the seventh duke) died on April 16, 1899.

The defendant, the ninth Duke of Marlborough, was the first son of the eighth duke. He was born on November 13, 1871.

By a disentailing assurance dated November 14, 1892, and made between the ninth duke of the one part and R. H. Milward of the other part, all the hereditaments of or to which the ninth duke was seised or entitled for any estate in tail under or by virtue of the resettlement of 1866, or otherwise howsoever, were granted, disposed of, and confirmed by the ninth duke to R. H. Milward in fee-simple, freed from all and every the estates or estate in tail male or in tail either at law or in equity of the ninth duke, and all remainders, reversions, estates, rights, titles, interests, and powers to take effect in determination or in defeasance of such estates or estate in tail male or in tail or any of them, to the use of the ninth duke in fee-simple.

On April 30, 1895, the plaintiff intermarried with Lord William de la Poer Beresford.

On November 6, 1895, the ninth duke intermarried with the defendant Consuelo Vanderbilt (hereinafter called the present duchess).

By an indenture of settlement dated July 19, 1897, and made between the ninth duke and the present duchess of the one part, and the defendants Mackworth Bulkeley Praed and Ivor Churchill Guest of the other part, in pursuance of an agreement entered into on the treaty for the last-mentioned marriage, the ninth duke, with the privity and approbation of the present duchess, conveyed all the freehold hereditaments of or to which the

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ninth duke was at the date of the settlement seised or entitled for an estate or interest in fee-simple (which premises formed parts of the hereditaments charged with jointures as aforesaid by the eighth duke's first and second marriage settlements) to the use of the ninth duke during his life, without impeachment of waste. And from and after his death, in the event of the present duchess surviving him, to the use that she might thenceforth receive during her life a yearly rentcharge of 2,500*l.* in full for her jointure, to be charged on the premises thereinbefore conveyed, and subject as aforesaid to the use of M. B. Praed and I. C. Guest for the term of 500 years to commence from the death of the ninth duke, without impeachment of waste, upon the trusts and subject to the powers thereinafter declared, and from and after the expiration or determination of that term, and in the meantime subject thereto and to the trusts thereof, to the use of the first and every other son of the ninth duke successively in tail male with remainder to the use of the ninth duke, his heirs and assigns for ever. And trusts were declared of the term of 500 years for raising portions for the child or children of the ninth duke by the present duchess (other than such son as therein mentioned) to the amounts therein mentioned.

The infant defendant, the Marquis of Blandford, was the first son of the marriage of the ninth duke and the present duchess. He was born on September 18, 1897.

The plaintiff submitted that under the circumstances she was entitled as from the death of the Dowager Duchess of Marlborough, widow of the seventh duke, to a jointure rentcharge of 2,500*l.* out of hereditaments to some of which the ninth duke was entitled for life under the indenture of July 19, 1897, and to others of which he was absolutely entitled under the disentailing assurance of November 14, 1892, subject only during the life of the Marchioness of Blandford to abatement under the provisions of the resettlement of 1866 of so much of that jointure as, together with the jointure of 2,500*l.* of the Marchioness of Blandford, exceeded the total sum of 4,000*l.* per annum.

The annual income of the estates charged with the jointures was amply sufficient to pay the total sum, and the plaintiff had applied to the ninth duke to pay to her the amount payable to her in respect of her jointure, but he refused to do so on the ground that the charge of the jointure in her favour was not a valid one.

The plaintiff accordingly brought this action to establish her right to her jointure.

Byrne, J., held that the plaintiff's claim was good, as the eighth duke was, upon the true construction of the resettlement of 1866, entitled to exercise the power of jointuring as often as he married.

The defendants, the present duke and duchess, the Marquis of Blandford, and the trustees of the settlement of July 19, 1897, appealed.

Haldane, Q.C., and *C. Ashworth James*, for the appellants.—Upon the true construction of the resettlement of 1866 there was no power to jointure the second wife after the dissolution of the marriage with the first wife. The words "the said power of jointuring . . . . may be exercised "as often as" the eighth duke "shall marry" do not confer any power to jointure a second wife while the first wife is living. Those words were inserted on account of the doubt which formerly existed as to the power to jointure a second wife after the death of the first—*Zouch* v. *Woolston* [1761].[1] There was a power to the duke to jointure his wife for a sum not exceeding 2,500*l.*, but not to give two jointures. That power was exhausted by the jointure given to Lady Blandford in 1869. There is no provision as to the priority of two ladies taking concurrently under appointments by the same duke. If the duke can appoint concurrent jointures to two or more ladies living at the same time many anomalies might arise. The duke might more than exhaust the power, which is limited to 4,000*l.*, and a subsequent tenant for life would be deprived of any power of providing for his widow. Secondly, the construction suggested by the plaintiff, if the

(1) 2 Burr. 1136.

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true one, is void as being a provision against public policy—*per* Lord Lyndhurst and Lord Truro in *Egerton* v. *Brownlow* (*Earl*) [1853].[2] A proviso which is inserted to meet the case of a future separation between husband and wife is contrary to public policy—*Cartwright* v. *Cartwright* [1853],[3] *H.* v. *W.* [1857],[4] and *Cocksedge* v. *Cocksedge* [1844].[5] The case of a divorce is analogous. Any provision in a settlement to take effect on the dissolution of the marriage is bad. The provision in the resettlement must be read as intending what is lawful, and not what is unlawful and against public policy.

Levett, *Q.C.*, and *W. Brinton*, for the plaintiff, and *Cozens-Hardy*, for the defendant Spencer Whitehead, trustee of the settlement of December 5, 1888, were not called upon.

RIGBY, L.J.—This is an appeal from Mr. Justice Byrne, and the points raised are two. Dealing with them in the order in which they were argued by counsel for the appellants, I will describe them thus: First, whether, upon the construction of the resettlement of 1866, there was any power enabling the late Marquis of Blandford, who afterwards became eighth Duke of Marlborough, who had already, in the exercise of a power contained in that deed, appointed to his first wife a jointure rentcharge of 2,500*l.*, to appoint upon his second marriage, during the lifetime of his first wife, who had obtained a divorce from him, a jointure rentcharge of 2,500*l.* for the second wife, now known as Lily Duchess of Marlborough. The second question is whether (if the first question is answered in the affirmative) it was within the competence of the parties to the resettlement of 1866 to bargain for a power which might in its exercise have such a result.

It appears to me that the case is by no means open to the difficulties that have been suggested. First of all, upon the point of construction. [His Lordship read the material clauses of the resettlement of 1866, and continued:] We have there a clear power to appoint a jointure to "any woman he may marry," exercisable by the express terms of the deed as often as he shall marry; and as a safeguard to the estate, that it might not be overburthened, there is a provision that any sum or sums by way of jointure should not altogether exceed the sum of 4,000*l.* Now it is argued upon the question of construction that that does not include the case of a second marriage, when the first wife, having obtained a divorce, might be living at the date of the second marriage. I must confess that I have been unable to grasp this argument. I can see that if I were considering the propriety of the terms of the settlement, and the idea occurred as to what was to take place in the case of a future Duke of Marlborough marrying again during the lifetime of the lady who had been his wife and who had been divorced, then there would be reasons for making a different provision to what is here made; but I cannot find that there is anything here pointing to that. We are told that the provision for exercising the power "as often as he shall marry" was intended solely for the purpose of doing away with a doubt which once existed whether a power of jointuring, having been exercised once, could be exercised again. It may be the reason, or one of the reasons, at all events, for which the clause was introduced; but I do not see any authority for supposing or entitling the Court to hold that it was limited to that purpose. We are bound to take the words as we find them, and they are words absolutely without any doubt or difficulty; and it appears to me to be as clear that the eighth duke was entitled to make an appointment on the second marriage as that he was on the first marriage, notwithstanding that his first wife was then living. It is always to be noticed that he had not power to charge more than 2,500*l.* in favour of a wife. That may be sufficient or insufficient as a limit; but it has been chosen by the parties, and the Court has no power or authority to alter it.

Then as to the question of the parties not being competent to provide that there

(2) 23 L. J. Ch. 348, 385, 400; 4 H.L. C. 1, 160, 197.
(3) 22 L. J. Ch. 841; 3 De G. M. & G. 982.
(4) 3 K. & J. 382.
(5) 13 L. J. Ch. 384; 14 Sim. 244.

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should be such a dealing with the property on the ground that it was against public policy, we do not find a syllable in the deed which is against public policy. But it is said that if we construe it so as to let in the second wife for a jointure we are doing something which is contrary to public policy. I have some difficulty in making out why this should be so, but I suppose it would be said that we are rendering a divorce more beneficial or less injurious to the husband than it otherwise would be. It is acknowledged that you must extend the principle to the children, which is a startling thing—that you cannot appoint in favour of the children of the second marriage in the same way as you could if the second marriage had taken place after the death of the first wife. I do not see that it is possible not to go to that extent. Cases were cited, one being a case in the Court of Appeal, which of course we should follow if we thought it was binding upon us in this case, and the others before Vice-Chancellor Wood and Vice-Chancellor Stuart. They are all alike in one respect. The parties to a marriage settlement, or what was equivalent to it, meeting together chose to bargain about what should take place in the event of a separation of the spouses. One has never had any doubt that such a bargain as to what should be the effect of a future separation of people who are living together as man and wife is absolutely bad. All that was held in those cases was that if you bargain about an event which you are not entitled to look forward to or to anticipate, your bargain will be bad, and it was carried so far in the case in the Court of Appeal that where a father was settling his property, and he provided for the event of a separation between his son and the intended wife, the Court held that an advantage could not be gained by the son which depended upon the separation which in fact afterwards took place. It was said that he had no right to claim through the fraud of the father, and that it was a fraud on the law to stipulate as he did. I do not see the resemblance at all, and I do not think there is any between this and any of the three cases which have been cited to us. They are perfectly easy to understand, and they are perfectly intelligible in principle; but it is equally clear, I think, that that principle does not apply to the present case. So I think on both points that have been argued the decision of Mr. Justice Byrne must be affirmed and the appeal dismissed.

Vaughan Williams, L.J.—I entirely agree. I will just say one word about the second point of public policy first. So far as the three cases cited by counsel for the appellants are concerned, they are all cases in which you find on the face of the instruments a matter being expressly bargained for, which was contrary to public policy. In the present case it is not and cannot be suggested that there is anything on the face of this clause in the settlement which is contrary to public policy. It is only said that, in what I may call the accidental application of it, such a clause might operate as an inducement to a husband to look forward to a divorce, because he would know he might be able to marry some other woman and to provide for her out of the family estates. Speaking for myself, I very much doubt whether, even if this clause had been written out large, as counsel suggested, it would have been against public policy. After all, public policy, like other things, must depend on a balance of what is politic—a balance of what is right. In this very matter of public policy one finds that principle sometimes applied. To take a different sort of case—a covenant in restraint of trade deliberately entered into by somebody who presently wishes to avoid the enforcement against him of the covenant he has entered into, because he says restraint of trade is against public policy,—in old days that used to be held so strictly, but in modern days you look at the whole subject-matter, and, bearing in mind that though on the one hand it may be contrary to public policy to have trade restrained, on the other hand it is contrary to public policy that a man should be allowed successfully to evade engagements he has entered into. So here you have a clause which generally is free from any objection. It is said that, with a view to a second marriage after a divorce obtained against a husband, it might possibly be an inducement to the

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husband to seek for a divorce, and as such against public policy. But on the other hand, if he does marry again—and the law allows him to marry again after a divorce—he has a duty to provide for his wife and children. It seems to me very doubtful whether on the balance of convenience it would be against public policy that a divorced husband exercising the right that the Legislature has given him, and marrying again, should make provision out of his property for the second wife, because for this purpose the considerations about the family and the people interested in remainder do not come into consideration. So much on the point of public policy.

With reference to the conveyancing point, I only wish to say one word about it in order that I may express what I understand to be the argument which has been addressed to us. We are invited to read the power, which it is expressly said that the husband may exercise as often as he shall marry—"the said power of jointuring"—as being a general power, and to read the words "appoint to any woman" in the same sense as if the words had been "appoint on marriage." And then it is said that the intention is that there should be a power of jointuring limited to the 2,500*l.*, and that it is that power, and that power only, which may be exercised not upon one marriage, but as often as Lord Blandford shall marry. Although that is a construction which one would perhaps not be sorry to give to these words, the words are too strong for us, and we can only construe them as Lord Justice Rigby has construed them.

ROMER, L.J.—I agree. With regard to the so-called public policy point, all I need say is that there is nothing whatever in that point. There is nothing contrary to public policy in a settlement providing or contemplating that a tenant for life may validly marry more than once, nor in a settlement providing that if he does so he may exercise certain powers over the settled property in order to provide for the wife and children of the subsequent marriages. A provision of that kind in such a settlement is perfectly valid. The cases cited have nothing whatever to do with such a case as that I have indicated, and that is the case before us.

There is a point that might possibly have been argued upon the construction of this settlement, and that is that the power of jointuring was limited in this way, that the power could not be exercised in favour of any woman who did not become the tenant for life's widow—that is to say, who was not the wife of the tenant for life at the time of his death. That point has not been argued before us. We start on the assumption which the appellants have taken before us, that in this case the power was not limited in the way I have indicated, and that the lady who divorced the eighth duke was entitled to the jointure which was appointed, or purported to be appointed, in her favour by him. That being so, and that point not being taken, it appears to me clear that upon this settlement nothing can be said against the claim of the second wife. She was clearly, within the words of the resettlement, a woman whom the eighth duke married, and it is clear that the duke had power to appoint to her by way of jointure a yearly rentcharge or charges not exceeding in the whole the sum he has appointed. The words "not exceeding in the whole" clearly point to this, that each woman who was entitled to have exercised in her favour the power of jointuring might have limited to her a sum not exceeding in the whole the sums mentioned in the settlement. For these reasons it appears to me there is nothing whatever in the first point that was argued, and I agree in thinking that the appeal must be dismissed with costs.

Solicitors—Nicholl, Manisty & Co., for appellants; Whitehead, Marshall & Co., for respondents.

[*Reported by A. J. Spencer, Esq., Barrister-at-Law.*

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WRIGHT, J. 1901. Jan. 15. } LONDON AND NORTHERN BANK, *In re*; MC CONNELL'S CASE.

Company—Director—Vacation of Office—"Absent himself"—Resolution to Forego Fees—Validity.

Although there is a difference between the act of "absenting oneself," which is purely voluntary, and the fact of "being absent," which is voluntary or involuntary as the case may be; yet the fact that a person is absent under some strong compulsion, which does not amount to physical necessity, does not necessarily negative the voluntary aspect of his act, or shew that he has not "absented himself."

Where, accordingly, the director of a company, though not actually physically prevented by present ill-health from attending the meetings of his fellow directors, was yet induced to stop away from them because his remaining at that season in England might have been injurious to his health, his absence was treated by the Court as being voluntary, and he was deemed to have "absented himself" within the meaning of a provision in the articles of association.

It is open to the directors of a company, with regard to remuneration which is not yet fully earned by them, to make, under the form of a resolution passed by them to renounce such remuneration, a new contract with the company, varying in the aggregate the several contracts which the directors have already severally made by accepting office as directors of the company.

Lambert *v.* Northern Railway of Buenos Ayres (18 W. R. 180) *distinguished.*

Summons in the winding-up of the London and Northern Bank, asking that the liquidator might be ordered to admit the claim of Sir Robert McConnell, Bart., formerly a director of the company, for the sum of 445*l.* for director's fees and travelling expenses alleged to be due to him from the bank.

The London and Northern Bank was incorporated as a limited company on April 6, 1898.

By article 91 of the articles of association it was provided (*inter alia*): "The first Directors and any Directors appointed before the Ordinary General Meeting in 1902 shall hold office until the Ordinary General Meeting in 1902 subject to the provisions herein contained."

Article 95: "Each of the Directors shall be paid out of the funds of the Company by way of remuneration for their services the sum of 300*l.* per annum, and such further sums as the Company may from time to time determine, and such remuneration shall be divided between them in such proportions and manner as the Directors may determine."

Article 97: "The office of a Director shall *ipso facto* be vacated—

. . . . . .

(*e*) If he absents himself from the Meetings of the Directors during a period of three calendar months without special leave of absence from the Directors.

. . . . . .

(*g*) If he is requested in writing by all his co-Directors to resign."

Article 172: "Every Director . . . . shall be indemnified by the Company against, and it shall be the duty of the Directors out of the funds of the Company to pay, all costs, losses, and expenses which any such . . . . [Director] . . . . may incur or become liable to by reason of any contract entered into or act or thing done by him as such [Director], or in any way in the discharge of his duties, including travelling expenses."

Sir Robert McConnell was duly appointed a director of the company on August 3, 1898, and continued from time to time occasionally to attend the meetings of the board of directors till February 3, 1899.

At a meeting of the directors held on February 3, 1899, at which Sir Robert McConnell was present, the following resolution was passed by the directors, as recorded in the minute-book of the bank: "It was resolved on the motion of Mr. Batty Langley that no remuneration be received by the directors for their services except travelling expenses until a dividend is declared on the ordinary shares."

Owing, as it was alleged, to continued ill-health, and to the consequent necessity of spending the spring abroad, Sir Robert McConnell failed to attend any meeting

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LONDON AND NORTHERN BANK, IN RE.

of the directors held subsequently to the meeting of February 3, 1899, during the months of March and April; but he did not make any request to his co-directors for special leave of absence, as provided by article 97 (*e*). No meeting of the directors was held between February 3 and March 3, 1899.

At a meeting of the directors held on May 5, 1899, the following resolution was passed by the directors, as recorded in the minute-book of the bank: "The General Manager reported, and it was ordered to be recorded on the minutes, that Messrs. Mack and McConnell did not attend any meeting of the directors during the last three months, and that they have ceased to be directors pursuant to clause 97, sub-section (*e*) of the Articles of Association; and that they be notified to this effect."

In pursuance of this resolution Sir Robert McConnell was accordingly notified, by a letter posted to him on May 8, that he had ceased to be a director of the bank. The bank went into liquidation on December 29, 1899; and a proof was tendered in the winding-up by Sir Robert McConnell for the sum of 445*l*. Of this amount the sum of 400*l*. was made up of directors' fees alleged to be due to the plaintiff from August 3, 1898, till December 29, 1899, and the sum of 45*l*. of travelling expenses. The liquidator, however, on August 3, 1900, rejected the whole proof on the ground—first, that Sir Robert McConnell had vacated his office on May 3, 1899, by reason of his having absented himself from the meetings of the directors for a period of three calendar months from February 3, 1899; and secondly, that on May 3, 1899, Sir Robert McConnell had not completed a full year of office, and that his remuneration was not apportionable.

Sir Robert McConnell thereupon took out the present summons in the winding-up of the company.

It was alleged in the affidavits read in evidence on the hearing of the summons that the resolution of February 3, 1899, already set out above, had been communicated to the shareholders of the bank on more than one occasion.

McCall, Q.C., and *T. Douglas*, for the plaintiff.—There is a difference between "absenting oneself" and "being absent," for the former phrase involves volition, the latter does not necessarily involve it. Here Sir Robert was involuntarily "absent," owing to ill-health; but he did not deliberately "absent himself" within the meaning of article 97 (*e*). Anyhow, the prescribed period of three months began to run only from March 3, 1899, and has not, accordingly, expired on May 3, as alleged by the liquidator. As for the self-denying resolution of February 3, 1899, that is a mere *nudum pactum*, without consideration, and cannot bind Sir Robert McConnell—*Lambert* v. *Northern Railway of Buenos Ayres* [1869].[1]

Tindal Atkinson, Q.C., and *A. Cohen*, for the liquidator.—Sir Robert McConnell was not actually and literally prevented from attending meetings after February 3—he possessed, and exercised, an indisputable choice. As to the date from which the period of three months began to run, that is immaterial; for the period, under any circumstances, came to an end within Sir Robert's first year of directorship, and a director's fees are not apportionable. As to the resolution of February 3, it is a perfectly good novation of the original contract as to remuneration. *Lambert* v. *Northern Railway of Buenos Ayres*[1] is distinguishable, for that case applies only to remuneration already earned. Here, moreover, even if the resolution were really a *nudum pactum*, it has been communicated to, and acted on, by the shareholders, and the plaintiff is now estopped from repudiating it. Had Sir Robert objected to the resolution on February 3, he could then have been requested in writing to resign by his co-directors under the provisions of article 97 (*g*). We do not now resist the claim for 45*l*. for travelling expenses.

McCall, Q.C., replied.

WRIGHT, J.—I am satisfied, in this case, that there was nothing in point of law which could be considered as an "involuntary absence." In the construction of an article like this, it has, I think, been

(1) 18 W. R. 180.

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held, in two or three cases,[2] that the expression "absents himself" means something more than the expression "is absent." I cannot, however, think that in this case there was anything which prevented Sir Robert McConnell from attending the meetings. I should come to the conclusion that he physically and medically had an option to attend or not. If he were afraid that it might be injurious to his health to stay in England, that does not oblige him to go abroad; and, under those circumstances, if he prefers to be certain of his health and to go abroad, I do not think it can be said that he is compulsorily absent. I should say that, under circumstances of that kind, he clearly "absents himself."

Still, in my judgment, even though I come to the conclusion that he "absented himself," I agree with counsel for the applicant that the directors were wrong in acting upon the theory that by such absence Sir Robert McConnell had vacated his office so soon as May 5. I think the true meaning of the provision is that which counsel for the applicant supported on that point—that Sir Robert could not be taken to have absented himself within the meaning of the article until there was a meeting which he ought to have attended; and the first such meeting after February 3 was on March 3. I do not think the period of three months began to run until that latter date. Nevertheless, when the three months had elapsed and June 3 had passed—there was a meeting on that day—it seems to me that Sir Robert had then absented himself from the meetings of the directors during a period of three calendar months without special leave of absence from them; because, when he received the notice that the directors had passed this mistaken resolution, he writes to say that he considers it a breach of faith, and to the like effect, but he does not in any way purport to inform the directors that he shall disregard their resolution or insist on acting as director, or that he shall consider himself to act as a member of the board. There seems to me to be no effectual protest of that kind; and as he did not get the special leave of the directors it seems to me that, before his year of office was over, he had *ipso facto* ceased to be a director.

Then, if so, according to the decision of Mr. Justice Cozens-Hardy in *Salton* v. *New Beeston Cycle Co.* (*No.* 1) [1899],[3] which I have followed in more than one instance, I think that, under an article worded as this article is worded, there is no room for apportionment or for treating the matter as one of *quantum meruit*. I am told—I have not required it to be verified in evidence—that Sir Robert attended only some four out of some fourteen meetings of the directors. At any rate, I am told—though this has not been discussed—that he did not make anything like a practice of attending regularly; and it is very difficult to say that, where an article directs that each director shall be paid by way of remuneration of his services the sum of 300*l.* per annum, he can be entitled to that reward unless, at any rate, he serves during substantially the whole of the year, or his attendance is waived by the company. A few casual attendances at meetings might really mean nothing in the work of a director. The principal business of a director very often consists in the determination of matters which fall to be determined only shortly before the annual or semi-annual meetings, and, in particular, in the preparation of balance-sheets and of the report to the shareholders, and in the statement to the shareholders of facts and considerations on which the shareholders are to decide whether or no a dividend is to be declared. If a director retire before the arrival of that period, it may be difficult to say that there is any value in his services at all. I do not see how any doctrine of *quantum meruit* can very well be applied.

But the great difficulty in the way of Sir Robert McConnell's claim is, to my mind, the resolution passed on February 3. It is said that that cannot be operative to destroy any right that Sir Robert McConnell had under the contract by which he became a director of the company. I cannot come to that conclusion; and I do not think that the case which

(2) See *London and Northern Bank, Lim., In re: Hall's Claim* [1900] (35 L. J. N.C. 311; W. N. (1900), 114).

(3) 68 L. J. Ch. 370; [1899] 1 Ch. 775.

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has been cited of *Lambert* v. *Northern Railway of Buenos Ayres*[1] is an authority to that effect. Certainly it is not a direct authority, for there the relator applied to restrain the company from paying the remuneration which they wanted to pay; and the ground of the decision was, that no such bill ought to be entertained. No doubt Vice-Chancellor Malins uses in that case some observations which are capable of meaning that, in a case like this, an agreement to waive the remuneration comes to nothing; but I think that those observations were directed only to the case in which the remuneration had been already earned. In any case, I do not feel clear that the decision is one which ought to be regarded as having the effect which it is now sought to attach to it. Here, on February 3, there was nothing due to the directors. In my view, nothing would be due to Sir Robert until the end of the year. The agreement between him and the company was still open and unperformed, or, at any rate, only partially performed; and there had been no breach of it at that time. I cannot imagine why it was not open to the directors at that time, at a directors' meeting, to make under the form of this resolution a new contract with the company, varying in the aggregate the several contracts which the directors had severally and verbally made by accepting office as directors of the company. It seems to me that it is open to all the directors to agree with each other that they shall continue to act on that footing. If this gentleman had dissented, the other directors might, after reasonable notice in writing, have requested and compelled him to resign by virtue of article 97 (*g*) of the articles of association.

I am doubtful how far a certain other fact is material, but it is of some weight—the fact, namely, that this resolution of the directors appears to have been communicated to the shareholders, not immediately, but some time early in August. Possibly that may make a difference. I am not sure that it does, and I only mention it to shew that I have not passed it over. I think that it might require something more than the mere fact of communication—that it might require some further evidence to shew that it was material. It is possible that the evidence ought to go to the extent of shewing—what it is almost impossible to shew by evidence—that the action of the shareholders was in some way influenced by that communication. I doubt whether the mere bare fact that it was communicated to them is enough to alter the case if I am otherwise wrong.

On the whole, I think that Sir Robert McConnell cannot maintain his claim in this case except for travelling expenses.

Solicitors—Nunn, Popham & Starkie, for plaintiff; Helder, Roberts, Walton & Thomas, agents for Simpson & Simpson, Leeds, for liquidator.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

JOYCE, J. 1901. Jan. 18, 19.

FEWSTER, *In re*; HERDMAN *v.* FEWSTER.

Attachment—Trustee—Money "in his possession or under his control"—Order for Payment into Court—Default—Trustee in Humble Circumstances—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s* 4, *exception* 3 *—Discretion of Court—Debtors Act*, 1878 (41 & 42 *Vict. c.* 54), *s.* 1.

Upon an application for leave to issue a writ of attachment against a trustee who has failed to comply with an order for payment into Court of money alleged to be "in his possession or under his control" within the third exception of section 4 *of the Debtors Act*, 1869, *it must be strictly proved that the money so ordered to be paid has been in the actual possession or control of the person sought to be committed. It is not sufficient to prove mere constructive receipt by a solicitor or agent on such person's behalf.*

This was a motion by Henry Herdman and Mary Ann Herdman his wife, the plaintiffs in the above-mentioned administration action, for liberty to issue a writ or writs of attachment against Anthony

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Fewster and Robert Fewster, the defendants in the said action, for their contempt in not paying into Court to the credit of the action, pursuant to an order of October 26, 1900, in that behalf, the sum of 479*l.* 9*s.* 11*d.*, being the one-fourth part of the plaintiff, Mary Ann Herdman, of the residuary estate of the above-named testator received by the defendants as the executors and trustees of such testator's will, and retained in their possession or under their control.

The testator died on August 24, 1872. The above-mentioned action for the administration of his estate was commenced by the applicants in 1898, and by the Master's certificate dated August 3, 1900, it was found that the respondents had received personal estate of the testator (not specifically bequeathed) to the amount of 2,047*l.* 11*s.* 3*d.*, and that they were entitled to be allowed 129*l.* 11*s.* 7*d.* on account of payments, leaving a balance due from them of 1,917*l.* 19*s.* 8*d.*, and that a sum of 479*l.* 9*s.* 11*d.*, being one-fourth of such balance, was due to the female applicant in respect of her one-fourth share in the residuary estate of the testator. By an order dated October 26, 1900, the respondents were ordered to pay the said sum of 479*l.* 9*s.* 11*d.* into Court. The failure of the respondents to comply with such order resulted in the present application.

The evidence relied upon by the applicants as proving that the money in question was in the possession or under the control within the meaning of the 3rd exception to section 4 of the Debtors Act, 1869,[1] was comprised in the Master's certificate and the affidavit (notice to read which had been given) of the respondents verifying the account upon which the certificate was based, whereby they stated that according to the best of their knowledge, information, and belief such account set forth a full account of the personal estate of the testator not by him specifically bequeathed, which had come to their hands either directly or indirectly by their order or for their use. A partner in the firm of solicitors who had acted for the respondents when proving the testator's will in 1872 had made an affidavit on the motion stating that "the 479*l.* 9*s.* 11*d.* was and is one-fourth of the residuary estate received by the said defendants as the executors and trustees of the said testator's will and retained in their possession or under their control."

It appeared that the respondents were in humble circumstances, and only one of them was represented by counsel, the other being apparently too poor to provide for his defence or to afford the journey to London.

Chubb, for the applicants.—The applicants have complied in every respect with the requirements of Order LII. rule 4. The respondents have not obeyed the order directing them to pay into Court this money, which, according to the finding of the Master's certificate, has been received by them, and the receipt of which they have admitted in their own affidavit. There is also the solicitor's affidavit to the same effect made on this motion. The case falls within the third exception to section 4 of the Debtors Act, 1869—*Marris* v. *Ingram* [1879].[2]

[JOYCE, J.—To bring a case within that exception, actual receipt must be proved.]

The evidence adduced is sufficient proof of the receipt of the money by the respondents. It is not necessary to prove actual receipt; receipt by an agent is within the scope of the exception, the words of which are "in his possession or under his control."

W. C. Dare, for the respondent Anthony Fewster.—There is no evidence that this respondent ever actually received one single penny of the balance found due. Receipt by an agent is not sufficient. The Court has a discretion under section 1 of the Debtors Act, 1878,[3] to refuse applica-

(1) The material provisions of section 4 of the Debtors Act, 1869, are as follows:

"With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.

"There shall be excepted from the operation of the above enactments:

. . . . . .

"3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of equity any sum in his possession or under his control."

(2) 49 L. J. Ch. 123; 13 Ch. D. 338.

(3) The material provisions of section 1 of the Debtors Act, 1878, are as follows: "In any

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tions of this sort, and this is a proper case for the exercise of such discretion.

Chubb replied.

Cur. adv. vult.

Jan 19.—JOYCE, J.—This is an application for leave to issue a writ or writs of attachment against the respondents. I need not say that sending a man to prison is, to my mind, a very serious matter, and the Court ought to exercise its power of issuing such writs with very great caution, and especially so where there is any suggestion or any reason for supposing that the respondents are in humble circumstances, or have not the means to enable them either to instruct a solicitor and counsel, or personally to come to London from a remote part of the country and defend themselves with what intelligence they may possess. [His Lordship stated the facts of the case, and continued:] Now, if this is a case for attachment at all, it must come within the third exception to section 4 of the Debtors Act, 1869.[1] During the course of the discussion yesterday I intimated an opinion that, in order to bring a case within this third exception, it was necessary to prove that the money ordered to be paid into Court had been in the actual possession or control of the person who was sought to be committed, and that the mere constructive receipt on his behalf by a solicitor or an agent who may never have accounted, was not sufficient. To that opinion, after reflection, I feel compelled to adhere.

I was referred by the applicants' counsel to the Master's certificate made in the administration suit. That certificate is not, perhaps, strictly in evidence on this occasion, but it finds that they have a sum of 2,047*l.* 11*s.* 3*d.* to account for, and that they have paid, or are entitled to be allowed on account thereof, sums to the amount of 129*l.* 11*s.* 7*d.*, leaving a balance due from them of 1,917*l.* 19*s.* 8*d.* on that account. Now the Master's certificate in an administration suit in no way differentiates between actual and constructive receipt, and it does not follow that the respondents have ever actually received into their hands the money which has by the certificate been found due from them. Then I come to the affidavit of the respondents exhibiting and verifying the account on which the Master's certificate was based. There they refer to the account and say, "We have in the account, . . . according to the best of our knowledge, information, and belief, set forth a full account of the personal estate of the said testator not by him specifically bequeathed which has come to our hands or to the hands of either of us, or to the hands of any person or persons by our order or the order of either of us or for our use or the use of either of us." In my opinion that will not do. It does not appear whether the money has been actually received by both or by either of them. It may have been received by an agent and may never have come to their hands at all. Then there is the affidavit made on this motion by the solicitor of the applicant. It states that the sum of 479*l.* 9*s.* 11*d.*, which the respondents were ordered to pay into Court was, and is, the one-fourth part of the applicant in the residuary estate of the testator received by the respondents as the executors and trustees of the testator's will, and retained in their possession or under their control. The applicants' counsel did not urge that affidavit upon me strongly, but if he had I would not have accepted it as evidence of the actual receipt of the money by the respondents. It is an affidavit by a partner in the firm which acted for the respondents when proving the testator's will twenty-eight years ago, and he does not state how it is that he comes to the conclusion that the money was in the possession or under the control of the respondents. In the circumstances I do not see my way to make the order asked for by the notice of motion, and even if I had been satisfied that the respondents had

[1] case coming within the exceptions numbered 3 and 4 in the 4th section of the Debtors Act, 1869 . . . or within either of those exceptions, any Court or Judge, making the order for payment, or having jurisdiction in the action or proceeding in which the order for payment is made, may inquire into the case, and (subject to the provisoes contained in the said sections respectively) may grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process or order of arrest or imprisonment."

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received the money or had it under their control, I should then have had to consider whether I ought not to exercise the discretionary power given to me by section 1 of the Debtors Act, 1878,[3] and refuse the application.

The motion must be refused.

Solicitors—Satchell & Chapple, agents for Davies & Balkwill, Newcastle-upon-Tyne, for applicants; Taylor, Willcocks & Lemon, agents for D. H. C. Balleny, Consett, for respondent Anthony Fewster.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

KEKEWICH, J. 1901. Jan. 16, 28. } PITT-RIVERS, *In re*; SCOTT *v.* PITT-RIVERS.

Will—Charitable Gift—Secret Trust.

A testator devised a museum and pleasure-grounds to which the public had been allowed access, with an annuity of 300*l. for the future maintenance of the museum and grounds, to his son, to whom he communicated his wishes that they should be maintained as they had been during his (the testator's) lifetime*:—Held, *that the gifts constituted a secret trust, and were given to the son and accepted by him for the express purpose that the museum and grounds should be maintained and used as they had been in the lifetime of the testator, and so that the son and those claiming through or under him should hold the property subject to a trust for such maintenance and user.* Held, *further, that such trust was enforceable by the Attorney-General as a charitable trust for the benefit of the public, even though the public thereby acquired rights which the testator never intended them to have, and to the detriment of the owner for the time being.*

Summons.

The testator, General Augustus Henry Lane Fox Pitt-Rivers, had laid out a part of his Rushmore estate on the borders of Wilts and Dorset as pleasure-grounds, known as the Larmer grounds, at Farnham in Dorsetshire. To these grounds the public had access under certain restrictions, but so that they could never acquire any rights there. Adjoining the Rushmore estate the testator purchased a house known as the Gipsy School and converted it into a museum in which to store and exhibit his collection of curios and relics of interest from all parts of the world. The museum was open to the public all the year round, including Sundays, and was in charge of a caretaker. Both the museum and the pleasure-grounds were closed to the public periodically so as to safeguard the testator's rights of ownership.

By his will dated June 12, 1892, the testator devised his estates, including the museum and pleasure-grounds, subject to certain rentcharges in favour of his widow and children, to his first and other sons successively for life and then in tail male.

By a codicil dated November 20, 1899, the testator made the following bequests:

"1. I bequeath my museum at Farnham in the county of Dorset, together with its contents, and the objects of curiosity in my house at Rushmore, which are intended to be placed in the said museum, to my eldest son Alexander Edward Lane Fox Pitt" (afterwards Pitt-Rivers, defendant to the summons) "and his heirs male; (2) I bequeath my Larmer grounds in the parishes of Farnham Royal and Tollard Royal, in the counties of Wilts and Dorset, to my said eldest son A. E. L. Fox Pitt and his heirs male; (3) I also bequeath unto my said eldest son and his heirs male the sum of 300*l.* per annum; the said sum of 300*l.* per annum is to be for the future maintenance of the said museum and Larmer grounds and the articles of interest therein and thereon; (4) I direct that the said museum and Larmer grounds, with the articles of interest therein and thereon, shall be kept in a good state of preservation; and I further direct that the said sum of 300*l.* is to be a further charge upon my estates in the counties of Wilts and Dorset; (5) I appoint my son-in-law Sir John Lubbock Bart." (now Baron Avebury) "and Charles Hercules Read to be the trustees only for the purposes so far as necessary in

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connection with the future maintenance of the said museum, Larmer grounds, and the objects of interest therein and thereon."

The testator died on May 4, 1900.

The evidence went to shew that the testator and his eldest son had had several conversations as to the keeping up of the museum and pleasure-grounds, and that the father had expressed a hope that the son would maintain them as the father had maintained them during his lifetime; the son's reply being that he hoped he would be able to do so. The question then arose whether the son took the estate beneficially or whether it was impressed with a trust, and this summons was taken out by the executor of the will and codicil against the eldest son and his infant son and the two museum trustees as defendants.

The questions asked by the summons were as follows:

First, whether the defendant Alexander Pitt-Rivers took an estate tail or any other and what estate in the museum and Larmer grounds, and whether beneficially or upon any and what trusts; secondly, whether the same defendant took any and what estate, and whether beneficially or upon any and what trusts, in the contents of the museum at Farnham and the objects of curiosity at Rushmore; thirdly, whether any and what articles at Rushmore passed under the gift in the first clause of the codicil; fourthly, what estate, and whether beneficially or upon any and what trusts, the same defendant took in the 300*l.* per annum bequeathed by the third clause of the codicil; fifthly, whether the defendants Lord Avebury and C. H. Read took any and what estate in the museum and its contents and the objects of curiosity mentioned in the first clause of the codicil, and the Larmer grounds and the objects of interest therein and thereon, and the annuity of 300*l.* respectively, or any and which of them, and whether they were under any and what duties in connection with the future maintenance of the museum, Larmer grounds, and the objects of interest therein and thereon; and sixthly, whether the gifts of the museum and its contents and the objects of curiosity at Rushmore, and of the Larmer grounds, and of the annuity of 300*l.* respectively, or any of them, failed as infringing the rule against perpetuities or otherwise.

Sheldon, for the summons.

P. O. Lawrence, *Q.C.*, and *Cann*, for the first defendant.—The onus is on the Attorney-General to prove any trust. The testator could not make his son a tenant in tail and then take the ownership and management entirely out of his hands. The conversations and the understanding between father and son cannot have amounted to a trust; if so, the burden would become very heavy, and the public would acquire rights which the testator never intended they should have. The very object of the conversations was that there should be a reservation of the right of the owner for the time being to close the grounds at any moment, and so preserve his rights against the public.

The Attorney-General (*Sir R. B. Finlay*, *Q.C.*) and *R. J. Parker*, for the Crown.—The law is clearly stated in *Jones* v. *Badley* [1868],[1] and the questions which were asked there must be answered here in favour of the Crown.

The land can be retained as land for charitable purposes under the Mortmain and Charitable Uses Act, 1891, ss. 3, 5, and 8, and the annuity, if it is not a rentcharge, does not fall within the Act.

We ask the Court to declare a trust that the public have access to the grounds as they had during the lifetime of the testator, and that the museum be open to the public in the same way. If a scheme be necessary, then the owner for the time being should be left with a very large discretion.

Warrington, *Q.C.*, and *P. S. Stokes*, for the infant defendant.

Renshaw, *Q.C.*, and *F. L. Wright*, for the defendant trustees.

P. O. Lawrence, *Q C.*, in reply.—Either the owner must be master, with power to exclude the public, or *vice versa*, and that the testator never intended.

Cur. adv. vult.

Jan. 28.—KEKEWICH, J., delivered the following written judgment: By the codicil of November 20, 1899, General Pitt-

(1) L. R. 3 Ch. 362.

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Rivers gave to his eldest son, the first defendant, Mr. Fox Pitt-Rivers—first, his museum at Farnham with its contents; secondly, the objects of curiosity in his house at Rushmore, which were intended to be placed in the said museum; thirdly, his Larmer grounds; and fourthly, the sum of 300*l.* per annum. All these gifts were made to Mr. Fox Pitt-Rivers and his heirs male, so that he took what was real estate as tenant in tail, and what was personal estate absolutely. I think that the gift of 300*l.* per annum falls under the latter description. It is by the same codicil charged on the testator's estates in the counties of Wilts and Dorset; but that charge does not prevent the bequest from being one of an annuity which is personal estate. The result is that Mr. Fox Pitt-Rivers can deal with the real and personal estate, thus given, as he pleases, and that, notwithstanding that the testator has directed on the face of the codicil that the museum and Larmer grounds, with the articles of interest therein and thereon, shall be kept in a good state of preservation, and has indicated his intention that the annuity of 300*l.* shall be available and shall be used for that purpose, such direction and intention cannot interfere with the beneficial gifts, of the construction of which there is no reasonable doubt.

But it has been disclosed by the evidence that the testator communicated his wishes to his son, Mr. Fox Pitt-Rivers, and that his son accepted the gifts with the knowledge that they were made to him for the purpose of effecting his father's wishes; and, further, that he assured his father that those wishes should be fulfilled. This constitutes a secret trust of the property given, enforceable against the son in this Court. There is no need to refer to authorities or to examine the doctrine of the Court on the subject, because the facts just mentioned are undoubted, and the doctrine of the Court that a secret trust is under such circumstances enforceable is perfectly well settled.

Nor is there any occasion narrowly to examine the evidence to ascertain what the communicated and accepted wishes of the father were. He had established the museum and had appropriated the Larmer grounds for purposes in connection with it, and he had maintained the museum and the grounds for the benefit and instruction of the public. He had done more than that, for he had expended money and trouble in providing entertainment for the public outside and beyond what would be derived from a mere visit to the museum and grounds. It may well be that, when he exacted a promise from his son that he would maintain the museum and grounds as heretofore, he did not bind him to provide the extra entertainment to which I have just referred, but he certainly did intend him to maintain the museum and grounds and to allow the public access thereto, and the son certainly accepted the gift of both with the assurance that this should be done. So far there is no substantial difficulty. Questions might arise in detail how the wishes of the father and the promise of the son should be effected; but they would be merely questions of detail, and none of principle would be possible.

Now comes the circumstance which raises a question of difficulty on which I reserved my judgment. While giving the property already mentioned to the son for the purpose of maintaining the museum and grounds as heretofore, the testator insisted that the public should have no rights. The public were to be allowed to use and enjoy the museum and grounds, but were to acquire no rights. This notion seems to have been strongly implanted in the testator's mind, and he referred to it frequently. He, being owner in fee, was able during his lifetime to do what was necessary to prevent the acquisition of rights by the public; and he occasionally closed the museum and grounds, with the express intention of shewing that he retained his paramount right as owner. Probably he thought that his son could do the same, and of course, if the son had succeeded to his father's position—that is, had taken the property absolutely unfettered by any trust—the son might have adopted the same lines as his father, and prevented the enjoyment of the public as a matter of right. This could only have been done by vesting the property absolutely in the son, and leaving it to his

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good faith and discretion to fulfil his father's wishes, though leaving him at the same time at liberty entirely to defeat those wishes if so minded. As it is, a trust has been established, and the question arises how far that trust can be enforced consistently with the denial of rights to the public.

The Attorney-General appears to support the public character of the trust. He is altogether out of Court unless he represents the public, and he cannot succeed in his contention that there is a secret trust to be enforced unless he further establishes that it is a trust for the benefit of the public. The Court, therefore, finds itself in this embarrassing position. If it accedes to the contention of the Attorney-General that there is a secret trust to be enforced for the benefit of the public, it must ignore or defeat the express intention of the testator that the public shall acquire no rights; and on the other hand, if that contention is rejected and the trust be not enforced, the only alternative can be that Mr. Fox Pitt-Rivers will be left absolute owner of the property in question, at liberty, if he pleases, to disregard his father's wishes, and treat the property as much at his disposal as if no trust had been communicated to and accepted by him. I have not forgotten that it may, and probably will, be possible so to provide for the management, use, and enjoyment of the grounds and museum that Mr. Fox Pitt-Rivers will be left in possession, and that for all practical purposes he will have such privileges of ownership as were enjoyed by his father; but nevertheless, considering the legal position, one must face the two alternatives to which I have called attention, and from which, it seems to me, there is no possible escape. Whichever alternative is right, and is adopted, there will necessarily be some departure from the testator's intentions—that is, in some respects those intentions will remain unfulfilled.

After full consideration I have arrived at the conclusion that the secret trust must be enforced at the suit of the Attorney-General, and for the benefit of the public. This will preserve the legal ownership of the son, which the father intended him to have; it will also fulfil his intention, as far as it can be fulfilled, that the museum and grounds shall be maintained as heretofore, and will avoid the possibility of the property being diverted from its intended purpose, which would be open if the son were declared beneficial as well as legal owner. I give credit to Mr. Fox Pitt-Rivers for honest intention to do his very best to fulfil his father's wishes; but that creates at best only an imperfect obligation, and I must take it on the evidence that this would not have satisfied the father, who desired to secure the maintenance of the museum and grounds. On the other hand, there will be something less than complete fulfilment of the father's expressed wishes. But, in giving effect to wishes and trusts declared in the language of laymen and not in that of technical lawyers, one must be prepared to find that in some respects there will be failure and imperfection in detail, and one must be content to secure the substance even on those terms. Here the wish not to give the public rights, though strongly entertained and insisted on, may properly be regarded as a minor matter in comparison with the more important provision that the museum and grounds should be maintained as hitherto.

I propose to declare the construction of the will on the points mentioned, and further to declare that it has been established to the satisfaction of the Court that the gifts to the son were made to Mr. Fox Pitt-Rivers, and were accepted by him, for the express purpose that the museum and grounds should be maintained and used as they had been in the lifetime of the testator, and so that he and those claiming through or under him should hold the property subject to a trust for such maintenance and user. If to these declarations be added liberty to Mr. Fox Pitt-Rivers or any person claiming through or under him, or the Attorney-General, to apply touching any question respecting such maintenance and user, that will suffice for the present as regards what I have thus far discussed.

There are two further questions arising on the codicil: First, it remains to be determined what are "the objects of curiosity in my house at Rushmore, which are intended to be placed in the said museum." There has been some

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argument on this, and some discussion of questions of law which are likely to require solution when the facts have been ascertained. Indeed, I went so far as to express an opinion on some of these questions. I think, however, that it will be better to say no more about them, but merely to direct an enquiry following the language of the codicil. It is possible, and even probable, that in the course of prosecuting that enquiry some of the questions to which I have just referred will fall for decision; but, nevertheless, an effort to ascertain all the facts in this way seems to me the preferable course.

The other question is what, if any, interest Lord Avebury and Mr. Charles Hercules Read take in any, and what, property disposed of by the codicil. It is obvious that the testator intended them to occupy some position of trust—that is, to have some duties and responsibilities—for he appoints them trustees for the purposes so far as necessary in connection with the better maintenance of the museum and grounds, and the objects of interest thereon and therein, but he directly gives them no property of any kind; and I do not think they can be held to take any interest in the annuity of 300*l.*, which is expressly given to Mr. Fox Pitt-Rivers. In coming to the conclusion that they take no estate or interest in anything, and have no duties to perform by virtue of the codicil, I am, of course, failing to give effect to what may well be supposed to have been the testator's intention; but I do not see my way to implying any estate, interest, or duty where none is expressed. If I were now settling a scheme, I should suggest for the consideration of the Attorney-General whether it would not be right and convenient to make those gentlemen trustees for the purposes of such scheme, and to give them some definite position and duties under it; but this is not at present proposed, and I must leave the matter now.

Solicitors—Tathams & Pym; Kennedy, Hughes & Ponsonby; C. R. Woolley; Solicitor to Treasury.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

Farwell, J. 1901. Jan. 16, 17. } Mayo, *In re*; Chester *v.* Keirl.

Will—Construction—Bequest to Illegitimate Children—Expression of Number—Evidence—Admissibility.

The testator gave a share in his residue to "the three children respectively of Caroline Lewis born prior to her marriage with her present husband." There were four such children (all illegitimate) of Caroline Lewis, born in 1873, 1876, 1878, *and* 1880. *The testator was the father of the three later-born children and acknowledged the paternity:*—Held *that the burden of proof was on the child born in* 1873 *to shew that the testator intended to benefit him.* Held *also, that evidence that the testator knew of the existence of the child born in* 1873 *was admissible, but that his instructions for his will and declarations of intention to benefit the parties, and former wills, were inadmissible.*

The testator, by his will dated November 3, 1891, devised and bequeathed all and every his estate, of whatsoever nature or kind, and wheresoever situate, unto his executor, upon trust for realisation and conversion, and after payment out of the net proceeds of his debts, funeral and testamentary expenses, to divide the remainder of such proceeds into thirteen equal parts, and to pay such parts respectively to, or to hold the same in trust for, the respective persons next thereinafter named, that was to say "... a fourth fifth and sixth part for the three children respectively of Caroline Lewis born prior to her marriage with her present husband one part for each child." The testator died in 1899.

Caroline Lewis, prior to her marriage with her present husband, had four children, all illegitimate, respectively born in 1873, 1876, 1878, and 1880. The testator was the father of the three later-born children, and acknowledged the paternity.

A summons was taken out to determine who were the persons entitled, and on the hearing the following evidence was tendered: (*a*) That the testator knew

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of the existence of the child born in 1873; (*b*) instructions for his will and declarations of intention to benefit the parties; and (*c*) a former will in which the three later-born children were mentioned by name.

Dauney, for the executor.

J. Henderson, for the child born in 1873.—The cases shew that where there is a general description of the objects of the testator's bounty, but there is a mistake as to the number, the word which denotes an incorrect number will be disregarded, and all the persons answering the description will take—*Daniell* v. *Daniell* [1849],[1] *Yeats* v. *Yeats* [1852],[2] *Newman* v. *Piercey* [1876],[3] and *Groom, In re; Booty* v. *Groom* [1897].[4]

Dunham and *J. A. Strahan*, for the three other children.—Declarations of intention are admissible to shew the persons intended—*Doe d. Gord* v. *Needs* [1836][5] and *Doe d. Hiscocks* v. *Hiscocks* [1839].[6] Or it may be said that the inclusion of the fourth child is a matter of presumption, and presumptions may always be rebutted by evidence—*Newman* v. *Piercey*.[3]

J. Tanner, for the next-of-kin.—The gift is void for uncertainty.

FARWELL, J., after stating the facts to the effect above stated, continued: There is no dispute about the identity of the parties before me. The question is whether the testator, in the gift to "the three children of Caroline Lewis born prior to her marriage with her present husband" meant the three children of whom he was the father, and acknowledged the paternity, or meant to include the fourth child, born in 1873, of Caroline Lewis.

In my opinion, the evidence of the solicitor and other deponents as to whom the testator intended is not admissible. The law, as I understand it, is correctly stated in *Wigram, Extrinsic Evidence* (4th ed.), p. 7: "The question just suggested has become much perplexed by a want of proper attention, on the part both of the Courts and of text writers, to the different *purposes* to which the admissibility of extrinsic evidence in aid of the exposition of wills may be applied, and to the different *nature* of the evidence which (with reference to such different purposes) parties have tendered for admission. It is said (and correctly), that the statute"—the learned author is referring to the repealed provisions of the Statute of Frauds, but his observations apply with equal force to the corresponding provisions of the Wills Act—"by requiring a will to be in writing, precludes a Court of law from ascribing to a testator any intention which his written will does not express, and, in effect, makes the writing the only legitimate evidence of the testator's intention. 'No will is within the statute but that which is in writing; which is as much as to say, that all that is effectual and to the purpose must be in writing, without seeking aid of words not written.' At the same time, however, Courts of law, though precluded from ascribing to a testator any intention not expressed in his will, admit their obligation to give effect to every intention which the will properly expounded contains. The answer, therefore, to the question above proposed—enjoined as well as sanctioned by the general principle above mentioned—must be, that any evidence is admissible which, in its nature and effect, simply explains what the testator *has* written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he *intended* to have written. In other words, the question in expounding a will is not,—What the testator meant? as distinguished from—What his words express? but simply—What is the meaning of his words? And extrinsic evidence, in aid of the exposition of his will, must be admissible or inadmissible with reference to its bearing upon the issue which this question raises." But it was urged that the evidence was admissible on the ground stated in the

(1) 18 L. J. Ch. 157; 3 De G. & Sm. 337.
(2) 16 Beav. 170.
(3) 46 L. J. Ch. 36; 4 Ch. D. 41.
(4) 66 L. J. Ch. 778; [1897] 2 Ch. 407.
(5) 6 L. J. Ex. 59; 2 M. & W. 129.
(6) 9 L. J. Ex. 27; 5 M. & W. 363.

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seventh proposition in *Wigram*, at p. 109: "Courts of law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose. These cases may be thus defined:—where the object of a testator's bounty, or the subject of disposition (*i.e.* the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator." But the present case does not fall within this rule, for it cannot, in my opinion, be said that the objects of the testator's bounty are "described in terms which are applicable indifferently to" the two classes —namely, the three children whom he acknowledged as his own, or the four children of Caroline Lewis. It may become necessary hereafter for the Court of Appeal to consider whether the cases referred to by Sir James Wigram are consistent with the Wills Act.

The other evidence tendered is to establish what children Caroline Lewis had, and what children the testator knew she had. Parol evidence of both these facts is admissible and relevant. In my opinion there is no evidence really worthy of the name to shew whether the testator did or did not know of the existence of the fourth child born in 1873. In my opinion the onus is upon the fourth child to shew that the testator knew of his existence. In order to raise a latent ambiguity he has to prove the existence of facts which may give rise to a proper inference that the description "the three children" is equivocal. It is not like the case of a testator making a gift to the three children of a particular person; in that case the testator is presumed to mean all the legitimate children, the number being rejected on the presumption of mistake. In the absence of evidence that he knew of the existence of the eldest child, there is no ground for holding that he was included. I cannot extend the bequest to include another illegitimate child by another man born anterior to the testator's connection with Caroline Lewis. There will be a declaration that the three children born in 1876, 1878, and 1880, and they alone, are entitled.

Solicitors—H. F. & E. Chester, for the plaintiff; Prideaux & Sons; G. S. Goodman; J. E. Duffitt; Bower, Cotton & Bower, agents for Mayo & Son, Yeovil, for the defendants.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

JOYCE, J. 1901. Jan. 22, 26.

WILSON *v.* TAVENER.

Licence—Agreement to Let Hoarding—Yearly Tenancy—Notice to Quit.

An agreement to let A erect a hoarding for a bill-posting and advertising station, and use a wall of a house for the same purpose, at a rental of 10*l. per annum, payable quarterly, on the usual quarter-days,*—Held, *to constitute a licence and not a tenancy, and that a three months' notice to quit, expiring at the end of a year of the term, was a reasonable and valid notice to determine it.*

This was an action for an injunction to restrain the removal of a hoarding and wall used as a bill-posting station by the plaintiff under an agreement for letting the same by the defendant, and for damages.

The agreement for letting was contained in two letters, each dated January 9, 1895, and each signed by the plaintiff and the defendant.

The one letter, from the defendant to the plaintiff, was as follows:

"To Mr. G. H. Wilson, bill-poster, &c.,
85 Falcon Road, Clapham Junction.

"I hereby agree to let you erect hoarding for a Bill-posting and advertising station upon the ground being the forecourt of the cottage No. 158 Falcon Road, Battersea. The said hoarding to be fixed in line and as close to the gable wall of the premises No. 160 Falcon Road aforesaid but not to touch or be fastened to the said wall, and to be erected and kept in repair at your

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own expense. Together with the end or gable wall of the cottage No. 148 Falcon Road for the same purpose at the rent of Ten pounds per annum payable quarterly on the four usual quarter-days, the first quarter to be due on the 25th day of March 1895. It being understood that the Sign Board of Falcon Hotel shall not be interfered with and the hoarding so erected is your property.

"Dated this ninth day of January 1895.

"(sd.) G. H. Wilson.

"C. Tavener.

"Witness to both signatures:

"J. S. Tavener."

The other letter, from the plaintiff to the defendant, was substantially to the same effect *mutatis mutandis*.

After several intermediate notices to quit, on September 29, 1900, the defendant's solicitors gave the plaintiff notice to quit and deliver up the forecourt and premises held under the agreement of January 9, 1895, as a bill-posting and advertising station, and to remove all boards or hoardings and all other fixtures and effects fixed by him on or about the premises on or before December 25, 1900.

On December 22 the plaintiff issued the writ in the action claiming an injunction and damages; but it was not served on the defendant until the afternoon of December 27. On the morning of December 27 the defendant, who was rebuilding the premises, had caused the wall and hoarding to be removed by her builders.

On December 24 the plaintiff obtained an *ex parte* injunction from the vacation Judge restraining the defendant in terms of the writ; but this was not served on the defendant until December 29.

On January 11, 1901, the plaintiff moved for an interlocutory injunction; but no order was made on the motion except that the action be set down for trial without pleadings and be heard on January 22.

Moyses, for the plaintiff.—The agreement of January 9, 1895, created a tenancy from year to year, and this can only be determined by a six months' notice expiring on December 25. It was not merely a licence.

Badcock, K.C., and *Ribton*, for the defendant.—This agreement was merely a licence to use the premises in the way indicated, and can be determined by either party at any time on giving a reasonable notice. Three months' notice is a reasonable notice.

Cur. adv. vult.

Jan. 26.—JOYCE, J., after stating the facts, continued: It is clear from the evidence before me, having regard to what has taken place, that no case is made out for an injunction, and the only question to be determined is whether the plaintiff is entitled to any damages: there are no facts in dispute.

This resolves itself into a question of law whether a three months' notice which had been given by the defendant to the plaintiff to determine this user of the premises was a sufficient notice, or whether the plaintiff was entitled to a six months' notice on the ground that he was a tenant or *quasi*-tenant of the defendant. If he is entitled to six months' notice, then he is entitled to substantial damages. The arrangement between the parties was contained in two documents, both dated January 9, 1895, under which the use of the gable-end and wall were enjoyed by the defendant. Both parties signed each document, and there is no material difference between the two. It is not necessary for me to read them through again; but they require careful consideration. The result, in my opinion, is that these documents did not confer on the plaintiff any right to the exclusive possession of any land or building of the defendant, and therefore I think there was no demise or lease, and the relation of landlord and tenant was never created between them. In point of fact, the effect of the documents was to give the plaintiff a mere licence which subject to the express terms of the contract between the parties was revocable at any time, and therefore I think the ordinary law of landlord and tenant is not applicable.

No one has suggested that it was a perpetual arrangement. It must therefore have been capable of being put an end to by either party, though, having regard to the times of payment, I think it would be

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difficult to make out that the arrangement could be determined in the middle of a quarter or perhaps in the middle of the year; but in fact it was determined at the end of the year, and a quarter's notice was given. I can find no law or Act of Parliament which lays it down that a six months' notice is necessary to determine such an arrangement as this, and I hold that a three months' notice was reasonable and sufficient.

In my opinion the action fails, and must be dismissed with costs.

Solicitors—G. Aplin Nichols, for plaintiff; Woodbridge & Sons, for defendant.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

COZENS-HARDY, J. 1900. Nov. 24. } RENDELL, *In re*; WOOD *v.* RENDELL.

Administration—Grant to Attorney—Duty to Distribute Assets.

Where letters of administration have been granted to the attorney of the person entitled, who is abroad, the attorney is administrator for all purposes, and is not justified in paying over assets to his principal for distribution until such principal has himself taken out administration.

The plaintiff in this case had taken out letters of administration to the personal estate of Thomas Rendell, deceased, who died intestate in England, as the attorney of his widow, who resided in America. The grant was in the usual form to "Richard Wood the lawful attorney of Elizabeth Rendell (who now resides in the United States of America) the lawful widow and relict of the intestate for her use and benefit and until she shall apply for and obtain letters of administration of the said estate of the said intestate."

The intestate left children who resided with his widow in America, but died possessed of personal estate in England. The plaintiff had got in the English assets; the intestate's funeral and testamentary expenses had been paid, and he left no debts. He took out this summons, asking whether he could safely pay over the residue of the property to the widow, or was bound himself to divide it among the persons beneficially entitled, and for the determination of the domicil of the deceased.

The widow had not taken out administration in the United States or elsewhere.

The domicil of the deceased was held to be British.

T. Douglas, for the plaintiff, was stopped by the Judge.

T. L. Wilkinson, for the widow.—The case is governed by the principle laid down in *De la Viesca* v. *Lubbock* [1840],[1] where administration had been granted to the defendant as attorney to a person appointed judicial administrator *pendente lite* by a Spanish Court. The Vice-Chancellor held that the defendant was bound by the recital in his grant that he was an attorney, and might safely pay over the money in his hands to the principal. In *Chambers* v. *Bicknell* [1843][2] it was held that beneficiaries could bring an action against a person to whom administration was granted as attorney. It does not shew that his having paid over the assets to his principal would not have been a good defence to such an action. There are some remarks of Vice-Chancellor Kindersley upon that case in *Edgar* v. *Reynolds* [1858][3] which ought to be before the Court, though the case is not in point.

In the present case it would be much the most convenient course to pay the money over to the widow. The only beneficiaries besides herself are her own children, and they all reside in America.

COZENS-HARDY, J.—This is a case of some importance, but not of much difficulty. The plaintiff is a person who has been constituted by the Probate Division administrator of the estate of the deceased.

(1) 10 Sim. 629.
(2) 2 Hare, 536.
(3) 27 L. J. Ch. 562; *sub nom. Dowell, In re; Edgar* v. *Reynolds*, 4 Drew. 269.

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RENDELL, IN RE.

He has taken an oath in common form to administer according to law all the estate of the deceased. The letters of administration were granted to him as lawful attorney, it is true, of the defendant, who in the character of his principal if she came here could obtain administration. She is not the legal personal representative of the deceased, either in the United States or elsewhere. Until she takes out administration she can only claim here as a person beneficially entitled to a share of the estate of the deceased. Her position as widow of the deceased is that there is no portion of the property of the deceased in England or elsewhere for which she can give a good receipt. Can I hold that it is the duty of the administrator to hand the assets over to one of the class of persons entitled who has not clothed herself, here or elsewhere, with the character of legal personal representative? I think not. The observations of Vice-Chancellor Kindersley in the case of *Edgar* v. *Reynolds*[3] are in accordance with strict common-sense and very much in point. He says in reference to *Chambers* v. *Bicknell*,[2] "That is a clear decision, that the person to whom administration is granted, on the nomination of the party entitled to it, is full administrator, exactly as if he had obtained administration in his own right, as regards the claim of other persons." And again: "When the administrator is once constituted, he is liable to all claims by persons who are entitled to claim against the estate." That being so, in my opinion the plaintiff could not get a good receipt if he handed over the assets to the widow.

Solicitors—Atkinson & Dresser, for all parties.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

BUCKLEY, J. 1901. Jan. 12, 19, 26. } ST. HILDA'S INCORPORATED COLLEGE, CHELTENHAM, *In re.*

Company—Memorandum of Association — Alteration — Practice — Association Formed for Purpose not of Gain—Licence of the Board of Trade—Sanction of Board of Trade to Proposed Alteration—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 23—*Companies* (*Memorandum of Association*) *Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1.

Where an association incorporated with the licence of the Board of Trade under section 23 *of the Companies Act*, 1867, *as an association formed for purposes not of gain, without the word "limited," desires to alter its memorandum of association, the proper course is first to submit the proposed alterations to the Board of Trade, and if the Board approves and authorises them then to apply to the Court under the Companies* (*Memorandum of Association*) *Act*, 1890, *for its sanction.*

Petition under the Companies (Memorandum of Association) Act, 1890, by St. Hilda's Incorporated College, Cheltenham (hereinafter called the association), for the confirmation by the Court of a resolution altering its memorandum of association by extending its objects so as to enable it to take over a similar institution known as St. Hilda's, Oxford.

The association was incorporated on November 8, 1895, under the Companies Acts, 1862 to 1890, as an association formed as a limited company, and authorised under licence of the Board of Trade to be registered with limited liability without the addition to its name of the word "limited."

The objects of the association as stated in clause 3 of its memorandum were:

"(*a*) To take over the buildings and property at present used for the purposes of the Establishment known as St. Hilda's College, Cheltenham, with the land and appurtenances belonging thereto, and other the assets and property now used for the purposes of the said College, subject to all existing liabilities in connection therewith, and to carry on the work of the said College on the existing premises

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ST. HILDA'S INCORPORATED COLLEGE, CHELTENHAM, IN RE.

and elsewhere as an Educational Establishment, Hostel, and House or Residence for Gentlewomen and Girls engaged or interested in Education, whether as Students or Teachers, and whether pursuing their studies or avocation as Teachers or simply as Students.

"(*b*) To provide Board, Lodging, and Attendance and all other necessaries and conveniences to Students attending Courses of Instruction at the Cheltenham Ladies' College, and to afford such Students facilities for study, research, and cultivation.

"(*c*) If thought desirable to found Scholarships, Exhibitions and Prizes, and to assist needy and deserving Students by loans and otherwise or by affording to them all or any of the advantages of the College either gratuitously or on reduced terms.

"(*d*) To affiliate the College, if thought desirable, with any University, College, or Association.

"(*e*) To purchase, rent, or otherwise acquire land, buildings, furniture, books, apparatus, and other property real or personal, and to build or alter existing buildings as may be deemed desirable.

"(*f*) To sell, let, or dispose from time to time of any land, buildings or other property of the Association not required for the purposes aforesaid.

"(*g*) To borrow or raise money, or to secure money due at interest upon Banking Account or otherwise, by the issue of or upon Bonds, Debentures, Mortgages, Bills of Exchange, Promissory Notes, or other obligations of the Association.

"(*h*) To do all such other things as are incidental or conducive to the attainment of the above objects, and that in case the Association shall take or hold any property subject to the jurisdiction of the Charity Commissioners for England and Wales, the association shall not sell, mortgage, charge or lease such property without such consent as may be required by law, and as regards any such property the Managers or Trustees of the Association shall be chargeable for such property as may come into their hands and shall be answerable and accountable for their own acts, receipts, neglects and defaults, and for the due administration of such property in the same manner and to the same extent as they would as such Managers or Trustees have been if no incorporation had been effected, and the incorporation of the Association shall not diminish or impair any control or authority exercisable by the Chancery Division or the Charity Commissioners over such Managers or Trustees, but they shall as regards any such property be subject jointly and separately to such control and authority as if the Association were not incorporated."

The memorandum of association further provided as follows:

"4. The income and property of the Association whencesoever derived shall be applied solely towards the promotion of the objects of the Association, as set forth in this Memorandum of Association, and no portion thereof shall be paid or transferred directly or indirectly by way of dividend or bonus or otherwise howsoever by way of profit to the Members of the Association; provided that nothing herein contained shall prevent the payment in good faith of remuneration to any officer or servant of the Association, or other person, not being a Member of the Association, in return for any services actually rendered to the Association; nor prevent the payment of interest at a rate not exceeding 5 per cent. per annum on money borrowed from, or lawfully due to any Member of the Association, nor the payment to any Member for occasional service, but this provision shall not authorise the payment of a salary to any Member as principal, teacher, or other officer—nor the appointment of any Member to any office with a salary.

"5. The liability of the Members is limited.

"6. Provided that the fourth paragraph in this Memorandum is a condition on which a license is granted by the Board of Trade to the Association, pursuant to section 23 of the Companies Act, 1867.

"7. If any Member of the Association pays or receives any dividend bonus or other profit in contravention of the terms of the fourth paragraph of the Memorandum, the liability of every Member of the governing body of the Association who has concurred in or authorised such

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profit, shall be unlimited; and the liability of every Member of the Association who has received any such dividend, bonus, or other profit as aforesaid, shall likewise be unlimited.

"8. The Capital of the Association is 50*l.*, divided into 100 shares of ten shillings each.

"9. If upon the winding up or dissolution of the Association there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the Members of the Association; but shall be given or transferred to some other Institution or Institutions having objects similar to the objects of the Association, to be determined by the Members of the Association at or before the time of dissolution; or in default thereof by such Judge of the High Court of Justice as may have or acquire jurisdiction in the matter.

"10. True accounts shall be kept of the sums of money received and expended by the Association and the matter in respect of which such receipt and expenditure takes place, and of the property, credits, and liabilities of the Association, and subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed in accordance with the regulations of the Association for the time being shall be open to the inspection of the Members. Once at least in every year the accounts of the Association shall be examined and the correctness of the balance-sheet ascertained by one or more properly qualified Auditor or Auditors."

Immediately after its incorporation the association took over, and had ever since carried on, the undertaking of the educational establishment known as St. Hilda's College, Cheltenham, referred to in its memorandum.

Of the one hundred shares of 10*s.* each in the capital of the association, nineteen only had been issued, all of which were fully paid up.

St. Hilda's Hall, Oxford, was an educational institution for gentlewomen and girls, established at Oxford by the founders of the association, and closely allied therewith.

It was deemed to the advantage of both institutions that St. Hilda's Hall, Oxford, should be taken over by and become part of the undertaking of the association; and, subject to the obtaining from the Court of an order confirming the proposed alterations in its memorandum of association, all necessary arrangements in that behalf had been completed.

By a special resolution of the association, passed and confirmed on November 24 and December 11, 1900, it was resolved:

"That the following alterations and additions be made in the memorandum of association, that is say:

"Clause 1. To change the name of the Association to 'St. Hilda's Incorporated College.'

"Clause 3. To add the following sections at the end of Section (*a*) of the said clause (namely):

"Section (*a.* 1). To take over the buildings and property at present used for the purposes of the establishment known as St. Hilda's College, Oxford, with the appurtenances and other the assets and property now used for the purposes of the said establishment subject to all existing liabilities in connection therewith and to carry on the work of the said establishment on the existing premises and elsewhere in or near Oxford as an educational establishment, hall, Hostel and house of residence for gentlewomen and girls engaged or interested in education, whether as students or teachers and whether pursuing their studies or avocations as teachers or simply as students.

"Section (*a.* 2). To found or take over and carry on wherever from time to time may be thought desirable similar educational establishments, halls, Hostels and houses of residence for gentlewomen and girls engaged or interested in education.

"Section (*b*). To add the words 'and at Oxford or elsewhere' immediately after the word 'college' in the said section.

"Section (*c*). To add the words 'or hall or other similar establishment' immediately after the word 'college' in the said section.

"Section (*d*). To add the words 'hall or other similar establishment' immediately

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after the word 'college' in the first line of the said section."

The alterations and additions to clause 3 of the memorandum referred to in the special resolution would, it was alleged, enable the association to carry on its undertaking more economically and efficiently by affording greater facilities for education and to obtain its main purpose by new and improved means, and also to enlarge the local area of its operations.

The Board of Trade was approached on behalf of the association, and intimated that it would sanction the proposed change of name of the association subject to the filing with the Registrar of Joint-Stock Companies of a printed copy of the special resolution in favour of the change, and this was done.

No bonds, debentures, or other securities or obligations of any kind had been issued by the association, and the association was not indebted beyond its current housekeeping expenses and the current salaries and wages of the staff and the employees of the association.

The Board of Trade had been served by the direction of the Judge, and appeared.

Abraham, for the petition.—The Board of Trade has no objection whatever to the amalgamation of the institution at Oxford with that at Cheltenham, but is indisposed to give the association general leave to affiliate similar institutions in other parts of the country. I should therefore propose, in order to meet that objection, to insert in the proposed additional clause—namely, (*a* 2)—some such words as "subject to the consent of the Board of Trade."

[BUCKLEY, J.—Does the Board of Trade assent to the alterations in the memorandum of association as leaving the company still one falling within section 23 [1] of the Companies Act, 1867.]

R. J. Parker, for the Board of Trade.—The Board of Trade has no objection to the general purport of the proposed alteration, but it wishes to guard against giving the institution any power to absorb undertakings which may be carried on for the purpose of gain. It is suggested that the words rendering the consent of the Board of Trade necessary to any further extension should be inserted.

[BUCKLEY, J.—I am not content with that. I think that the proper course is that the institution should apply to the Board of Trade and enquire whether it will licence the company with the altered memorandum or will assent to the proposed alterations as proper to be made under the existing licence. The petition had better stand over generally, with liberty to restore when the Board of Trade has made up its mind as to the exact nature of the alterations to which it is ready to assent as leaving the company still within the description contained in section 23 of the Companies Act, 1867.]

Jan. 28.—The petition having been restored to the list,

Abraham stated that the matter had again been before the Board of Trade, and that the Board was prepared to sanction the proposed alterations with the addition of the words "with the consent

(1) The Companies Act, 1867, s. 23, enacts: "Where any association is about to be formed under the Principal Act as a limited company, if it proves to the Board of Trade that it is formed for the purpose of promoting commerce, art, science, religion, charity, or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income of the association, in promoting its objects, and to prohibit the payment of any dividend to the members of the association, the Board of Trade may by licence, under the hand of one of the secretaries or assistant secretaries, direct such association to be registered with limited liability, without the addition of the word limited to its name, and such association may be registered accordingly, and upon registration shall enjoy all the privileges and be subject to the obligations by this Act imposed on limited companies, with the exceptions that none of the provisions of this Act that require a limited company to use the word limited as any part of its name, or to publish its name, or to send a list of its members, directors, or managers to the registrar, shall apply to an association so registered. The licence by the Board of Trade may be granted upon such conditions and subject to such regulations as the Board think fit to impose, and such conditions and regulations shall be binding on the association, and may, at the option of the said Board, be inserted in the memorandum and articles of association, or in both or one of such documents."

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of the Board of Trade" at the beginning of clauses (*a* 2) and (*b*) of the objects clause.

R. J. Parker, for the Board of Trade.

BUCKLEY, J.—This is a petition presented by a company which holds a licence of the Board of Trade granted under section 23 of the Act of 1867, to carry on its business without the addition to its name of the word "limited." The petition is under the Memorandum of Association Act, 1890, asking the Court to confirm certain alterations in the memorandum of association. When the petition came before me I directed the Board of Trade to be served, and I desire to say why I did that. Where the Board of Trade grants its licence under section 23 of the Act of 1867, it does so upon seeing the memorandum of association and satisfying itself that the company, to whom the licence is granted, is such as satisfies the provisions of that section. Where a petition is presented to the Court for alterations in the memorandum of association under the Act of 1890, it may be that those alterations would so alter the scope of the company's objects as that the Board of Trade would not have licensed it had its memorandum been in the altered form, because it would have fallen within that section. It seemed to me, therefore, that it was necessary for me, before I dealt with this petition, to direct the Board of Trade to be served. The Board of Trade in this case has intimated that the alterations in its opinion are such as to leave the company one which can properly hold its licence. If the Board of Trade had not taken that view, it appears to me that the Court must have taken one or other of two courses: It must either have refused the petition; or must have granted it only upon the terms that the company should alter its name by adding the word "limited." Orders under the Act of 1890 can be made by virtue of section 1, sub-section 3, "on such terms and subject to such conditions as to the Court seems fit." If the Board of Trade had not assented to the alterations as being in its opinion proper in the case of a company holding its licence, I should have had to direct either that the petition should be dismissed or that the proper alterations should be made, so that the company should no longer trade without the addition of the word "limited" to its name. However, the Board of Trade see no objection, and I therefore make the order. The company must pay the costs of the Board of Trade.

Solicitors—Waterhouse & Co., agents for Winterbothams & Gurney, Cheltenham, for petitioner; Solicitor to Board of Trade, for Board of Trade.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

KEKEWICH, J. 1901. Jan. 16, 17.

BATH *v.* BATH.

Fund in Court—Payment Out to Wrong Person — Stop Order — "Default" of Paymaster-General — Court of Chancery (Funds) Act, 1872 (35 & 36 *Vict.* c. 44), *s.* 5.

The words "guilty of any default" in section 5 *of the Court of Chancery (Funds) Act*, 1872, *point to some act of misfeasance or carelessness attributable to the Paymaster-General himself or to those under his direction and superintendence.*

Consequently, where a person entitled to a fund in Court has not obtained a stop order on the fund, and it has been paid out to a wrong person, the Paymaster-General is not guilty of default within the meaning of the section, and the Treasury cannot be called upon to replace the fund in Court out of the Consolidated Fund.

Petition.

The action related to money paid into Court many years ago by the South-Eastern Railway Company under the Lands Clauses Consolidation Act, 1845, in respect of lands taken by them, in which the plaintiff, who was then an infant, was interested.

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BATH v. BATH.

In 1879 the plaintiff came of age, and shortly afterwards an order was made for payment out to him of various funds in Court, but such order did not include the funds the subject of the present application.

In December, 1891, a receiving order was made against the plaintiff in the County Court of Kent, and in his statement of assets the debtor did not include these funds. The debtor having been adjudicated a bankrupt, on April 20, 1893, an agreement was entered into between him and the present petitioners, the Creditors' Assets Co., Lim., by which the latter undertook to pay into the County Court a sum sufficient to pay all the debts and costs in full, provided that if the scheme of arrangement, as set out in the first schedule to the agreement, were approved by the Court, all the bankrupt's property, described in the second schedule thereto, should be vested in the petitioners, and the bankruptcy should be annulled.

On July 11, 1893, an order was made by which the scheme was approved, the receiving order rescinded, and the adjudication annulled, and "that all the property of the above-named debtor be, and that the same henceforth shall become vested in the Creditors' Assets Co., Lim.," and the money necessary to pay all the debts and costs in full was paid into Court.

The solicitor who acted for the bankrupt throughout was Mr. Charles Parr (a respondent to this petition), who was in the employ of Messrs. May, Sykes & Batten, the solicitors to the debtor. At the date of the order part of the bankrupt's property consisted of 471*l.* 9*s.* 3*d.* cash and 989*l.* 18*s.* New Consols in Court standing to the credit of the action, and paid in as above stated; but neither he nor his solicitors, nor Parr, nor the petitioners, had any knowledge of the existence of those funds, and consequently no stop order was placed upon them.

In 1895 the plaintiff became aware of the existence of these funds to which he was entitled, and on February 29, 1896, on his application, Kekewich, J., made an order for payment out of them to him. The application was supported by affidavits of the plaintiff, Parr, and Frederick John Smith purporting to shew no incumbrances.

In April, 1899, the petitioners, having become aware of the existence of these funds and of the payment out to the plaintiff, presented this petition, asking that the order of February 29, 1896, might be discharged, and an order directing the Paymaster-General or the Commissioners of the Treasury to replace to the credit of the action the sums of 471*l.* 9*s.* 3*d.* cash and 989*l.* 18*s.* New Consols, together with all dividends accrued due since February 29, 1896, and for distribution of the funds as if they were now in Court, and payment out to the petitioners. They alleged that the existence of the order of the County Court of July 11, 1893, had been concealed from Kekewich, J., when he made the order of February 29, 1896, for payment out.

The plaintiff and his solicitor stated in their evidence that the funds in Court were never intended to vest in the petitioners; the scheme of arrangement, though it spoke in general terms of "all the property" of the debtor, contemplated only such property as was contained in the second schedule.

Kekewich, J., held that the vesting order of the County Court vested in the present petitioners everything, whether known or unknown, which had been vested in the trustee in the bankruptcy for the benefit of the creditors. That being so, the order made by his Lordship on February 29, 1896, was not properly made, all the facts not being before the Court; and the funds which had been paid out to the plaintiff in fact really belonged to the petitioners.

This decision raised the question of liability to replace the funds amongst the several respondents.

Renshaw, Q.C., and *E. H. Pollard*, for the petitioners.

Warrington, Q.C., and *Muir Mackenzie*, for the plaintiff, the respondent Bath.

P. O. Lawrence, Q.C., and *Micklem, Q.C.*, for the respondent Parr.

The Attorney-General (*Sir R. B. Finlay, Q.C.*) and *R. J. Parker*, for the Treasury,

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called attention to an unreported case of *Jones* v. *Jones*,[1] decided by Lord Cairns, L.C., in 1879.

(1) JONES v. JONES.

LORD CAIRNS.—The facts under which this application is made to me do not appear very perfectly on the petition, but I will state them as I understand them to be, after hearing the admissions agreed to between the petitioner and the counsel for the Treasury.

The estate of a testator named Lacy was being administered in the Court of Chancery. As to a part of the estate there was an intestacy subject to the life interest of a Mrs. Hutchison. 1,278*l.* 9*s.* 4*d.* was carried over to a separate account representing this part of the estate, and it was entitled "The account of the share of the testator's residuary estate given to Mrs. Hutchison for life." This fund, subject to Mrs. Hutchison's life interest, belonged to Elizabeth Harriet Lacy, the sole next-of-kin of the testator. She died in 1853, and her administrators were James Samuel Jones and John Des Champs Jones. Her next-of-kin were eight in number and John Des Champs Jones was one of the eight. John Des Champs Jones by indenture of February 28, 1862, mortgaged his eighth share to the petitioner Fielding with a power of sale; and on March 24, 1862, the petitioner Fielding obtained the usual stop order on the fund.

About eight years afterwards the petitioner Fielding, under the power of sale in the mortgage, sold this share of John Des Champs Jones to the petitioner Gibbons and assigned it by an indenture dated July 16, 1870; and from that time the petitioner Fielding ceased to have any interest in the fund. Gibbons did not obtain any stop order on the fund.

Then came the Court of Chancery (Funds) Act, 1872, by which the office of the Accountant-General was abolished, and it was enacted that her Majesty's Paymaster-General should perform all the duties and exercise all the powers and authorities which were performed by or vested in or capable of being exercised by the Accountant-General. The funds of the Court of Chancery were taken over by the State, and section 5 of the Act provided that the Consolidated Fund should be liable to make good to the suitors of the Court all money in Court, and that, if the Lord Chancellor should certify to the Treasury in writing that the Paymaster-General had failed to "pay any money in Court, or transfer or deliver any securities in Court, required by any order of the Court of Chancery to be paid, transferred, or delivered from his account, or has been guilty of any default with respect to such money or securities," the Treasury should pay out of the Consolidated Fund the sum certified to be required to pay the money or to replace the securities or make good such default.

It is under this section that the present application is made to me. It is said that the Paymaster-General has been guilty of a default with respect to the share of John Des Champs Jones in the fund in question. This default is attempted to be made out in the following way: Mrs. Hutchison, the tenant for life, died on June 20, 1872; John Des Champs Jones had died previously. It appears that in 1862, when the petitioner Fielding obtained his stop order, a note of the stop order was made in the usual way against the account in question in the book at that time in use in the office of the Accountant-General, in which the account of that fund was contained. In process of time, but before the office of Accountant-General was abolished, this book was filled up and ceased to be used, and the account of the fund in question was carried into a new book in which it was from that time kept. In carrying it into the new book the notice of the stop order was inadvertently omitted; and in the new book it stood without any notice of the stop order. In February, 1873, after the duties of the Paymaster-General had commenced, those who were then the personal representatives of Elizabeth Harriet Lacy applied to the Court of Chancery to distribute the fund. A certificate of the fund was given in the usual way by the Paymaster-General, and no mention was made in the certificate of any stop order. The Court thereupon ordered the fund to be paid to the personal representative of Elizabeth Harriet Lacy.

It is said upon this state of facts that I should certify that the Paymaster-General has been guilty of default with respect to the money. It is said that he ought to have known of the stop order, and ought to have taken care that the fund was not paid out without notice having been given according to the stop order. I should have very great difficulty in holding that the Paymaster-General had under these circumstances been "guilty of any default." These words appear to me to point to some act of misfeasance or carelessness attributable to the Paymaster-General himself or to those under his direction and superintendence at the time when the act occurs. I incline to think that the negligence in this case occurred in the time of the Accountant-General when the account of the fund was carried into the new book; but it is not necessary that I should decide this, and I do not desire to do more than to intimate a doubt with regard to it.

But it seems to me impossible upon another ground that I can give the certificate which the petitioners ask for. The stop order was obtained by the petitioner Fielding, and it required notice to be given to Fielding. But Fielding ceased, as I have said, in 1870 to have any interest in the fund, and he is not in any

The facts in that case sufficiently appear from the written judgment given below.

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BATH *v.* BATH.

KEKEWICH, J.—I am absolutely bound by *Jones* v. *Jones*,[1] and must dismiss the petition as against the Paymaster-General and the Commissioners of the Treasury with costs. As between the other respondents to the petition, the plaintiff in the action and his solicitors, there must be a declaration that each of them is jointly and severally liable to replace the funds in Court which have been improperly paid out, together with interest at 4 per cent. per annum from the date of payment out, and to pay the costs of the petitioners and of the other respondents.

Solicitors—Ranger, Burton & Frost, for petitioners; Payne, Shaw-Mackenzie & Lake, for plaintiff; Armitage & Strouts, for Parr; Solicitor to the Treasury, for Treasury.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

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way damnified by the fund having been paid to the representative of Elizabeth Harriet Lacy. On the other hand Gibbons, who is interested in the fund, never obtained any stop order and never required any notice to be given to him, and he therefore cannot complain of any default as against him on the part of the Paymaster-General. It was indeed stated before me by the petitioners, and apparently not denied, that the solicitor for Fielding was also solicitor for Gibbons; and it was said that, if notice had been given to Fielding, his solicitor would have known it and would have communicated the notice to Gibbons. But this was an accident which might or might not have led to the result supposed, and which cannot give to either of the petitioners any right which they would not otherwise have had. The security provided by the Court was a security for Fielding only, and it is necessary in my opinion that Fielding should be able to shew me that he, Fielding, has been in some way injured by the manner in which the Court has dealt with the funds. I must therefore decline to make an order upon the petition.

BUCKLEY, J. 1901. Feb. 5. } SMITH'S SETTLED ESTATES, *In re.*

Settled Land—Street Improvements—Expenses of Sewering and Paving—Charge upon Premises—Incumbrance—Discharge—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150 *and* 257—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 11, *sub-s.* 1.

A tenant for life who has been required by a urban authority under section 150 *of the Public Health Act*, 1875, *as owner of premises forming part of the settled land, to pay certain expenses for making up streets fronting, adjoining, or abutting thereon, and has done so with a view of keeping the charge constituted by section* 257 *of that Act alive for his own benefit, is entitled under section* 11 *of the Settled Land Act*, 1890, *to raise the money necessary for discharging such incumbrance and the costs thereof by mortgage of the settled land or any part thereof.*

Adjourned summons.

John Smith, who died on March 26, 1879, by his will dated December 3, 1874, devised all his real estates to trustees to hold the same to the uses and upon the trusts thereinafter declared of and concerning the same—that was to say, as to certain specified freeholds in favour of his four daughters therein named, and as to and concerning all the residue of his real estate to the use of his son George Smith during the term of his natural life, he keeping the buildings in good and tenantable repair and insured against fire, and committing no waste, and after his decease upon trusts for the benefit of the children of George Smith, and in default of such children for the testator's four daughters.

The testator's residuary estate comprised (*inter alia*) the Lodge estate, Mill Road, Cambridge, with ten cottages erected thereon, which was bounded by four streets. None of these streets except Mill Road was a properly made-up street.

In 1895 the corporation of the borough of Cambridge, acting as an urban council, gave notices under section 150 of

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the Public Health Act, 1875, to George Smith, the tenant for life, requiring him to sewer, level, pave, flag, and channel three of the streets. Subsequently the corporation executed the works referred to in the notices, and by notices of apportionment, dated in 1897 and 1898, required him to pay an aggregate sum of 678*l.* 17*s.* 10*d.* in respect of his proportion of the expenses.

In August, 1900, the corporation obtained in the Court of summary jurisdiction orders for the payment by the tenant for life of the 678*l.* 17*s.* 10*d.*, and on August 3 he paid that sum out of his own pocket.

This was a summons taken out by the tenant for life against the surviving trustee of the will, asking (*inter alia*) for a declaration that the applicant had power under section 11 of the Settled Land Act, 1890, to raise by mortgage of the settled land or of any part thereof the money required to discharge the 678*l.* 17*s.* 10*d.* charged under the Public Health Act, 1875, on part of the settled land.

The applicant in his affidavit in support of the summons alleged that he always disputed his liability for the payment of the 678*l.* 17*s.* 10*d.*, and only paid the same after the orders of the Court of summary jurisdiction were made, and to avoid further proceedings and expense, and that he had no intention whatever of paying that sum for the benefit of the inheritance.

W. Brinton, for the summons.—The 678*l.* 17*s.* 10*d.* which the tenant for life was called upon to pay is by section 257 of the Public Health Act, 1875, constituted a charge upon the total ownership of the settled land—that is, on the respective interests of every owner for the time being in proportion to his interest—*Birmingham Corporation* v. *Baker* [1881].[1]

It is therefore an incumbrance for the discharge of which the tenant for life is entitled under section 11 of the Settled Land Act, 1890,[2] to raise the necessary money by mortgage of the settled land. And the case is not affected by the circumstance that the tenant for life paid off the charge in the first instance out of his own money, the presumption being that he intended to keep it alive for his own benefit—*Harvey, In re*; *Harvey* v. *Hobday* [1895],[3] and *Burrell* v. *Egremont (Earl)* [1844].[4]

A. Roscoe, for the trustee.—The expenses of making up roads are, by section 150 of the Public Health Act, 1875, recoverable from the "owner" of the premises; and, by section 4 of the Act, "owner" is defined to mean "the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." Section 11 of the Act of 1890[2] only applies where there is an incumbrance to be paid off. Here the incumbrance has already been paid off and no longer exists, and therefore the section has no application.

BUCKLEY, J.—It seems to me that this money was payable in respect of expenses incurred by the local authority which they could recover from the owner, and which, until recovery, were "a charge on the premises in respect of which they were incurred" within section 257 of the Public Health Act, 1875. The tenant for life was the owner of the premises, and under section 150 was liable to pay for these works; but they were charged upon the inheritance in the first instance. He has paid them, and he is entitled to keep the charge alive in his own favour and say it must be deemed an incumbrance within section 11 of the Settled Land Act, 1890,[2]

(1) 17 Ch. D. 782.

(2) The Settled Land Act, 1890, s. 11, subs. 1, enacts: "Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee-simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly."

(3) 65 L. J. Ch. 370; [1896] 1 Ch. 137.

(4) 13 L. J. Ch. 309; 7 Beav. 205.

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and to raise the money necessary for discharging that incumbrance, and the costs thereof, by mortgage of the settled land or any part thereof.

Solicitors—Field, Roscoe & Co., agents for Ginn & Matthew, Cambridge, for all parties.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

WRIGHT, J. 1901. Jan. 16, 17. } LADY FOREST (MURCHISON) GOLD MINE, *In re.*

Company — Winding-up — Promoter —Sale—Secret Profit—Commencement of Fiduciary Relation—Liability to Account —Misfeasance Summons.

A vendor who sells property to a company towards which he stands in a fiduciary relation at the time of the sale is not liable to account in the winding-up of the company for any undisclosed profit made by him on the transaction, unless either, first, his conduct has been tainted with fraud; or, secondly, he stood towards the company in a fiduciary relation, not only at the time of the sale, but also at the time of his original acquisition of the property in question.

Olympia, Lim., *In re* (67 L. J. Ch. 433; [1898] 2 Ch. 153; *affirmed, sub nom.* Gluckstein *v.* Barnes, *in* HOUSE OF LORDS, 69 L. J. Ch. 385; [1900] A.C. 240), *discussed and distinguished.*

Cape Breton Co., *In re* (54 L. J. Ch. 822; 29 Ch. D. 795), Ladywell Mining Co. *v.* Brookes (56 L. J. Ch 684; 35 Ch. D. 400), *and dicta of* LORD CAIRNS *in* New Sombrero Phosphate Co. *v.* Erlanger (48 L. J. Ch. 73, 84; 3 App. Cas. 1218, 1234, 1235) *followed.*

The mere suppression by the vendor of the amount of profit that is being made by him on the sale to the company does not by itself amount to fraud within the meaning of the above proposition.

Where a syndicate is formed for the acquisition and working of a gold mine absolutely and entirely for their own benefit, and without, at the time, any present intention of promoting or selling to any other company, the mere fact that they contemplate the bare possibility of the promotion by them of and sale to another and larger company, in the event of their needing further capital, or being able to sell at a greatly enhanced price, does not place them in any fiduciary relation at the time of their own formation to any such company which they may happen subsequently to promote.

Misfeasance summons issued in the winding-up of the Lady Forest (Murchison) Gold Mine, Lim. (hereinafter called the company), under section 10 of the Companies (Winding-up) Act, 1890, on behalf of the New Balkis Eersteling, Lim., who were creditors of the company, asking (*inter alia*) that Darlington Simpson might be declared liable to pay to the company certain sums of cash amounting together to 4,460*l.*, and to account to the company for the value of 4,260 of their shares of 1*l.* each, which had been allotted as fully paid up, on the ground that the said sums of cash and the said shares were a profit made by the said Darlington Simpson as a promoter of the company without its knowledge or sanction on the acquisition by it of the Lady Forest Gold Mine, in which the said Darlington Simpson was interested.

The Murchison (Western Australia) Gold Syndicate, Lim. (hereinafter referred to as the syndicate), of which Darlington Simpson was a director, was incorporated under the Companies Acts, 1862 to 1890, on February 11, 1895, with a nominal capital of 25,000*l.*

The prospectus of the syndicate, dated February 7, 1895, stated (*inter alia*) that the object of the syndicate was to "acquire, work, and further develop a gold-mining property in the centre of the Murchison Goldfields, Western Australia." The price to be paid for the purchase of the property in question was fixed at the sum of 15,000*l.* The prospectus further intimated that immense profit was to be derived "from the acquisition of such properties at an early stage, and, after a

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comparatively small development, reselling them to the public." It also stated that it would be seen by the engineer's report and estimate that the net working capital of the syndicate, after payment of the purchase-money of 15,000*l.*, would be "sufficient to fully equip and work the 10 stamp mill, and yield, on the basis of the average value of the lodes . . . . a nett profit to the shareholders of 36,000*l.* a year."

In accordance with this prospectus, the Lady Forest Gold Mine was duly acquired by the syndicate at the purchase-price of 15,000*l.*, and the mine was successfully worked by them till the time of its sale to the company. The company was promoted by the syndicate, and was incorporated under the Companies Acts, 1862 to 1890, on October 16, 1895, with a nominal capital of 100,000*l.* The object of the company, as stated in its prospectus issued on October 17, 1895, was (*inter alia*) "to acquire, work, and further develop" the Lady Forest Gold Mine. The purchase-money to be received by the syndicate was fixed at 75,000*l.*, payable as to 50,000*l.* in fully paid-up shares, and as to 25,000*l.*, in cash or shares at the option of the company. The property was subsequently duly acquired by the company on these terms.

The first directors of the company, and the directors of the syndicate at the time of the sale by them of the Lady Forest Gold Mine, were identical; and this fact was expressly stated on the prospectus of the company. It was alleged, however, by the plaintiffs that the syndicate never disclosed to the company, at the time of the said sale, the amount of the profit that was being made by the syndicate on the sale by them to the company of the Lady Forest Gold Mine.

The sum of 4,460*l.* in cash and the value of the 4,260 fully paid-up shares, for which the said Darlington Simpson was now summoned to account, represented the profit alleged to have been personally received by him as a shareholder in the syndicate on the re-sale to the company of the property in question.

Swinfen Eady, Q.C., and *J. W. Manning*, for the New Balkis Eersteling, Lim.—The syndicate, including Simpson, stood in a fiduciary position towards the company at the date of the sale by the syndicate to the company of the Lady Forest Gold Mine. The amount of the profit made by the syndicate was not, however, disclosed, and Simpson, accordingly, is liable to account to the company for his share of it—*Olympia, Lim., In re* [1898, 1900].[1] The fact that the directors of the syndicate and of the company were the same does not of itself constitute any disclosure by the syndicate to the company.

Jenkins, Q.C., and *Muir Mackenzie*, for Darlington Simpson.—The decision in *Olympia, Lim., In re*,[1] has no application to the present case. That decision was based on two elements that are absent here—first, on fraud; and secondly, on the fact that in that case the vendor was actually in a fiduciary position towards the company at the time of his acquisition of the property re-sold by him to the company. In the Court of Appeal, Lindley, M.R., and Rigby, L.J., based their decision on the fact that the vendor did, in fact, stand in a fiduciary position towards the company at the time when his syndicate first acquired the property; whilst Collins, L.J., in the Court of Appeal, and Lord Halsbury, L.C., and Lord Macnaghten, in the House of Lords, principally proceeded on the footing that there was fraud. Lord Robertson, again, in the House of Lords, founded his judgment on both aspects alike. Neither of these elements is to be found in the present case. On the one hand, there was clearly no fraud—no *suggestio falsi*—but merely non-disclosure. On the other hand, it cannot be claimed that the syndicate was in any fiduciary position whatever to the company at the time of its acquiring the gold mine on February 11, 1895. The present case is, therefore, entirely uninfluenced by the decision in *Olympia, Lim., In re*.[1] In the present case the only remedy open to the company was to rescind the contract—*New Sombrero Phosphate Co.* v.

(1) 67 L. J. Ch. 433; [1898] 2 Ch. 153. Affirmed in the House of Lords, *sub nom. Gluckstein* v. *Barnes*, 69 L. J. Ch. 385; [1900] A.C. 240.

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Erlanger [1878][2]; and that, of course, could only have been done whilst the respective parties were still in a position to be remitted to their original *status in quo*. There are, however, a number of cases which shew that, where a vendor did not stand in a fiduciary position towards the company to whom he has sold at the time of his own acquisition of the property in question, and where there has been no fraud, the company has no other remedy except this of rescission—has no right to call upon the vendor to account for his undisclosed profit—*Coal Economising Gas Co., In re; Gover, ex parte* [1875],[3] *New Sombrero Phosphate Co.* v *Erlanger*,[2] *Cape Breton Co., In re* [1885],[4] *Ladywell Mining Co.* v. *Brookes* [1887],[5] and *Cavendish-Bentinck* v. *Fenn* [1887].[6] If *Olympia, Lim., In re*,[1] really supports the interpretation now put upon it by the plaintiff company, then all of these decisions, only one of which was even referred to in the judgment of the House of Lords, must be taken to have been tacitly overruled. That, however, is not the case; and these decisions are still good law, and govern the present action.

Swinfen Eady, Q.C., in reply.—The facts would certainly have justified us in asking for rescission, had it been possible to put the parties back into their original *status in quo—Cavendish-Bentinck* v. *Fenn*.[6] The result, however, of the judgment in *Olympia, Lim., In re*,[1] is to give us a new, additional remedy, and to impose upon the vender to a company towards which he stands in a fiduciary position a quite new liability—the liability to disclose the extent, if any, of the profit he is making. It is not enough for the vendor to shew that he has made no positive misrepresentation—that is, that he is not guilty of fraud; he must do more, he must shew that he has disclosed the whole truth. Thus Lord Halsbury says in the House of Lords: "I think the Master of the Rolls is absolutely right in saying that the duty to disclose is imposed . . . . by well-settled principles of common law." Again, Lord Macnaghten says: "Secretly, and therefore dishonestly, they put into their own pockets the difference between the real and the pretended price."

[WRIGHT, J.—But in *Cape Breton Co., In re*,[4] and *Ladywell Mining Co.* v. *Brookes*,[5] there was no more disclosure than here.]

Lydney and Wigpool Iron Ore Co. v. *Bird* [1886][7] and *Dunne* v. *English* [1874][8] are other authorities in favour of my contention.

As to the theory that in order to fix a vendor with liability it is necessary to carry back his fiduciary position to the time of his original acquisition of the property, that is inconsistent with the language of Lord Macnaghten in *Gluckstein* v. *Barnes*[1]: "he says that he was not in a fiduciary position . . . before the company was formed. . . . But to my mind the point is immaterial, for it is not necessary to go back beyond the formation of the company." In *Cape Breton Co., In re*,[4] there was no idea of selling to a company to be subsequently promoted, such as there undoubtedly was here. If necessary, however, it ought to be held that both *Cape Breton Co., In re*,[4] and *Ladywell Mining Co.* v. *Brookes*[5] have now been overruled by the House of Lords.

WRIGHT, J.—A serious and difficult question is involved in this summons. To me, however, it is clear that the finding of fact, or the construction, upon which the Court of Appeal and the House of Lords mainly proceeded in *Olympia, Lim., In re*,[1] has no counterpart in the present case.

There were two matters which lay at the root of the judgments in the Court of Appeal and the House of Lords in *Olympia, Lim., In re*.[1] One was the conclusion at which the Lords Justices and the law Lords arrived—that is, that from the beginning, from the date of the earliest agreement for acquisition on the part of

(2) 48 L. J. Ch. 73; 3 App. Cas. 1218.
(3) 45 L. J. Ch. 83; 1 Ch. D. 182.
(4) 54 L. J. Ch. 822; 29 Ch. D. 795.
(5) 56 L. J. Ch. 684; 35 Ch. D. 400.
(6) 57 L. J. Ch. 552, 555; 12 App. Cas. 652, 658.
(7) 55 L. J. Ch. 875; 33 Ch. D. 85.
(8) L. R. 18 Eq 524

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the vendors, there was also a commencement of the promotion of the company which was ultimately promoted. I need not go into the language in which they describe how they arrived at that conclusion. It is enough to say that the property was there acquired by the vendors, and acquired by them in such a way that they ought to be regarded as having been, at the time of their acquisition of it, in some sense promoters of the vendee company. The second ground upon which the Court of Appeal proceeded was an express and fraudulent representation made by the vendors to the vendee company. Now, neither of these circumstances is present here. To me it is plain, looking at the prospectus of the vendor syndicate dated February 7, 1895, and the prospectus of the vendee company dated October 17, 1895, that, when the vendor syndicate acquired the Lady Forest Gold Mine, they acquired it absolutely and entirely for themselves, and not in the least degree with any then present intention of selling it to any other company, or of forming any other company whatever. It is quite true, of course, that they regarded it as a possible event in the future that another company, with a larger capital, might be formed; but they plainly contemplated working the mine for themselves, for their own profit, in the first instance, and contemplated forming another company only in case they should want further working capital, or should find that the undertaking had grown so large that they could sell it at a greatly enhanced price to another company. There was not, accordingly, any present intention of promoting and selling to another company. To my mind, accordingly, it is impossible to regard the vendor syndicate as having acquired the property in question in such a way as to affect their acquisition with the character of an acquisition by promoters of an intended company. Nor is there here any express fraud or misrepresentation such as there was in *Olympia, Lim., In re.*[1] Although I feel compelled to say that Simpson and the other directors, who were members of the syndicate, were guilty of a breach of duty in the matter, yet it seems to me that they were not guilty of anything which, in any ordinary sense of the word, can be described as fraud at all. They disclosed that they were directors of the vendor syndicate, and thereby they necessarily disclosed that they were making some profit. It is quite true that they did not disclose what profit they were making, and in doing that, as it seems to me, they were wrong, and guilty of a breach of duty; but that is quite a different thing, as is pointed out in *Englefield Colliery Co., In re* [1878],[9] from such a gross fraud as there was in *Olympia, Lim., In re.*[1]

Then comes the question—if the decision of the Courts of Appeal in *Olympia, Lim., In re,*[1] does not apply, can Simpson be held liable on any general ground? I confess that, if I am permitted to say such a thing, I myself personally should have agreed with the dissenting judgment of Lord Justice Bowen in *Cape Breton Co., In re*[4]; but it seems to me that I am not at liberty to do so. I should have thought that circumstances existed here sufficient to fix Simpson with liability. He was one of the directors of the Lady Forest Co., and one of its promoters. As director of that company he assisted in paying out of its coffers 75,000*l.*, or the value of 75,000*l.*, part of which was for himself and his fellow-members of the syndicate, and he never told the Lady Forest Co. how much he and his fellow-members of the syndicate were to get in consequence of the act by which he, their director, was binding them. In advising the purchase by the Lady Forest Co., as a director of that company, he was not acting independently or disinterestedly; and he was making for himself a profit, though not, I think, a dishonest profit, because it appears that the shares of the syndicate stood at a very high rate. I do not say that the profit that he was making for the syndicate was out of proportion to the profit made in similar cases; but I think that he ought to have disclosed it, and also that he could not justify paying out the

(9) 8 Ch. D. 388.

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money of the company when he did not bring an independent mind to the question. But is that enough? It seems to me that I am precluded by three cases from holding that it is enough. There is *Cape Breton Co., In re*,[4] which has been sometimes explained as proceeding upon particular facts; there is *Ladywell Mining Co.* v. *Brookes*,[5] which has not been so explained; and there is the statement of Lord Cairns in *New Sombrero Phosphate Co.* v. *Erlanger*[2] in the House of Lords—all of which appear to me to go to this result: that there is a breach of duty in such a case sufficient to entitle the vendee company to rescind or repudiate the contract, if matters have not been too much altered in the meantime; but that there is no sufficient ground for requiring a person in the position of Simpson to repay the profit or the benefit that he has received out of the sale. It is quite true, I think, that the cases on which so much reliance has been placed on Simpson's behalf have been to some extent doubted, perhaps even questioned, in later cases. Certainly some of them have been more or less criticised. But they have been cited and discussed, without ever being expressly dissented from, or, still less, overruled, in the cases to which I have been referred.

Under those circumstances it seems to me that I have nothing to do except to follow what I believe to be their effect, and to dismiss the summons.

Solicitors—Dale, Newman & Hood, for applicants; Harwood & Stephenson, for respondent.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

FARWELL, J. 1901. Jan. 18, 24. } BRITISH MUTOSCOPE AND BIOGRAPH CO. *v.* HOMER.

Landlord and Tenant—Distress for Rent—Patented Chattel—Sale to Purchaser with Notice of Restrictions on User—2 Will. & M. c. 5, s. 2.

The purchaser of a patented article at a sale of a distress for rent does not acquire the right to use the article, in breach of a contract entered into by the tenant with the patentee restricting the right to use the article, if at the time of purchase he has notice of the contract.

The plaintiffs, the British Mutoscope and Biograph Co., were the owners of letters patent for an invention relating to mutoscopes. The letters patent were in the ordinary form of a grant from the Crown of "our especial licence, full power, sole privilege, and authority, that the said patentee by himself, his agents, or licensees and no others, may . . . make, use, exercise, and vend the said invention"; and contained a clause commanding "all our subjects whatsoever . . . that they do not at any time during the continuance of the said term of 14 years, either directly, or indirectly, make use of or put in practice the said invention, or any part of the same, nor in any wise imitate the same nor make, or cause to be made, any addition thereto or subtraction therefrom . . . without the consent licence or agreement of the said patentee." The other plaintiffs, the London and District Mutoscope Co., were licensees with the exclusive right to use and licence others to use coin-operated mutoscopes for exhibition purposes within the City of London.

In October, 1900, the last-named company delivered to one Maynard ten mutoscopes to which their licence applied, for exhibition purposes, on certain conditions contained in an agreement of October 23, 1900. These conditions, contained in a printed form addressed to the company, were as follows: "1. The money to be collected fortnightly by your own man, and checked by me or by some one in my employ. 2. I am to receive 25 per

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cent. of the gross takings by way of rent, payable when the collection is made. 3. You are at liberty to move the machines at any time, giving seven days' notice in writing. 4. The machines are to remain the sole property of yourselves. 5. In the event of any machine ceasing to work I will give you notice at once, and the same is to be rectified by you at your expense. 6. If at any time these premises change hands, I agree to give you due notice, in order that you may remove machines or arrange with new tenants. 7. I undertake to protect machines from wilful damage so far as I am able. 8. All coins found in the machines to be the property of yourselves subject to the percentage above-mentioned."

The mutoscopes were placed in a shop, No. 99 Whitecross Street, in the City of London, of which Maynard was tenant. On December 23, 1900, the landlord seized the ten mutoscopes under a distress for arrears of rent due from Maynard. On January 5 following, the mutoscopes were put up for sale by auction, and one of them was bought by the defendant. The plaintiffs then commenced an action for an injunction to restrain the defendant from "using, selling, letting, exhibiting, or dealing with, the mutoscope coin-operating machine, during the continuance of the letters patent." The plaintiffs moved for an interlocutory injunction in the terms of the writ, and it was agreed that the application should be treated as the trial of the action.

It was admitted that the notice required by 2 Will. & M. c. 5 was given, and that the defendant knew before he purchased the mutoscopes of the terms and conditions under which they had been supplied to Maynard.

Brydges, for the plaintiffs.—The landlord's right to sell depends on the statute 2 Will. & M. c. 5.[1] If a patentee sells an article he must doubtless be deemed to have sold the full right to use it. So where the patentee employs an agent for sale, the purchaser is not bound by any conditions restrictive of its user of which he has no notice—*Incandescent Gas Light Co* v. *Cantelo* [1895].[2] But if the purchaser has notice of restrictions on user imposed by the patentee he cannot use a patented article in breach of those conditions—*Incandescent Gas Light Co.* v. *Brogden* [1899].[3]

The *Defendant*, in person.—I am entitled to all the rights of the licensee. The licensee could put these machines anywhere and permit any one to use them. The statute 2 Will. & M. c 5 did not confer any fresh right to distrain, but merely a right to sell what always could be taken.

[He referred to *Co. Lit.* 118*b*, 182*b*.]

Brydges replied.

Cur. adv. vult.

FARWELL, J., after stating the facts to the effect above stated, continued: Counsel for the plaintiffs and the defendant, who appeared in person, asked me to accept the foregoing as an agreed statement of facts, and to treat this as the trial of the action and determine their rights under 2 Will. & M. c. 5. No point was raised or argued on the question whether the machine, being on the premises for exhibition purposes, was within any of the common-law exceptions to the general right of distress, and I accordingly express no opinion on this point.

A patentee is entitled to restrain any person in whose hands he finds an article which infringes his patent from infringing such patent, unless the defendant can shew a title direct or derivative from the patentee to use the patent; and it has recently been held in *Incandescent Gas Light Co.* v. *Brogden*[3] that a purchaser who buys with knowledge of the conditions under which his vendor is authorised to use the patented invention is bound by such conditions, and that such conditions are not contractual, but are incident to and a limitation of the grant

(1) So far as material to be stated, section 2 of the statute 2 Will. & M. c. 5 is in the following terms: "where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, . . the person distraining shall and may . . . cause the goods and chattels so distrained to be appraised . . . and after such appraisement shall and may lawfully sell the goods and chattels so distrained."

(2) 12 Rep. Pat. Cas. 262.

(3) 16 Rep. Pat. Cas. 179.

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of the licence to use, so that if the conditions are broken there is no grant at all. The defendant, therefore, would be clearly liable in the present case, unless the statute 2 Will. & M. c. 5 protects him; and he contends that the statute has this effect. At common law a landlord had no right to sell distresses, but only to detain them as pledges for enforcing payment. The right of sale, therefore, depends on statute. Shortly stated, the statute provides that where any goods or chattels shall be distrained for any rent reserved and due upon any lease, and the tenant or owner of the goods or chattels distrained shall not within five days after such distress taken and notice thereof left at the premises charged with the rent distrained for, replevy the same, the person distraining may, in the manner pointed out by the Act, appraise the goods and chattels seized, and after such appraisement sell them for the best price. The Act obviously extends to goods and chattels belonging to persons other than the owner of the demised premises, and it is therefore impossible for the plaintiffs to succeed on the short ground that the mutoscope and the right to use it free from conditions were not the tenant's property. This appears from *Lyons* v. *Elliott* [1876],[4] where Mr. Justice Blackburn says, "the general rule at common law was that whatever was found on the demised premises, whether belonging to a stranger or not, might be seized by the landlord and held as a distress till the rent was paid." But it is equally clear that the Act does not extend the common-law right to seize, but merely adds a power to sell that which the landlord could seize at common law. The landlord's right to distrain is founded on the principle that the rent reserved by his demise issues out of the land, and he distrains by taking possession (in the nature of a pledge) of goods and chattels found upon such land. Thus *Co. Lit.* 47*a*: "*Reserve to him a yearly rent, &c.* First, it appeareth here by Littleton that a rent must be reserved out of the lands or tenements, whereunto the lessor may have resort or recourse to distrain, as Littleton here also saith, and therefore a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, corodie, multure of a mill, tithes, fairs, markets, liberties, privileges, franchises, and the like." And with this accords *Rolle's Abr.* f. 446, "Reservations" (B), pl. (2) and (4): "(2) Un rent ne poet estre reserve hors d'ascun incorporeal inheritance, come advowsons, commons, offices, corodies, multure d'un molyn, dismes, fairs, markets, liberties, priviledges, franchises, and tiel semble. . . . (4) Un rent ne poet estre reserve hors d'un chose que gist solment en grant pur ceo que nul distresse poet estre." See also *Jewel's Case* [1588].[5] In distraining, therefore, the landlord looks to the land demised, and to the goods and chattels found thereon. If the demise be of an incorporeal hereditament no entry can be made upon it, and no goods and chattels can be found upon it; and in like manner if the goods and chattels be of an incorporeal nature, they can have no local position upon the land demised, and are incapable of seizure into the possession of the landlord.

It is essential to a distress that the property distrained should be capable of physical possession. Now a patent right is a privilege granted by the Crown in the exercise of its prerogative, to the first inventor, and is described in *Stephen's Commentaries* (7th ed.), vol. 2, p. 9, as an incorporeal chattel. I should be disposed myself to classify it as a *chose in action*, which has been defined to be "a right to be asserted, or property reducible into possession, either by action at law or suit in equity." See *Fleet* v. *Perrins* [1869].[6] [His Lordship then referred to the common form of a grant of letters patent for an invention, and continued:] Now this necessarily confers a right to bring an action to restrain infringement, and to recover damages. At any rate it is not a *chose in possession*. But a *chose in action* cannot be found upon the demised premises. It has no locality, and is incapable of manual seizure; and this is borne out by the fact that for this reason *choses in action* could not, at common law, be taken in execution under a writ of *fieri facias*—

(4) 45 L. J. Q.B. 159; 1 Q.B. D. 210.

(5) 5 Co. Rep. 3.

(6) 38 L. J. Q.B. 257, 262; L. R. 4 Q.B. 500, 513.

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see *Stephen's Commentaries* (7th ed.), vol. 3, p. 617; or of *levari facias*—*Dundas* v. *Dutens* [1790].[7] The landlord has seized a chattel—namely, the mutoscope—and the plaintiffs raise no claim to any property in this; but the patentee's right is entirely distinct from the right of property in the chattel. It is a right of action to prevent any dealing with that chattel in contravention of the letters patent, and such right is not part of, or capable of seizure with, the chattel, but is outside and antagonistic to the possessory title to the chattel. The plaintiff's rights arise out of the grant under the Royal prerogative, coupled with section 16 of the Patents Act, 1883, which enacts that every patent when sealed shall have effect "throughout the United Kingdom and the Isle of Man." The landlord has not seized, and could not seize, these rights, and the defendant has only purchased such a chattel as the landlord could and did seize. Having regard to the decision in *Incandescent Gas Light Co.* v. *Brogden*,[3] the defendant is in no better position than if Maynard had been a mere infringer. It is not a question of contract *inter partes* affecting a chattel seized and sold by a landlord, but of the absence of any licence, in the event that has happened, to use the patented invention. If the defendant's contention were correct, an infringer might fill his room with infringing articles, and pay his rent by allowing his landlord to seize and sell them free from any right of the patentee to complain of the infringement. The plaintiffs are therefore entitled to an injunction as asked, and to the costs of the action.

Solicitors—Lloyd-George, Roberts & Co., for plaintiffs.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

(7) 1 Ves. 196.

BUCKLEY, J.
1901.
Jan. 31. Feb. 1.
} RIVINGTON *v.* GARDEN.

Costs—Higher Scale—Special Grounds—Rules of the Supreme Court, 1883, Order LXV. rule 9.

The fact that a case of difficulty and importance has been conducted with extreme ability and diligence on the part of the solicitors does not constitute a special ground for allowing costs on the higher scale within Order LXV. rule 9.

Williamson *v.* North Staffordshire Railway (55 L. J. Ch. 938; 32 Ch. D. 399) *followed.*

Davies Brothers *v.* Davies (56 L. J. Ch. 481), Leeuw, *In re*; Rein *v.* Wrathall (93 L. T. J. 333), *and* Marriott *v.* Cobbett (38 S. J. 620) *not followed.*

Partition action arising under the will of John Hillman, who died in 1830.

By his certificate the Master found that ten persons respectively were absolutely entitled to 120-180ths of certain property, the subject-matter of the action, in shares varying from 5-180ths to 20-180ths, and certain other persons, whose shares were settled, to the remaining 60-180ths. There were many defendants, and the titles were complicated.

On further consideration the proposed minutes provided for costs of the action to be taxed as between solicitor and client and on the higher scale.

H. Terrell, K.C., and *Popham*, for the plaintiffs.—This was a case of exceptional difficulty requiring exceptional ability and diligence on the part of the solicitors, by the exercise of which the estate has been saved a considerable sum of money. There are, therefore, "special grounds arising out of the nature or the difficulty of the case" within the meaning of Order LXV. rule 9,[1] and costs on the higher scale ought to be allowed—*Davies Brothers*

(1) The Rules of the Supreme Court, 1883, Order LXV. rule 9, provide: "The fees set forth in the column headed 'higher scale' in Appendix N. may be allowed, . . . if, on special grounds arising out of the nature and importance, or the difficulty or urgency of the case, the Court or a Judge shall . . . . so order; . . ."

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RIVINGTON v. GARDEN.

v. *Davies* [1887],[2] *Leeuw, In re; Rein* v. *Wrathall* [1892],[3] and *Marriott* v. *Cobbett* [1894].[4]

[*Williamson* v. *North Staffordshire Railway* [1886],[5] *Paine* v. *Chisholm* [1891],[6] *Ellington* v. *Clark* [1888],[7] and *Assets Development Co.* v. *Close* [1900][8] were also referred to.]

Dibdin, K.C., for a defendant, supported the application.

Whinney, H. W. Vaughan Williams, Crossfield, Christopher James, and *J. W. Manning* respectively, for other parties concerned, did not oppose.

BUCKLEY, J.—On this further consideration there is only one question upon which I have to pronounce a decision, and that is, whether I ought to allow the costs of the action as between solicitor and client, and on the higher scale. Of the parties before me, no one opposes the application for costs on those terms; but there are persons who are trustees and who come here and say that they cannot consent; and consequently, they not being in a position to take an order by consent, I must consider what my powers are under Order LXV. rule 9.

Counsel for the applicants ask me to assume that, if I were to refer to the Master and ask him for his opinion upon the matter, he would certify that the action has been one of considerable complication, and that it has been carried through in an extremely able way in chambers, and that all needless detail has been avoided. I do not know how that is; but, for the purposes of this judgment, I will make the assumption that that is so. Under these circumstances ought I to allow, under Order LXV. rule 9, costs on the higher scale? I am not impressed with the great difficulty and importance of this case. I have seen partition actions that were very much more difficult to work out than this. But, again, I will assume that this is a case of difficulty and of importance, and that the amount in question is large.

The argument which has been addressed to me seems, shortly stated, to be this —that, whereas the rule says I may allow costs on the higher scale "on special grounds arising out of the nature and importance, or the difficulty or urgency of the case," I am thereby authorised to allow costs on the higher scale on account of the ability and diligence with which the solicitors have conducted an important case. My first observation is that the rule does not say so. What is the exact meaning of the rule is, I agree, a matter of great difficulty; but I am guided by two decisions in the Court of Appeal, and upon them I must use the best of my judgment in determining what is right under the present circumstances. I have had to deal with them before in *Assets Development Co.* v. *Close*,[8] but I will deal with them again on this occasion. In *Williamson* v. *North Staffordshire Railway*[5] there was before the Court of Appeal a case involving difficult questions of fact and of law, and Lord Justice Cotton said that the case was one of importance and of extreme difficulty; but the Court of Appeal did not see their way to allow costs on the higher scale by reason of that fact. There is an interlocutory observation by Lord Justice Fry, who says: "The rule does not say 'on the ground of the importance and difficulty' of the case, but on 'special grounds arising out of the nature and importance, &c.'" Later he assents to the proposition that the case is one of great importance and difficulty, but says: "Is that a special ground?"—of course meaning that it was not a special ground, and the Court of Appeal so held. Looking at that judgment it appears to me impossible for me to say that from the fact that this case was one of difficulty and importance I derive authority to reward solicitors for the ability with which it is said they conducted it. Directly you have a case of importance and difficulty, the solicitor, if he does his duty, will of course be put on his mettle, and will use exceptional care and diligence in attending to it. But I must find a special ground arising out

(2) 56 L. J. Ch. 481.
(3) 93 L. T. J. 333.
(4) 38 S. J. 620.
(5) 55 L. J. Ch. 938; 32 Ch. D. 399.
(6) 60 L. J. Q.B. 413; [1891] 1 Q.B. 531.
(7) 58 L. T. 818.
(8) 69 L. J. Ch. 715; [1900] 2 Ch. 717.

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of the nature and importance. I agree that the fact that the solicitor has used extraordinary ability and diligence is a special ground, but it is not a special ground arising out of the importance of the case—it is a special ground arising from the fact that he was a man of ability, and that he used his best ability in the case. There are no words in the rule which apply to that. *Williamson* v. *North Staffordshire Railway*,[5] which was decided in 1886, was followed in 1891 by *Paine* v. *Chisholm*.[6] In that case Mr. Justice Stephen had given costs on the higher scale. The Court of Appeal discharged his order, and did so on the ground that he had no power to give them, because the rule was not satisfied. I need not say that, but for this rule, the Court has no power to give costs on the higher scale. Lord Justice Bowen, at the conclusion of his judgment, says: "I should wish to add that we have not dealt lightly with this question. We took time to consider our judgment in order that we might go through all the cases that could have any bearing on the point." The effect of the judgment in *Paine* v. *Chisholm*[6] was this —that in order to make the rule applicable you must satisfy two conditions: first, that the case is one of importance or difficulty or urgency, whichever cause you are going to rely upon; and secondly, that the special ground alleged is one arising out of that fact. Lord Esher says so in his judgment. Lord Justice Bowen says so too; and Lord Justice Fry says this: "The judge may make the order 'upon special grounds arising out of the nature and importance, or the difficulty or urgency of the case.' It is to be observed, therefore, that there must be 'special grounds.' What the precise meaning of that expression may be it is difficult to define; but it is, at any rate, clear that it cannot apply unless there is something peculiar and special in the circumstances of the case. Again, the special grounds must arise from the nature and importance, or from the difficulty, or from the urgency of the case." Those, then, are the two cases in the Court of Appeal. There are other cases in the Court of Appeal, such as *Ellington* v. *Clark* [1888],[9] where costs on the higher scale were allowed in a patent action on the ground that "When the plaintiffs brought scientific witnesses it was necessary for the defendants to bring scientific witnesses."

(9) 5 Rep. Pat. Cas. 319, 328.

Upon the assumption which I have made, it appears to me that the special ground alleged here is not that the case was a difficult one or an important one—and, having regard to the decision of *Williamson* v. *North Staffordshire Railway*,[5] the application could not have been sustained upon that—but is that the solicitors, having to deal with a complicated and important case, used exceptional ability and conducted the proceedings in an extremely able way and escaped all unnecessary details, and thus saved costs. In other words, the special ground alleged is the conduct of the solicitor and the ability of the solicitor, and not the nature of the case.

But then authorities have been referred to which are said to be contrary to that, and I will just mention them in their order of date. First, there is *Davies Brothers* v. *Davies*,[2] before Mr. Justice Kekewich in 1887. My first observation is that in that case *Williamson* v. *North Staffordshire Railway*,[5] which was decided in 1886, was not cited. If the learned Judge had had that case before him he would I think have treated it as governing the case with which he had to deal. Mr. Justice Kekewich there said: "I am now dealing with a case which is certainly a special one as regards its nature and importance. It necessarily occupied a considerable time, many witnesses were called, and the oral evidence was of a special character. It involves large questions of the highest importance to the parties concerned, and is important also to others. It was presented to the Court in such a manner that I have been able to discuss the real questions in issue without wasting time on oral or documentary evidence touching matters not really in dispute, or for some other reason not immediately relevant. Without wishing or intending the slightest injustice to counsel, who have rendered me invaluable assistance, I think that this is in great measure due to the way in which the case was prepared for trial on both sides, the

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labour and responsibility falling mainly on the plaintiffs, and it seems to me to be essentially a case to which Order LXV. rule 9 applies. I therefore propose to direct that the costs subsequent to reply shall be taxed on the higher scale." This dwells upon the facts that the case was a heavy one and that a large amount of oral evidence had been given. But the Court of Appeal in *Williamson* v. *North Staffordshire Railway* [5] had said that that was not a special ground within the rule. Next is a case before Mr. Justice Chitty in 1892—*Leeuw, In re; Rein* v. *Wrathall*.[3] In this case *Williamson* v. *North Staffordshire Railway* [5] again was not cited. It was not an opposed case. It was an administration action, and counsel for the plaintiff asked for costs on the higher scale. Mr. Byrne, Q.C. (now Mr. Justice Byrne) and Mr. Hatfield Green supported the plaintiff in bearing testimony to the efficient manner in which the solicitors had done their duties, and it is simply stated that Mr. Pochin appeared as counsel for residuary legatees. There seems to have been no argument and no opposition, and Mr. Justice Chitty said (according to the note) that, "where skill, ability, and promptitude in winding-up an estate were specially displayed, the solicitors were entitled to special acknowledgment. In this case there was no doubt the solicitors for the plaintiff had saved a great deal to the estate in the way of costs, and they had demonstrated the rapidity with which the machinery of the Court could be used for winding up estates where solicitors understood the method by which the machinery could be put in motion. He thought the solicitors should be rewarded for having carried through the administration so rapidly and successfully, and he should order their costs to be taxed on the higher scale." The other case is *Marriott* v. *Cobbett*.[4] It was a partition action. *Williamson* v. *North Staffordshire Railway* [5] again was not cited; and at the end of the report are these words in brackets, "We are favoured with a report of the above case"; I infer that it was not a report by one of the gentlemen who usually report for the *Solicitor's Journal*, but that note had been obtained from somebody or another. It is, therefore, of but little authority. The learned Judge is there reported to have said that "he had received from his Chief Clerk a special report as to the extremely able way in which the proceedings in chambers had been conducted, and to the effect that all needless detail had been avoided, and, although he very rarely allowed the higher scale, he should do so in this case as an encouragement to others." I regard those two notes—for they are nothing more than notes or decisions—with doubt. It may very well be that there were some circumstances before the learned Judge, which do not appear in these notes, which might have brought the case within the rule. And in *Leeuw, In re*,[3] it seems to me that there were circumstances which the learned Judge might and perhaps did rely upon which would have brought the case within the rule although the report does not state that he did rely upon them. I can only say, as far as I am concerned, I am unable to find in the rule anything which says that costs on the higher scale may be allowed on the special ground that solicitors ought to be encouraged or ought to be rewarded, which is the language attributed to the learned Judge in those notes—as to which I may express my doubts as to whether his Lordship used it in that connection. But those two cases, as it appears to me, are inconsistent with *Williamson* v. *North Staffordshire Railway*,[5] and if those cases had been adversely argued, and the former case had been called to the attention of the learned Judge, I do not think that he would have decided them in that way. It is sufficient for me to say that I decline to follow them, because, as it appears to me, they are contrary to the principle which is laid down by the Court of Appeal.

The result therefore is, that, as in *Assets Development Co.* v. *Close*,[8] I can only say, following the decisions in the Court of Appeal, that, unless I can find a special ground arising from some one of the matters mentioned in Order LXV. rule 9, I have, it appears to me, no jurisdiction to order costs on the higher scale. I am of opinion that the conduct of the solicitors

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in the matter—the way in which they have done their duty—is neither "the nature of the case," nor "the importance of the case," nor "the difficulty of the case," nor "the urgency of the case." It is the manner in which they have dealt with those things, which to my mind is a totally different thing. Under those circumstances, therefore, I must refuse to order costs on the higher scale.

Solicitors—Gresham, Davies & Dallas; Clayton, Sons & Fargus; Thorold, Brodie & Bonham Carter; W. M. Lloyd; Hewitt & Urquhart.

[*Reported by Arthur Lawrence, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
Feb. 6, 7.

DE FALBE, *In re*; WARD *v.* TAYLOR.

Fixtures—Tapestry—Ornamental Purposes—Tenant for Life and Remainderman—Damages for Removal—Costs of Appeal—Shorthand Note of Judgment.

The exception of ornamental fixtures from the rule "Quicquid plantatur solo solo cedit" applies as well between tenant for life and remainderman as between tenant and landlord.

Tapestries affixed by means of nails and moulding to the walls of a drawing-room by the tenant for life for the purpose of enjoying them as ornaments are within the exception of ornamental fixtures as between tenant for life and remainderman, and are removable by the tenant for life or by his executors after his death.

D'Eyncourt *v.* Gregory (36 L. J. Ch. 107; L. R. 3 Eq. 382) *and* Norton *v.* Dashwood (65 L. J. Ch. 737; [1896] 2 Ch. 497) *observed on.*

The remainderman is not entitled to consequential damages occasioned by the removal of ornamental fixtures, as, for instance, to compensation for the expense of redecoration.

Costs in the Court of Appeal include the costs of shorthand notes of the judgment in the Court below without express mention.

Appeal against a decision of Byrne, J.

Under the will made in 1872 of her former husband, who died in 1875, an estate and mansion-house at Luton Hoo, in Bedfordshire, were devised to Madame de Falbe for her life, and after her death to such person as should at her death be the testator's heir-at-law in fee.

Madame de Falbe entered into possession and resided in the mansion-house. In 1885 or 1887 she purchased certain old Flemish and French tapestries, and fixed them in the hall and drawing-room of the mansion-house as hereafter mentioned. Madame de Falbe died in 1899, having by her will, made in 1896, specifically bequeathed the tapestries to the appellant.

The heir-at-law, who became entitled on the death of Madame de Falbe to the estate and mansion-house, had settled the same upon himself for life with remainder to his sons in tail. He died in 1900, leaving an infant son, the present tenant in tail of the estate.

This action was brought to administer Madame de Falbe's estate, in which the question was now raised whether the tapestries passed under her will or whether they were annexed to and formed part of the inheritance.

The tapestries consisted of ten pieces—three in the hall and seven in the large drawing-room of the mansion-house. The three pieces in the hall were placed loosely in large oak frames, which rested on the oak dado running along the wall. On the top of the frames there were three small brass or iron plates, which were screwed to the frames, and these plates were nailed to the wall. To the lower part of these tapestries were attached small plates, also screwed to the wall. A rule could be passed between the tapestries and the walls, which were hung in a manner similar to that adopted for hanging heavy pictures and pier-glasses, and could be removed without injury to the wall. The seven pieces in the large drawing-room were fixed as follows: Small strips of wood were fixed in the wood on the walls by means of nails and screws, and over those wooden strips canvas was stretched and nailed, and the tapestries were fastened to these strips and over

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the canvas by very small tacks, which did not penetrate the wooden strips. After the tapestries were put up, white and gold mouldings, made for the purpose, were fixed round the strips of wood by thin wire nails and screws, some of which were long enough to penetrate, and did in fact penetrate, the face of the wall. These tapestries formed an essential feature of the general decoration of the room; and although the ceiling and frieze remained as before, the rest of the walls of this room were altered and redecorated to accord with the tapestries.

Byrne, J., held that the three pieces of tapestry in the hall were not annexed to the freehold, and that they passed under the will of the testatrix, but that the seven pieces in the drawing-room were annexed to the freehold, and that they belonged to the remainderman. The legatee appealed as regards the tapestries in the drawing-room. There was no appeal as regards those in the hall.

Norton, *K.C.*, and *T. L. Wilkinson*, for the appellant.—These tapestries were not affixed to the freehold so as to pass with the freehold, but were removable by the tenant for life on the principle that they were put up for mere ornament as distinguishable from architectural design. Byrne, J., decided against us on the authority of *D'Eyncourt* v. *Gregory* [1866] [1] and *Norton* v. *Dashwood* [1896] [2]; but these cases were decided on the ground that the tapestries were so affixed as to form part of the architectural design—see *Hill* v. *Bullock* [1897],[3] *per* Lindley, L.J. In the present case the tapestries were affixed in the most convenient manner and place for use as ornaments. The rule *Quicquid plantatur solo solo cedit* is subject to two broad exceptions—first, where the chattel is affixed for purposes of trade; secondly, where it is affixed for purposes of ornament; and each exception applies as well between tenant for life and remainderman as between tenant and landlord. The weight of earlier authority is in favour of the appellant. In *Lawton* v. *Lawton* [1743] [4] Lord Hardwicke observes: "What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney pieces, is now allowed to be done." In *Dudley* (*Lord*) v. *Warde* (*Lord*) [1751] [5] Lord Hardwicke considered the exception of ornamental fixtures as well as the exception of trade fixtures to apply as between tenant for life and remainderman as well as between executor and heir. In *Squier* v. *Mayer* [1701] [6] Lord-Keeper Wright held that hangings nailed to the wall were personalty as between the heir and executor. In *Harvey* v. *Harvey* [1740] [7] Sir W. Lee, C J., held that hangings and tapestry belonged to the executor and not to the heir. In *Cave* v. *Cave* [1705],[8] on the other hand, Lord-Keeper Wright said that "although pictures and glasses generally speaking are part of the personal estate; yet if put up instead of wainscot, or where otherwise wainscot would have been put up, they shall go to the heir. The house ought not to come to the heir maimed and disfigured"; but a year later, in *Beck* v. *Rebow* [1706],[9] Lord-Keeper Cowper laid down "that hangings and looking glasses were only matter of ornament and furniture, and not to be taken as part of the house or freehold, but removeable by the lessee of the house." *Cave* v. *Cave* [8] was cited to Chitty, J., in *Norton* v. *Dashwood*,[2] but *Beck* v. *Rebow* [9] was not cited to him.

H. B. Howard, for the executor.

Levett, *K.C.*, and *T. T. Methold*, for the respondent.—These tapestries have been so affixed as to become part of the wall, and the intention of the tenant for life to bequeath them separately from the house is immaterial. It is a simple question of fact—are they part of the wall? We take the law as stated by Chitty, J., in *Norton* v. *Dashwood*,[2] where he says, "In considering any question of fixtures the important circumstances to be regarded are, first, the mode of annexation of the articles and the extent to which it is

(1) 36 L. J. Ch. 107; L. R. 3 Eq. 382.
(2) 65 L. J. Ch. 737; [1896] 2 Ch. 497.
(3) 66 L. J. Ch. 454, 705, 707; [1897] 2 Ch. 55, 482, 483.
(4) 3 Atk. 12, 15.
(5) 1 Amb. 113.
(6) Free. C.C. (ed. 1823), 249, Case 316.
(7) 2 Strange, 1141.
(8) 2 Vern. 508.
(9) 1 P. Wms. 94.

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united with the freehold; secondly, its nature and construction, as whether it has been put up for a temporary purpose, or by way of permanent improvement; and, thirdly, the effect its removal will have upon the freehold." For that statement Chitty, J., cites *Amos and Ferard on Fixtures* (3rd ed.), p. 125, and *Smith's Leading Cases* (10th ed.), vol. ii. p. 208.

[STIRLING, L J., referred to *Hallen* v. *Runder* [1834].[10]]

The cases are collected in *Williams on Executors* (9th ed.), vol. i. pp. 646 to 649. The moulding was certainly part of the wall, and if the moulding was part of the wall the tapestry, canvas, and backing must also have been part of the wall, and the structures fall within the test of Lord-Keeper Wright in *Cave* v. *Cave*[8]—namely, that they were "put up instead of wainscot." There was a new architectural as well as decorative formation of the room.

[VAUGHAN WILLIAMS, L.J.—You must go to this length—that the tenant for life herself could not have removed them.]

It would have been waste on her part to have done so. The right of a tenant for life against the remainderman is not so strong as the right of a tenant against his landlord. There are two classes of exceptions from the general rule—one, cases between landlord and tenant, the other cases where the chattel has been affixed for purposes of trade.

[STIRLING, L.J.—If the exception as between landlord and tenant extends to ornamental as well as to trade fixtures, why does it not also do so as between tenant for life and remainderman? The foundation of the rule is to prevent injustice.]

The authorities do not go to that length as between tenant for life and remainderman—*Dudley* (*Lord*) v. *Warde* (*Lord*),[5] *Squier* v. *Mayer*,[6] and *Harvey* v. *Harvey*.[7] Ornamental chattels are not an exception in the same way as trade fixtures. The present case, on the facts, is indistinguishable from *D'Eyncourt* v. *Gregory*,[1] which was followed by Chitty, J., in *Norton* v. *Dashwood*[2] and approved in *Hill* v. *Bullock*.[3]

(10) 3 L. J. Ex. 260; 1 Cr. M. & R. 266.

[They also cited *Holland* v. *Hodgson* [1872].[11]]

RIGBY, L J.—We do not think it necessary to call for a reply; and considering that the principle involved is clear, we do not think it necessary to reserve our judgments, notwithstanding the numerous cases which have been cited to us.

The question arises in the present case between a tenant for life of an estate, including a mansion-house, and the remainderman. The tenant for life being dead, her claim is represented by her executors, but it is not in any sense a case as between heir and executor as that is understood in the authorities. It is a question beween the representatives of the tenant for life, who must be taken to be in the same position as the tenant for life herself would have been, and the remainderman. With reference to the question of fixtures, we all know that there was a time when everything fixed to the freehold was held to go with the freehold, and it was only by slow degrees that that unbending rule was modified and came to assume at last the proportions which it now retains. For instance, years ago (see *Herlakenden's Case* [1588][12]) hangings and wainscot, although fastened only in such a way that they might be removed, nevertheless went with the freehold; but in modern time there have come to be important exceptions, one being in favour of trade fixtures, entitling a person who has put up what are now called "fixtures"—that means removable fixed things for the purposes of trade—to remove them; and that exception is not confined in any way to a case of landlord and tenant, meaning thereby the owner of the immediate reversion and a tenant for years. That exception extends equally—as is shewn by *Dudley* (*Lord*) v. *Warde* (*Lord*)[5]—to the case of a tenant for life, and the person who comes into possession of the estate upon his death. There is another equally important and equally well-established exception from the rule—that is to say, in the case of articles which are fixed to the freehold, not with the object of enhancing the value of the freehold, but for the pur-

(11) 41 L. J. C.P. 146; L. R. 7 C.P. 328.
(12) 4 Co. Rep. 62*a*.

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poses of ornamentation. Objects so fixed —as, for instance, chimney-glasses—are removable; and counsel for the respondent is obliged to allow that in that case also it would not be only as between a landlord and tenant for years that the exception would apply, but as between a tenant for life and a person in remainder or reversion who takes the estate subject to the life tenancy.

Now if that exception as to articles affixed for the purpose of enjoyment or ornamentation is to apply in one case—that is to say, in the case of a chimney-glass—I cannot see why the same exception is not to be of general application, and I shall assume that it is so. Then the only question is this, whether these tapestries which are now in question were so affixed as to become part of the house, or so affixed as to remain removable at the will and pleasure of the person who affixed them, or, failing her doing so during her lifetime, by her executors after her death. A great deal of time has been spent on the point, which was evident at first, as to how these tapestries were affixed to the freehold. It is said they are as firmly fixed as they could be. I pass that by. They were quite as firmly affixed, I dare say, as they would be by a person who intended them to remain there always, but I do not think that is of much importance. The Courts in such cases fortunately have not to enquire whether screws which fix an object to a wall are one inch or two inches or three inches long, or whether there are half a dozen or a dozen of them, or whether they penetrate into the mortar of the wall or not. In all cases of this kind it appears that the object, whatever it is, that is affixed for the purposes of ornamentation is affixed, but there is the exception which says it may be removed. Numerous cases have been cited, and amongst others *D'Eyncourt* v. *Gregory*,[1] which is a decision of Lord Romilly, and *Norton* v. *Dashwood*,[2] which is a decision of Mr. Justice Chitty. As to the first case I have no hesitation in saying that I have great difficulty in accepting it, owing in part to what I consider the very inconclusive reasoning which is used by the learned Judge in support of his decision; because he talks about paper and panelling and other matters of that kind as if they really concluded the case. Paper, he says, is part of the wall, and so of course it is. Then he says it cannot be taken away. That I question altogether. If there be a paper which a tenant for life does not like, I conceive that the right of the tenant for life is to take away that paper and substitute another, and if it is not worn out a tenant for life is under no obligation to wait until the first paper is worn out; but if it becomes distasteful or displeasing, or if another paper pleases the tenant for life better, he may scrape away the earlier paper and put on another one which he likes better. With regard to the panelling, I am by no means satisfied that the law has changed since Lord Hardwicke laid it down in *Lawton* v. *Lawton*[4] that, whatever originally might have been the rule about wainscot fixed with screws, in the year 1743, the time when he was speaking, it had become recognised as removable. I might go on through other cases which were cited by Lord Romilly, especially, for example, one about a grindstone—that is, the upper loose stone of a mill. He considered that analogous. I do not consider it so at all. I consider that the finding as to tapestries in that case cannot be maintained or supported unless there was some proof (which I do not see in the report of the case) that the house was fitted to the tapestry rather than the tapestry to the house; and in that way, although I do not say it would even then be clear, it might be possible to support the decision by saying that the tenant for life who affixed the tapestry had shewn a plain intention to add it irrevocably and permanently to the house. At any rate, I am of opinion that the decision in *D'Eyncourt* v. *Gregory*[1] is not right if it is applicable to the case now before us; and for the purpose of the present case, and as far as may be necessary for that purpose, I should hold that that case ought to be overruled. Then there is the case of *Norton* v. *Dashwood*,[2] which also is in its circumstances very different from the present. There tapestries which had for a hundred years belonged to and formed part of the decoration of the

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mansion-house were held under very special circumstances to be attached to the house and not removable. I may say that I am not quite satisfied that those circumstances were sufficient to authorise the finding, but they are at any rate very different from the circumstances in the present case. Here we have a tenant for life purchasing, it is said at a large price, a number of tapestries—there were seven which are called French tapestries and three which are called Flemish tapestries. The three Flemish tapestries, it is suggested, were of a kind fit to be put into frames without stretching; but the seven French tapestries, according to the evidence of people who understand these things, required to be stretched, and they were chosen to be put up in the drawing-room.

[His Lordship described what was done, saying that the result was very much in the nature of a picture-frame round each piece of the tapestry, and that he could see nothing to indicate anything else than the natural intention of the owner of beautiful objects to set them up for the purpose of the ornamentation of the room, and continued:] It is said that the tapestries formed part of the wall. I agree that in a sense they were part of the wall. They were rigidly affixed to the wall, and no doubt affixed in such a way as in earlier days would have been held to make them inseparable parts of the wall; but the question is whether they were not made "fixtures," meaning objects fixed to the wall, which might be removed at the will of the person who fixed them, and I am of opinion they were of the last-mentioned character. I can see no other reason in any one of the things done than the wish of the tenant for life to have beautiful and valuable objects placed in such a position as might please the eye and satisfy her desire for ornament. I see no reason why she should not have the right to take them down.

The argument for the remainderman amounts to this—that the moment she had placed them there, she as well as every one claiming through her would be absolutely bound to leave them there, and, if the argument is sound, might have been restrained by an injunction from taking down the tapestries on the ground that they were part of the wall and the building. I altogether dissent from any such suggestion. The tenant for life happened to retain them there, and wished to do so during her life. It is quite conceivable that she might have fallen in with better specimens of tapestry, and if she had done so I think she would have been entitled at once to remove those which she had already placed there for the purpose of replacing them by others, or she might, if she had been tempted by an enhanced offer, have agreed to sell them, and taken them down for the purpose of sale. I do not think the fact that she would first have had to take down the mouldings and then to undo the fastening by tacks and nails makes any difference at all. I think she had a perfect right to do it at any time, and I think that right passed on to her executors. As a matter of fact, she made a bequest of these tapestries, and the legatee has appeared here to argue on his own behalf. The executor has also appeared. The executor must be taken to have been supporting the legatee, and I think they are right.

There were one or two other cases cited by counsel for the appellant which I have not gone into because it is not necessary to do so. The case falls within the broad principle that decorative objects—that is, objects set up for the purpose of ornamentation—fall within the exception to the rule that things fixed to the freehold must belong to the owner of the freehold. On that broad ground I wish to decide the case.

VAUGHAN WILLIAMS, L.J.—I entirely agree. The question in this case is a question with respect to the right to remove certain tapestries which have been affixed to the freehold. I do not mean to say, and no one would say, that as a matter of history all the cases upon the subject of the removability of fixtures are absolutely consistent. They are not. But there is this amount of consistency in the cases—that, starting from the absolute rigid rule *Quicquid plantatur solo solo cedit*, there has been a consistent progress towards relaxation of that rule, and it is impossible, according

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to my view, to shew that there has been ever any substantial period of relaxation. Now, having said that, I wish to add that, as I understand this case, this is a case in effect between the executor of the tenant for life and the remainderman, and I want to state one fact, which is really the basis of my judgment so far as I am concerned. The matters in respect of which this question has arisen are certain tapestries—that is, certain chattels. I have not the very faintest doubt myself upon this evidence that these tapestries or these chattels were affixed to this freehold for the purpose of the enjoyment of these chattels, and in no sense and in no way for the improvement of the freehold.

I do not suppose that it would be denied that when one has to deal with the question of fixtures it sometimes becomes a material question to consider the object and purpose of the annexation. That does not mean to consider the motive of the person annexing, but to consider the object and purpose of the annexation, to be inferred from the circumstances of the case. That being so, let us see how it is that that question comes to be material. It will not be denied, and has not been denied in argument, that amongst the exceptions from the rigid rule *Quicquid plantatur solo solo cedit* there come two broad exceptions—one the exception in respect of trade fixtures, the other the exception in respect of ornamental objects which have been annexed in some way or another to a freehold. Counsel for the respondent in his argument suggested that the latter exception did not apply excepting in the case of landlord and tenant. Now, here again is one of the instances of the progression of the law; but without considering the relaxation in favour of trade fixtures—about which I have not to say anything, because no such question arises here—with regard to the question of ornamental fixtures, it seem to me that the authorities are substantially all one way. We find cases as early as *Squier* v. *Mayer*,[6] which was a case between the executors and the heir, where the exception in respect of ornamental fixtures was applied as against the heir; and whatever may be the position of the remainderman, it is at least no better than the position of the heir. On the contrary, the heir is always supposed to be the most favoured. I do not consider it necessary to go through the various cases in which that exception has been applied since that time. All I say is that, if the cases are looked at during the whole of the period since *Squier* v. *Mayer*,[6] it will be found from time to time that this exception or relaxation in respect of ornamental fixtures has been recognised, and also the authorities seem to me to make it clear that it has been recognised in cases other than cases as between landlord and tenant. That being so, it is impossible to say that the only matter to be taken into consideration is the *quantum* of fixture — how much and in what manner the chattel has been affixed to the freehold. No one, of course, would say that that is not a material fact to be taken into consideration. There may be such an incorporation of the chattel with the freehold that it might be absolutely impossible to deny that the chattel has become part of the freehold, and absolutely impossible to apply these exceptions. Therefore the *quantum* of fixture is important. But that is not the only fact that has to be taken into consideration. One has to ask oneself, Is there any more fixing here than was necessary for the enjoyment of the chattel? If you have a heavy object like a heavy ormolu clock, and you fix it to the wall of some room, of course you may have, in order to make it safe, to use very substantial fixings. You may have to drive an iron bar right through the wall of the house and to rivet it at the back. You may have to apply a sort of fixing that in many cases would be conclusive of incorporation of the chattel in the freehold; but that inference does not arise the moment you come to the conclusion that that fixing which was done was a fixing which was absolutely necessary for the enjoyment of the chattel. That seems to me the right conclusion in this case. The tenant for life has tapestries — expensive tapestries—which she has bought and wishes to enjoy, and the mode of enjoying them necessarily is

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by hanging them on the walls of the house, and she wishes to hang them in such a way that they shall not be torn. To drive nails through the tapestry into the wall would spoil the tapestry, and make indelible marks all round its edges. That is avoided by putting laths or thin pieces of wood against the wall, and then affixing the tapestry to those thin pieces of wood, which do not tear the tapestry, whereas the use of nails to affix the tapestry to the wall would involve the use of much bigger nails, which would tear the tapestry. In my judgment, it is perfectly obvious that everything which was done can be accounted for as being absolutely necessary for the enjoyment of the tapestry; and when I come to that conclusion there is an end of the case so far as my judgment is concerned, notwithstanding the remaining objections that counsel urged, whether the objection went to denying the exception in favour of ornamental tapestries or to denying its application as between tenant for life and remainderman. I think when one has fairly arrived at the conclusion that there was only such a fixing as was necessary for the enjoyment of the chattels, one is bound to decide the case in favour of the executor of the tenant for life.

I want to say one word about *D'Eyncourt* v. *Gregory* [1] and *Norton* v. *Dashwood*.[2] Speaking for myself, I do not find that either Lord Romilly or Mr. Justice Chitty say one word inconsistent with the principle which I have sought to apply in arriving at this judgment. Lord Romilly expressly says, in arriving at his conclusion, that it is an inference which he draws from the particular facts of that case, and he says, "Unquestionably, in coming to these conclusions, I have not done so with any degree of confidence, or even of complete satisfaction to myself." He is there speaking of questions of fact. "The evidence, minute and clear as it is, cannot give the same effect that a personal examination might do; but even on a personal examination I should doubt whether I could come to a more accurate conclusion. The best conclusion I can come to with regard to the articles I have enumerated, is, that they seem to me to belong to the freehold, and to be inseparable from it." That is to say, Lord Romilly concluded, from all the facts of that case that the intention to be inferred from the facts was that the tapestries were affixed as they were to the wall for the purpose of the improvement of the freehold, and not for the purpose of the enjoyment of the chattels. It seems to me that *Norton* v. *Dashwood* [2] is capable of precisely the same explanation.

STIRLING, L.J.—I am of the same opinion. The question in substance arises between the tenant for life, Madame de Falbe, and the remainderman under her former husband's will. Madame de Falbe, being tenant for life under that will, became possessed of certain valuable tapestries worth, it is stated, several thousands of pounds, and she proceeded to affix them to the walls of the drawing-room of a house of which she was tenant for life. She has died and, the tapestries remaining so fixed, the question has arisen between the representatives who, it is admitted, stand in the same position as herself, and the respondent who claims under the person who was entitled in remainder under the husband's will. The question is whether those tapestries still form part of the estate of Madame de Falbe, or whether they pass to the remainderman as annexed to the freehold.

Undoubtedly the old rule of common law was that whatever became affixed to the freehold passed to the owner of the freehold, but modifications have been introduced from time to time into that law. The first question which I think deserves consideration is, what is the ground on which that old simple rule has been modified? Now, I find in a case which I have before me, and which I desire to refer to on another point, a statement on that subject in the judgment given by Baron Martin in the Court of Exchequer which expresses so exactly what I desire to say, that I prefer to read his judgment rather than use any words of my own. I refer to the case of *Elliott* v. *Bishop* [1854],[13] where Baron Martin said: "The

(13) 24 L. J. Ex. 33; 10 Ex. 496; and in Exchequer Chamber, *sub nom. Bishop* v. *Elliott* [1855], 24 L. J. Ex. 229; 11 Ex. 113.

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old rule laid down in the old books is, that, if the tenant or the occupier of a house or land annex anything to the freehold, neither he or his representatives can afterwards take it away, the maxim being '*Quicquid plantetur solo, solo cedit*': *Minshall* v. *Lloyd* [1837].[14] But as society progressed, and tenants for lives or for terms of years of houses, for the more convenient or luxurious occupation of them, or for the purposes of trade, affixed valuable and expensive articles to the freehold, the injustice of denying the tenant the right to remove them at his pleasure, and deeming such things practically forfeited to the owner of the fee simple by the mere Act of annexation, became apparent to all; and there long ago sprung up a right, sanctioned and supported both by the Courts of Law and Equity, in the temporary owner or occupier of real property or his representative, to disannex and remove certain articles, although annexed by him to the freehold, and these articles have been denominated 'fixtures'; and the best definition with which I am acquainted is that given in the judgment of the Court in *Hallen* v. *Runder*,[10] viz. that they are articles which were originally personal chattels, and which, although they have been annexed to the freehold by a temporary occupier, are nevertheless removeable, and of course saleable, at the will of the person who has annexed them." It will be observed there that the learned Judge says the rule has been relaxed in favour of both tenants for life or for terms of years, and that the objects to which the rule relates are those which have been affixed to the freehold "for the more convenient or luxurious occupation of them, or for the purposes of trade." It is not disputed that, as between landlord and tenant, chattels annexed to the freehold for purposes of trade have long been included in this exception to the rule. It cannot be disputed that in recent years, whatever may have been the case in former times, objects which have been affixed by way of ornament to the freehold, as between landlord and tenant, fall within the same category. That point is considered in this very case of *Elliott* v. *Bishop*,[13] and forms the subject of an elaborate judgment by Mr. Justice Coleridge, sitting in the Court of Exchequer Chamber, on appeal in that very same case. There the Court came to the clear conclusion, citing a judgment of Chief Justice Dallas in *Buckland* v. *Butterfield* [1820][15] in these terms: "In the progress of time this rule has been relaxed"—that is, the old rule *Quicquid plantatur solo solo cedit*—"and many exceptions have been grafted upon it. One has been in favour of matters of ornament, as ornamental chimney-pieces, pier glasses, hangings, wainscot fixed only by screws, and the like." So that it is clearly established that, as between landlord and tenant, ornamental objects are included in the exceptions. Now is there any reason why, if ornamental objects are included in the exceptions as between landlord and tenant, they should not be included in the exceptions as between tenant for life and remainderman? If we look at the origin of the rule as stated in the passage which I have just read, it seems to me there can be no reason in such a distinction. The origin of the rule is stated to be to prevent the injustice of denying the tenant, either for life or for years, the right to remove them at his pleasure, and so practically forfeiting expensive property to the owner of the freehold. If that be a good ground as between landlord and tenant, I fail to see why it is not a good ground for the application of the rule as between tenant for life and remaindermen. So far as authority goes, we find the matter in this position. Lord Hardwicke, in the year 1751, dealing with a case of trade fixtures—namely, *Dudley* (*Lord*) v. *Warde* (*Lord*),[5] said: "The case being between executor of tenant for life in tail, and a remainded man, is not quite so strong as between landlord and tenant, yet the same reason governs it." Therefore he treats, as regards trade fixtures, the rule as being the same as between landlord and tenant and as between tenant for life and remainderman. It seems to me that in a case of earlier date—namely, *Lawton* v. *Lawton*[4]—decided in 1743, which was

(14) 6 L. J. Ex. 115; 2 M. & W. 450.

(15) 2 Br. & B. 54.

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also a case of trade fixtures, Lord Hardwicke refers to the case of ornamental fixtures and treats them as really being governed by the same rule. He points out that in the old cases, "so long ago as Henry the Seventh's time, the Courts of Law construed even a copper and furnaces to be part of the freehold"; but he goes on: "Since that time, the general ground the Courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the publick to encourage tenants for life, to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney pieces, is now allowed to be done." That I read as referring to ornamental objects, and as shewing that Lord Hardwicke's opinion was that ornamental fixtures stood in the same position as trade fixtures both as regards the position between landlord and tenant and that between tenant for life and remainderman.

It appears to me, therefore, that both on principle and authority the exceptions from the rule extend as well to ornamental fixtures as to trade fixtures. Now what have we here? What are the objects as to which the dispute arises? Tapestries, which as we can see from the photographs before us, are tapestries of an ornamental character, and therefore it appears to me that the rule applies in this case. That goes a long way certainly, if not the whole way, to decide the case, but I do not desire to rest it entirely on that. A case which is less favourable to the right to remove is the case between heir and executor, or between vendor and vendee, or between mortgagor and mortgagee. In those cases no question of injustice arises; there is no injustice and no forfeiture of any property when a man owner in fee affixes his own chattels to the freehold. Therefore, there is no necessity for introducing any relaxation into that rule at all. But even in such cases the question arises as between heir and executor as to whether or no things which are originally chattels have or have not became part of the freehold, and as is pointed out in one of the latest cases on the subject—namely, that of *Holland* v. *Hodgson*[11] —the question of what constitutes an annexation sufficient to make the property part of the land is one which must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention—namely, the degree of annexation and the object of the annexation. As regards the degree of annexation, that in some cases is material, as is pointed out by the learned Judge, who gives various examples in which the degree of annexation may be material. As regards the object, the main question which has to be considered is whether the object of the annexation is to improve the freehold to which the annexation is made or whether it is for the more complete and better enjoyment of the chattel itself. Here, as I have said, the chattels to be enjoyed are certain pieces of tapestry. How are those to be enjoyed? They must, to be enjoyed, be made available for being seen by the eye, and in order that they may be properly seen they must be put in a large room, being large pieces of tapestry. What the lady did was to put them into the best room in the house —namely, the drawing-room—and she affixed them, no doubt, to the walls of the room, but she did it in such a way that the tapestries might be removed without any structural damage—by which I mean, not that there may not be some injury done to the plaster and so forth, but that nothing is required to be altered in the structure of the house. Nor was anything in the structure of the house really altered when they were put up. But there were certain additions made to the tapestries themselves in the shape of panels and canvas stretched upon them, painted or dyed a suitable colour for the enjoyment of the tapestries themselves, so that the accompaniments might not be an eyesore to the beholder. Looking at the evidence as to the mode in which they were affixed, and the position in which they were placed, and what was done in reference to putting them up, I confess I feel no doubt that everything that was done here was done for the better enjoyment of the chattels, and not to make an addition to the value, to the extent of many thousands of pounds, of this mansion-house.

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DE FALBE, IN RE, App.

I come, therefore, to the same conclusion at which my learned brothers have arrived, and I think this appeal ought to be allowed.

RIGBY, L.J.—The order of Mr. Justice Byrne will be discharged, and a declaration made that these seven pieces of tapestry were chattels and belonged to the estate of the tenant for life, and the respondent must pay the costs here and in the Court below, which will include the costs of the executors.

Levett, K.C.—The respondent claims an enquiry as to the damage done to the inheritance by the removal of the tapestries—*Amos and Ferard on Fixtures* (3rd ed.), pp. 123, 124. It has cost the respondent 300*l.* to redecorate the room.

RIGBY, L.J.—That represents expense of redecoration. There is no waste here for which the respondent is entitled to be compensated. It is not worth directing an enquiry about the trifling damage caused by taking down the chattels. Whether it is 10*s.*, or 1*l.*, or 30*s.*, it ought to be arranged between you. The respondent is not entitled to consequential damages for redecoration.

Norton, K.C., asked that the costs might include the costs of the shorthand note of the judgment in the Court below.

RIGBY, L.J.—These are allowed as part of the costs of the appeal without special mention.

Appeal allowed.

Solicitors—Rowcliffes, Rawle & Co., for appellant; Lake, Shaw-Mackenzie & Co., for executors; Hadden-Woodward & McLeod, for remainderman.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

BUCKLEY, J. 1901. Jan. 25, 29.

BEVERLY, *In re*; WATSON *v.* WATSON.

Executor — Trustee — Will — Trust for Sale and Conversion—Shares of Residue—Appropriation of Specific Assets—Chattels Real—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 4, *sub-s.* 1.

The principle upon which the rule, that under a will containing a trust for sale and conversion executors and trustees are entitled to appropriate specific assets to answer shares of residue, proceeds is that it must be competent for executors and trustees to agree with the beneficiary that they will sell the particular assets to the beneficiary and set off the amount against the money which they would otherwise have to pay to him, and that it is not necessary for them to go through the form of first converting the assets and then handing over to the beneficiary the money which the beneficiary may be desirous of immediately reinvesting in the very assets which have just been sold. The doctrine, therefore, of appropriation is not confined to pure personal estate, but extends to chattels real and also to real estate which is subject to a trust for sale and conversion.

Although section 4, *sub-section* 1 *of the Land Transfer Act*, 1897, *applies as well to personal as to real estate, it has not taken away from executors and trustees the power of appropriation which existed before the Act, at all events in cases where there is a trust for sale and conversion.*

Adjourned summons.

Susan Beverly, by her will dated June 26, 1899, appointed her sister, the plaintiff Euphemia Watson, and the plaintiff Randle Fynes Wilson Holme executors and trustees thereof, and after making certain pecuniary and specific bequests and reciting that under the will of her late husband Alfred Beverly, dated in 1892, and under her marriage settlement dated in 1882, she had certain powers of appointment, she in exercise of those powers of appointment appointed that all the property subject thereto should be transferred to the trustees of her will, and she directed that they should hold the same and all other property of which she

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should die possessed upon trust to sell, call in, and convert, with power to postpone, and out of the moneys to arise from such sale, calling in, and conversion to hold the net residue thereof, after payment thereout of her funeral and testamentary expenses and debts and other payments directed by her will, upon trust to divide the same into nine equal parts and to pay two of such equal ninth parts to the plaintiff Euphemia Watson, and two other equal ninth parts to her sister the defendant Grace Watson, and two other equal ninth parts to the defendant Emily Jane Watson, and to hold the three remaining ninth parts upon the trusts therein contained. The testatrix then settled the three ninth parts as to one ninth part upon trusts for the benefit of her brother the defendant John Watson and his children, as to another one ninth part upon trusts for the benefit of her sister-in-law Mabel Watson, the wife of her brother Frank Hilton Watson, and her children, and as to the remaining one ninth part upon trusts for the benefit of her sister the defendant Elizabeth Sophia Annesley and her husband and children. The will contained a power to appropriate funds to answer annuities, but no power to appropriate specific assets to answer the ninth shares in the residue.

The testatrix died on July 11, 1899.

All the debts, testamentary and funeral expenses, and liabilities of the testatrix, and the legacies (except a certain annuity of 400*l.*) bequeathed by the will had been paid or provided for, and the residue of her estate amounted to about 110,000*l.*

The residuary estate comprised (*inter alia*) certain leasehold houses and a reversionary interest in a sum of stock which the trustees proposed to appropriate at valuations amongst the beneficiaries instead of selling.

The plaintiff Euphemia Watson had agreed to accept a leasehold public-house known as the Artesian Arms, and three leasehold houses in Porchester Terrace, Paddington, at a valuation of 3,050*l.*, on account of and in part satisfaction of her two ninth shares of the residuary estate. The defendant Grace Watson was willing to accept a leasehold house, No. 22 Hamilton Terrace, at a valuation of 2,300*l.* on account of and in part satisfaction of her two ninth shares in the residuary estate. The defendant Emily Jane Watson had agreed to accept a reversionary interest in a sum of 1,180*l.* Great Indian Peninsular Railway Co. Guaranteed 5 per cent. Stock at a valuation of 1,222*l.*, on account of and in part satisfaction of her two ninth shares in the residuary estate.

The plaintiffs were of opinion that it would be beneficial to the estate, as saving the costs of sale, to make such appropriation at the above valuations, and took out the present summons asking for the determination by the Court of the following questions: (1) Whether, notwithstanding the trust for sale and conversion, the plaintiffs, as trustees of the residuary estate, might lawfully appropriate the leasehold houses and reversionary interest on account of and in part satisfaction of the respective two ninth shares of the plaintiff Euphemia Watson, the defendant Grace Watson, and the defendant Emily Jane Watson of the residuary estate; and (2) whether the plaintiffs might appropriate other assets of the testatrix being of a nature authorised by the will or by law as trust investments towards satisfaction at a proper valuation of the shares of other beneficiaries in the residuary estate under the will.

R. B. Yardley, for the summons.—Executors have power to appropriate specific assets to answer shares of residue —*Elliott* v. *Kemp* [1840],[1] *Nickels, In re*; *Nickels* v. *Nickels* [1898],[2] *Lepine, In re*; *Dowsett* v. *Culver* [1891],[3] *Brooks, In re*; *Coles* v. *Davis* [1897],[4] and *Richardson, In re*; *Morgan* v. *Richardson* [1896].[5]

It is true that in all those cases the appropriation was of personal estate; but, for purposes of appropriation, it is submitted that no distinction exists between pure personalty and chattels real, and that the doctrine of appropriation applies to chattels real.

The doctrine proceeds upon the ground of convenience. The appropriation is in

(1) 10 L. J. Ex. 321; 7 M. & W. 306, 313.
(2) 67 L. J. Ch. 406; [1898] 1 Ch. 630.
(3) 61 L. J. Ch. 153; [1892] 1 Ch. 210.
(4) 76 L. T. 771.
(5) 65 L. J. Ch. 512; [1896] 1 Ch. 512.

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effect the result of an agreement between the executor and the beneficiary, under which the beneficiary takes the specific property instead of the proceeds. In the case, no doubt, of settled shares an executor can only appropriate an investment which is authorised by the will or settlement; but no such restriction exists where the share is not settled and the beneficiary is *sui juris*. It is, however, suggested in *Brickdale and Sheldon's Land Transfer Acts*, p. 275, that the effect of section 4 of the Land Transfer Act, 1897,[6] is that, in the absence of any provision in the will of a testator dying after December 31, 1897, excluding the operation of the section, the executors cannot be advised to execute the powers of appropriation which they formerly enjoyed, but must conform strictly to the terms of the section. But it is to be observed that the section refers to "prescribed provisions," presumably meaning thereby rules to be made under section 22 of the Act; but as no rules applying to this subject have yet been made, the procedure of section 4 is not available. Having regard to the marginal note, the operation of the section is to be confined to real estate, and it was not intended to supersede the power to appropriate given under the old law. In any case, it is submitted that the power conferred by the section is cumulative. The plaintiffs have therefore power to make the proposed appropriations.

Stanley Fisher, for the defendants Elizabeth Sophia Annesley and her infant children.—There is no reported case in which the Court has sanctioned the appropriation by executors of chattels real to answer a legacy, and it is therefore presumed that no power to make such appropriation ever existed. But assuming that this power was originally possessed by executors, it has been either superseded altogether by section 4 of the Act of 1897, or else the section prescribes a mode of procedure which must be observed. The section applies to all property which vests in the executors, including shares, stocks, &c., and there can be no valid appropriation unless the procedure prescribed by the Act is followed. If the leaseholds proposed to be appropriated had been registered leaseholds, the executors would have been bound under section 4, sub-section 3 of the Act to comply with the provisions of the Act.

[He also referred to the Land Transfer Rules, 1898, rule 130, and form 47.]

R. B. Yardley, in reply, referred to the definition of "land" in section 4 of the Land Transfer Act, 1875.

[BUCKLEY, J., referred to section 24, sub-section 1 of the Act of 1897.]

Cur. adv. vult.

Jan. 29.—BUCKLEY, J., stated the facts and continued: The cases are numerous in which it has been held that executors and trustees have power to appropriate personal estate under such circumstances as arise in this case. For instance, in *Elliott* v. *Kemp*[1] appropriation of furniture; in *Barclay* v. *Owen* [1889][7] appropriation of a mortgage debt; in *Lepine, In re; Dowsett* v. *Culver*,[3] appropriation again of a mortgage debt; in *Richardson, In re; Morgan* v. *Richardson*,[5] appropriation of stock in a brewery company; in *Brooks, In re; Coles* v. *Davis*,[4] appropriation of shares in a brewery company; in *Nickels, In re; Nickels* v. *Nickels*,[2] appropriation of stock; and in *Waters, In re; Preston* v. *Waters* [1889],[8]

(6) The Land Transfer Act, 1897, s. 4, sub-s. (1), enacts that: "The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court."

(7) 60 L. T. 220.

(8) 24 L. J. N.C. 36; W. N. (1889), 39.

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appropriation of mortgages and other securities, were all held to be valid. In some of those cases there was a trust for conversion; in others there was not. There was no trust for conversion in *Elliott* v. *Kemp* [1] or in *Richardson, In re; Morgan* v. *Richardson*,[5] or in *Barclay* v. *Owen*.[7] In each of the other cases there was a trust for conversion. Counsel have not referred me to, and I have not found, any case relating to appropriation of chattels real. The question I have to determine is whether under circumstances such as these a valid appropriation can be made of chattels real.

Now in order to determine that, I ask myself what is the principle upon which appropriation is proper. Where, as in *Richardson, In re; Morgan* v. *Richardson*,[5] there is no trust to convert but simply a gift of property amongst certain parties, appropriation would seem easy; the parties are to have the property unconverted, and the executors must arrive at equality as best they can. Where there is a trust for conversion, what is the principle? Under a trust for conversion each person is entitled of course to money, and the principle I apprehend is this—that where the trustee is directed to convert and to pay the beneficiary money, it must be competent for him to agree with the beneficiary that he will sell the beneficiary the property against the money which otherwise he would have to pay to him; but it is not necessary to go through the form of first converting the property, and then giving the beneficiary the money which the beneficiary may be desirous immediately to reinvest in the property which has just been sold.

Now, when I look at the authorities, it seems to me that that is the principle upon which this proceeds. That is to be found most plainly, I think, in the case of *Lepine, In re; Dowsett* v. *Culver*.[3] The appropriation there was of a mortgage debt. Lord Lindley puts it upon this principle. He says: "If the assets are amply sufficient to satisfy the other five-sixths, why cannot one legatee at once say, 'I will not trouble you to turn my share into cash; give me something instead of it which I will take'"; and again: "The executor might have said to the legatee, 'I can sell you this mortgage for 700*l*. Will you buy it, and will you agree to set off your legacy against the purchase-money?' All that might have been gone through; but the substance of that has been done." Lord Justice Bowen says: "It cannot be doubted that the executor might have sold the mortgage by private contract for what it was worth. It cannot be doubted that he might sell it to the legatee, and agree to set off the purchase-money against the legacy; and then he might further agree with the legatee that he should hold the legal estate for him. The whole of that can be put in a short compass, and it is exactly what has been done"; and Lord Justice Fry says: "there is no objection whatever to their" (that is, the trustees) "entering into arrangements which are of the nature of the sale of a particular asset, which they are bound to convert, to a *cestui que trust*, setting off the purchase-money for the asset against the portion which the *cestui que trust* is entitled to in the testator's estate." I apprehend, therefore, that the true principle is, that where there is a trust for sale and conversion it is competent to the executor and trustee to say to a person who is entitled to the proceeds of the conversion: "I will agree with you to give you this asset without converting it in satisfaction *pro tanto* of the money which would be coming to you if I converted it." Moreover, that principle would not be necessarily confined to the case where there was a trust for sale and conversion, for it may be that the circumstances would be such that the executor would be bound to turn assets of the testator into money and apply it to the legacy in ordinary course of administration, apart from any trust for sale and conversion; but where there is a trust for sale and conversion, as here, then it seems to me the matter is plain.

Now, if that is the principle, it is obvious that the doctrine of appropriation is not confined to pure personal estate, but extends to chattels real, and extends also, I conceive, to real estate which is subject to a trust for sale and conversion. There is no difference in principle. The only question would be

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BEVERLY, IN RE.

whether under the old law the executor would have the control of the real estate so as to hand it over. Here there is a trust for sale and conversion. It appears to me that it is competent for the executors to agree with the *cestuis que trust* to appropriate to their shares of the residuary estate the leaseholds unconverted.

But then a question has been raised whether that state of the law has been altered by section 4, sub-section 1 of the Land Transfer Act of 1897. It has been argued before me that, having regard to the connection in which section 4 of that Act is found, it is to be read as confined to real estate, and does not extend to chattels real. I do not think that contention can be maintained When I look at section 4 I find that the language is this: that "The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate"—residuary estate there must mean residuary estate whether it be personal or whether it be real; it cannot be confined to real estate —"appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy." It seems to me that the residuary estate there must mean what it has meant before; it must mean any residuary estate, be it personal or be it real estate. So that I think that section 4, sub-section 1 of the Land Transfer Act applies, as far as it is applicable at all, to the present state of things.

Then the argument presented to the Court was that, having regard to section 4, sub-section 1 of the Land Transfer Act, 1897, the power of appropriation which existed before the Act was done away with, and that an executor must now follow the provisions of the Act as to certain notices and the like, and that unless he did so he could not appropriate at all. It seems to me that that is an argument which cannot prevail. If the principle be such as I have stated, that under a trust for sale and conversion you may give the beneficiary the property in satisfaction *pro tanto* of the money which would be coming to him if you did convert, I do not see that the Act has done anything to take that away. The Act may have some application to cases in which there is no trust for sale and conversion, where you are going to appropriate under such circumstances as in *Richardson, In re; Morgan* v. *Richardson*.[5] As to that I say nothing. It is quite sufficient for me to deal with the case before the Court. Where there is a trust for sale and conversion, I do not see that that section of the Land Transfer Act has made any difference to that which was the power before.

Under those circumstances it seems to me that the executors and trustees of this will have power to appropriate these particular portions of the estate towards satisfaction of these shares. That answers the first question upon the summons which is addressed to the three shares of Euphemia, Grace, and Emily, who take absolutely. They have power to consent to the appropriation, and if they do consent well and good. But the second question relates to the three ninth shares which are settled. As to these a different principle comes in. The trustees of the settled shares can only consent to take in satisfaction of what is given to them such investments as are authorised by the instrument which creates the settlement. This will contains certain clauses as to investment, and there cannot, I apprehend, be appropriated to those three ninth shares any investments which do not fall within the scope of the investments allowed by the will. Subject to that, I think appropriation may be made under the settlement.

Solicitors—Godden, Son & Holme, for all parties.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

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BUCKLEY, J. 1901. Feb. 13. } WHITE, *In re*; WHITE *v.* EDMOND.

Evidence—Presumption—Woman Past Child-bearing — Widow Aged Fifty-six Years and Three Months.

The Court treated as past child-bearing a widow aged fifty-six years and three months who had been married for twenty-four years and had immediately after the marriage had one child.

The cases of presumption against child-bearing in the case of a spinster are equally applicable to the case of a widow who has had a child.

Croxton *v.* May (9 Ch. D. 388) *and* Hocking, *In re*; Michell *v.* Loe (67 L. J. Ch. 662; [1898] 2 Ch. 567), *distinguished.*

Adjourned summons.

William White, who died on January 10, 1885, by his will dated August 1, 1879, specifically bequeathed to his trustees certain leasehold premises in Tooke Street and West Ferry Road, Millwall, Poplar, upon trust to pay or otherwise permit his daughter Anna, the wife of John Howard White, to receive and take the rents and profits thereof for and during the term of her natural life for her sole and separate use and benefit, and upon her decease the testator directed his trustees to stand and be possessed of the last-mentioned premises in trust for all the children of his daughter Anna who should live to attain the age of twenty-one years, and if more than one in equal shares.

Anna White was born on November 15, 1844; and on March 10, 1866, she married J. H. White, with whom she lived down to his death on August 15, 1890. There was only one child of the marriage—namely, J. W. G. White, who was born on June 1, 1866, and was therefore of the age of thirty-four years or thereabouts.

This was an originating summons taken out by Anna White and J. W. G. White against the surviving trustee of the will asking (*inter alia*) for a declaration that upon the true construction of the will, in the events which had happened, the plaintiffs were between them absolutely entitled to the leasehold premises by the will specifically bequeathed in trust for the plaintiff Anna White and her children, and that the defendant, as trustee of the will, might be ordered or authorised to assign the same to the plaintiffs or as they might direct.

At the time of the present application the plaintiff Anna White was of the age of fifty-six years and three months, and a widow.

H. Terrell, K.C., and *J. Bacon*, for the summons. — The plaintiff Anna White being a widow of the age of fifty-six years and three months, the Court will presume that she is past child-bearing—*Haynes* v. *Haynes* [1866],[1] *Widow's Trust, In re* [1871],[2] *Millner's Estate, In re* [1872],[3] *Maden* v. *Taylor* [1876],[4] *Davidson* v. *Kimpton* [1881],[5] *Browne* v. *Warnock* [1880],[6] and *Forty* v. *Reay*.[7]

[BUCKLEY, J., referred to *Edwards* v. *Tuck* [1856].[8]]

Croxton v. *May* [1878],[9] in which the Court refused to make the presumption in the case of a married woman aged fifty-four years and six months, is distinguishable on the ground that the married woman there, although married for seventeen years, had only lived with her husband for three years of that period. The decision in *Hocking, In re*; *Michell* v. *Loe* [1898],[10] proceeded upon a totally different principle from that in the other cases referred to—namely, that where property is given to B in the event of A having a child the Court will not enter into the question of A being past child-bearing for the purpose of depriving B of the chance of becoming entitled to the property.

The present case is clearly within the authorities, and, that being so, the plaintiffs are between them absolutely entitled

(1) 35 L. J. Ch. 303, and see cases cited in note.
(2) 40 L. J. Ch. 380; L. R. 11 Eq. 408.
(3) 42 L. J. Ch. 44; L. R. 14 Eq. 245.
(4) 45 L. J. Ch. 569.
(5) 18 Ch. D. 213.
(6) 7 L. R. Ir. 3.
(7) Cited in Dart V. & P. (5th ed.), p. 345.
(8) 23 Beav. 268.
(9) 9 Ch. D. 388.
(10) 67 L. J. Ch. 662; [1898] 2 Ch. 567.

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to the leaseholds and to have them assigned to them by the trustee.

Hornell, for the trustee.

BUCKLEY, J., stated the facts, and continued: A number of cases have been cited, but the material ones, to my mind, are these: *Haynes* v. *Haynes*,[1] where it was presumed that a spinster aged fifty-three years and two months was past the age of child-bearing; but the headnote to the report adds the query "whether this age is not too low"; *Widdow's Trust, In re*,[2] where Vice-Chancellor Malins made the presumption in the case of a widow aged fifty-five years and four months who had never had any children, and in the case of a spinster aged fifty-three years and nine months; *Millner's Estate, In re*,[3] where the age of the lady was forty-nine years and nine months, and the husband was still living, and she had never had a child. The marriage had taken place in 1846, and the decision was pronounced in 1872, so that there had been twenty-six years of married life, no issue, and the husband was still living; *Davidson* v. *Kimpton*,[5] where the lady was a spinster of the age of fifty-four; *Lyddon* v. *Ellison* [1854],[11] where the lady was a spinster, and fifty-six years of age. It will be observed that in all the cases to which I have referred the ages were less than that of the lady in the present case; but it will also be observed that I have not mentioned any case of a widow who had had a child. One case was that of a widow, but she had never had any children—*Widdow's Trust, In re*[2]; and there was one case in which the marriage was still subsisting—*Millner's Estate, In re*.[3] In these circumstances I have to consider whether the cases relating to spinsters do not equally apply to widows who have had children. The only difference that occurs to me is that there is nothing to shew in the case of spinsters whether they are or have been capable of child-bearing, while in the case of a widow who has had a child there is. On the other hand, if there has been a long lapse of time since the birth of a child, as in this case—twenty three years — the presumption would be that the capacity of child-bearing has ceased. It seems to me that I can apply the principle of the cases relating to spinsters to widows who have had children.

It is said that there are two cases to the contrary. One is *Croxton* v. *May*,[9] which seems to me to be distinguishable. There the age of the lady was fifty-four years and six months, and there is a substantial difference between that case and the present one. The lady had never had any children, but the married life had only subsisted in reality for three years, although she had been actually married for seventeen years, and under those circumstances the Court of Appeal held that the incapacity to bear children had not been satisfactorily proved. I do not think that decision is applicable to the present case. The other case is *Hocking, In re*,[10] which is a case of very general application to cases to which it is applicable, if I may use such an expression. The proposition there laid down by the Court of Appeal was that the Court will not deprive a living person of a possible interest. Lord Lindley says: "If property is given to A. in the event of B. having no children, can A. claim that property before the death of B.? My answer is, No, neither at law nor in equity, unless B.'s possible child is the only person who can deprive A. of the property. When that is the case, the Court of Chancery has ordered funds under its control to be paid to A. when satisfied that B., owing to her age, can have no child." The case before me is exactly that excepted case, because if the plaintiff Anna White has more children who attain twenty-one, the property, instead of passing wholly to the plaintiff J. W. G. White, would pass to him and the other children. *Hocking, In re*,[10] is not therefore a case which applies.

I hold therefore that the plaintiffs are entitled to have the leaseholds bequeathed to the plaintiff Anna White assigned to them, or as they shall direct.

Solicitors—Keddey, Fletcher & Fry, for plaintiffs; Philbrick & Co., agents for Haynes & Co., Bow, for trustee.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

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(11) 19 Beav. 565.

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KEKEWICH, J.
1901.
Jan. 19, 30.

HAYNES *v.* FOSTER.

Married Woman—Election—Restraint on Anticipation—Subsequent Discoverture—Gift by Will—Compensation.

The doctrine of election does not apply in the case of a married woman to whom an interest with a restraint on anticipation attached thereto is given by the same instrument as that which gives rise to a question of election, even though at the time when the question of election arises the married woman has become discovert.

Hamilton *v.* Hamilton (61 L. J. Ch. 220; [1892] 1 Ch. 396) *distinguished.*

Petition.

The testator, Morgan Hugh Foster, by his will dated November 1, 1888, directed his lands in Turkey to be sold and the proceeds of sale to be held by the trustees of his will as if they were moneys arising from the conversion of the residue of his personal estate. The testator bequeathed his residuary personal estate to trustees upon trust for sale and conversion and for his wife for life, and after her death upon trust to set apart two sums of 8,000*l.* each, and to stand possessed of the residue upon trust for his son Arthur Foster for life with remainder to his issue as therein stated. And as to the investments representing the one sum of 8,000*l.*, the testator directed his trustees to hold it upon such trusts in favour of his daughter Lady Thomas and her issue as should correspond with the trusts declared in favour of his son Arthur Foster and his issue, but so nevertheless that his said daughter should not have power to deprive herself by way of anticipation of the annual produce to which she should become entitled for her life, and should take it for her sole and separate use; and in default or failure of issue trusts were declared in favour of the testator's other two children. And as to the investments representing the other sum of 8,000*l.*, the testator directed his trustees to hold it for his daughter Lady Lacon, upon trusts corresponding with those declared in favour of his daughter Lady Thomas, with similar trusts in default or failure of issue in favour of his other two children.

The testator died on June 15, 1891, and his wife died on November 14, 1892.

According to Turkish law the testator had no power to dispose of his Turkish estates by will, and they vested, as to one half in his son Arthur Foster, and as to one fourth in Lady Thomas, and as to one fourth in Lady Lacon.

An action had been commenced in 1892 by E. C. Haynes, a trustee of the marriage settlements of Lady Thomas and Lady Lacon, to have the rights of the parties determined in the proceeds of sale of the Turkish property, and orders had been made for the sale of the property and payment into Court of the proceeds of sale.

This was a petition by the plaintiff in the action for payment out of Court of the proceeds of sale to the parties entitled, and the question was raised whether in Lady Thomas and Lady Lacon elected to take by inheritance and not under the will they were bound to compensate out of their shares of the residuary estate those who by their election lost benefits under the will, or whether the restraint on anticipation relieved them of such necessity; and further, whether in the case of Lady Lacon the restraint had any effect, she having become a widow by the death of her husband, Sir Edward Broughton Knowles Lacon, Bart., on August 11, 1899, since the date of the presentation of the petition.

P. O. Lawrence, K.C., and *George Henderson*, for the petition.

Warrington, K.C., and *E. Beaumont*, for Arthur Foster.—The doctrine of election is founded on the presumption of a general intention that every part of an instrument shall take effect; but in the case of Lady Thomas the restraint on anticipation rebuts that presumption, and she cannot be put to her election—*Vardon's Trusts, In re* [1885].[1] Lady Lacon's case is different; although during coverture she is not put to her election, yet on becoming a *feme sole* she is bound

(1) 55 L. J. Ch. 259; 1 Ch. D. 275.

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by the doctrine of election—*Codrington* v. *Lindsay* [1873] [2] and *Hamilton* v. *Hamilton* [1892].[3]

Austen-Cartmell, for Lady Lacon.—The testator imposed a restraint on anticipation in order to prevent the possibility of Lady Lacon alienating her interest, and at the time when the restraint was imposed there was no fund out of which compensation could be made; therefore the doctrine of election does not apply, and she can take against the will without making compensation—*Wheatley, In re*; *Smith* v. *Spence* [1884],[4] *Vardon's Trusts, In re*,[1] *Whitwell, In re*; *Senior* v. *Wilson* [1890].[5] If *Hamilton* v. *Hamilton*[3] cannot be distinguished from this case it is inconsistent with the earlier authorities and ought not to be followed.

Dighton Pollock, for Lady Thomas.

Warrington, K.C., replied.

Cur. adv. vult.

Jan. 30.—KEKEWICH, J.—A somewhat curious question arises in this way: The testator Morgan Hugh Foster was the owner of some lands in Turkey, and by his will he purported to direct those lands to be sold and the proceeds of sale to be held by the trustees of his will as if the same were moneys arising from the conversion of the residue of his personal estate. He disposed of the residue of his personal estate in such manner as to give interests therein to his three children, Arthur Foster, Lady Thomas, and Lady Lacon. According to the law of Turkey, the testator had not the power which he purported to have of disposing of the proceeds of sale of land in that country, and the result is that such proceeds are divisible in certain shares between his three children aforesaid, who take them of course, not under the will, but by inheritance. If they insist on this title they are bound, according to what is styled the doctrine of election, to compensate out of the interests which they nevertheless take under the will those who thereby lose the benefits which the testator intended for them in the proceeds of sale of the land in Turkey. I do not find it necessary here to expound the doctrine of election or to do more than state, as I have done, its application in a concrete form to this particular case. But in stating the effect of the will I have intentionally omitted one provision which gives rise to the question falling for decision. Arthur Foster takes such interest as is given to him in the residue for his own benefit, without more, and the application of the doctrine of election is simple; but as regards Lady Thomas and Lady Lacon, their interests are coupled with restraint on anticipation, and it is that which has occasioned difficulty.

I will say no more now about Lady Thomas, but deal with the case of Lady Lacon only. It is urged on her behalf that application of the doctrine of election is excluded by this restraint on anticipation; and to that it is replied that, whether this might otherwise have been the correct conclusion or not, it is incorrect as matters stand, because Lady Lacon became a widow in August, 1899, and thereupon the restraint on anticipation ceased to have any effect. On this point several authorities were cited, and they must be noticed. Let me first say that *Codrington* v. *Lindsay*,[2] reported in the House of Lords as *Codrington* v. *Codrington*,[2] does not seem to me to have any real bearing on the case in hand. It is a well-known authority of great value and most instructive, much learning on the doctrine of election being found in the judgments of the learned Judges who took part in the decisions. But the point with which I am dealing did not arise, and could not have arisen there, and for the present purpose it cannot be regarded as a guide to any conclusion. My particular attention was called to the decision of the Court of Appeal, that the plaintiff was bound to account only for income received from the date of the order *nisi* for the dissolution of her marriage; but, apart from the observation that the grounds for this conclusion are not stated, study of the case has convinced me that it does not give me any assistance. A

(2) 42 L. J. Ch. 526; L. R. 8 Ch. 578; and in House of Lords, *sub nom. Codrington* v. *Codrington* [1875], 45 L. J. Ch. 660; L. R. 7 H.L. 854.

(3) 61 L. J. Ch. 220; [1892] 1 Ch. 396.

(4) 54 L. J. Ch. 201; 27 Ch. D. 606.

(5) W. N. (1890), 171.

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more important and useful case is *Vardon's Trusts, In re*,[1] but before commenting on that I must mention *Wheatley, In re; Smith* v. *Spence*.[4] In the latter case the claim of a married woman against a will would clearly have brought her within the doctrine of election, but that her interest under the same will, out of which compensation was sought to be made, was restrained from anticipation; and Mr. Justice Chitty held that this restraint excluded application of the doctrine. His views are clearly and forcibly expressed in the judgment, and briefly come to this—that by adding the restraint on anticipation the testator must be taken to have expressed his intention that the married woman should not be able to part with the interest given to her, and therefore must also be taken to have intended that she should not be at liberty to make that compensation which is the necessary consequence of the application of the doctrine of election. He held it to be a question of intention, and in substance said that one cannot properly insist on a beneficiary under a will giving effect as far as possible to all the testator's dispositions if you find him expressing the intention that the means of doing this shall be withheld. The same learned Judge took the same view in *Whitwell, In re; Senior* v. *Wilson*,[5] which I think calls for no further comment. *Vardon's Trusts, In re*,[1] first came before Mr. Justice Kay, and that learned Judge held that a restraint on anticipation was no bar to the application of the doctrine of election, and that the Court could insist on the married woman making compensation to those whose interests she defeated by her election, notwithstanding such restraint. He did not consider the question of intention at all. He only considered whether in a case to which the doctrine of election would otherwise have been applicable the restraint on anticipation—that is to say, the inability on the part of the lady to alienate—created any difficulty, and he held that it did not. But the case went to the Court of Appeal, and the Lords Justices took a different view. The judgment of the Court was delivered by Lord Justice Fry, and it rests on intention. It is to be observed that that was a case of a settlement, and not of a will, and some different considerations may be applicable to the two different instruments, because, as stated by Lord Redesdale in *Birmingham* v. *Kirwan* [1805],[6] in a passage which is cited with approval by Lord Hatherley in *Codrington* v. *Codrington*,[2] "deeds being generally matter of contract the contract is not to be interpreted otherwise than as the consideration expressed requires." The judgment in *Vardon's Trust, In re*,[1] however, does not distinguish between the two classes of instruments, and treats the intention as paramount in both alike. The key to the judgment of the Court of Appeal is to be found in the following paragraph: "This settlement, therefore, in our judgment, contains a declaration of a particular intention inconsistent with the doctrine of election, and therefore excludes it." Mr. Justice Chitty's judgment in *Wheatley, In re; Smith* v. *Spence*,[4] had been discussed before Mr. Justice Kay, who disapproved of it, but was cited again in the Court of Appeal, and, though not expressly approved by the judgment, must, I think, be treated as upheld by it.

If, then, Lady Lacon were still a married woman, it would follow that the restraint on anticipation of her interest in the residue would render it impossible for her to make compensation thereout, and would exclude the doctrine of election. But then it is urged that, she being now discovert, the restraint has ceased to exist, and compensation is therefore possible. If I am right in the view which I have taken of Mr. Justice Chitty's decision in *Wheatley, In re; Smith* v. *Spence*,[4] and of the decision of the Court of Appeal in *Vardon's Trusts, In re*,[1] it matters not whether Lady Lacon is now discovert or not. You must look to the will to ascertain what the testator's intention was, and if the testator has said that he intends her not to be capable of alienating her interest—that is, to be incapable of making that compensation thereout which the doctrine of election requires—then, because he has expressed that intention, the doctrine of election is excluded. Against this view reliance is placed on the decision of Mr. Justice North in *Hamilton* v. *Hamilton*.[3] He there held that a lady entitled to

(6) 2 Sch. & Lef. 444.

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repudiate a covenant in a settlement made by her when under age was bound to make compensation out of other interests under the same settlement to those whom she thus defeated; and I cannot read his judgment, which I have read with some care, without surmising that if the lady had at that time been discovert he would have obliged her to make compensation, notwithstanding that the settlement contained a restraint upon anticipation. But this was not the point decided. His judgment deals elaborately with and decides two points, and really two points only. It was argued that the restraint on anticipation contained in the settlement contemplated only the marriage on which the settlement was made, and therefore had no application to the subsequent coverture in existence when the case was heard. This argument he rejected, and decided that the restraint was applicable to the then existing coverture. The other point was that she had exercised her election by bringing the action which was commenced before the second coverture—that is, when she was discovert—and that therefore the restraint arising on the second coverture might be disregarded. The learned Judge rejected this argument also, and held that the obligation to elect arose when he delivered judgment. She was then a married woman and restrained from anticipation, and therefore her income during the then existing coverture could not be applied in compensation. *Vardon's Trusts, In re*,[1] was cited, and was commented on in the judgment; but I do not understand from the report that there was any argument on the point of intention, or that it was considered by the learned Judge. If that case stood alone, I might be bound to adopt it to the extent of saying that the effect of the restraint on anticipation of Lady Lacon's interest having ceased, and she electing to take against the will, that is, electing to claim by inheritance the property which the testator purported to give her as bounty, she is bound to make compensation to those whom she thus defeats out of her interest in the residue. But, as already stated, I do not think that Mr. Justice North's decision covers the exact point, and if it must be treated as doing that by implication (for it certainly does not expressly) it is at variance with the principle upon which the decisions in *Wheatley, In re; Smith* v. *Spence*,[4] and *Vardon's Trusts, In re*,[1] rest, and which principle seems to me to be perfectly sound.

There is, however, a subordinate point of which I find no trace in any of the other cases, but of which, after the arguments dealing with it, I am bound to take notice. It is said that the restraint on anticipation indicates only what counsel for Arthur Foster styled a limited intention. It was argued in fact that, as the restraint can only operate during coverture, the testator must be taken to have intended that only during coverture it should interfere with election. This argument of course proceeds on the proposition that testators are supposed to know the law. So they are, but it does not follow that you must attribute to them knowledge of the refined doctrines of equity. And in my judgment it would be going much too far to say that when a testator restrains a woman from anticipation he must be taken to intend, although no doubt that is the result, that if at any time during her enjoyment she is discovert the restraint will become wholly inoperative against her alienation. I put to counsel during the argument this test, which on reflection seems to me a good one: If the testator purported to restrain a man from alienation, his direction would be futile, because the law would not allow it; but could it be said that he did not intend such restraint to take effect? Intention which depends on construction of the testator's language, and the legal effect of that language, are two different things.

I therefore hold that Lady Lacon is not bound to make compensation, even though she is now discovert, and is capable of alienating her interest in the residue, because the restraint on anticipation is no longer operative. Arriving at this conclusion, I need say nothing about Lady Thomas, who is still a married woman, but who it was said might become liable to make compensation if and when she became discovert. I have dealt with the point on which I reserved judgment, and I think that, subject to that, the several

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HAYNES *v.* FOSTER.

questions arising on the petition, including the question of costs, were disposed of at the hearing.

Solicitors—Hunters & Haynes, for petitioner; Fladgate & Co., for respondents.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
Feb. 6.

ARNOT *v.* UNITED AFRICAN LAND CO.

Company—Special Resolution—Declaration by Chairman—"Conclusive evidence"—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

The provisions of section 51 *of the Companies Act*, 1862, *that the declaration of the chairman in the case of a special or extraordinary resolution, that the resolution has been carried, "shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same," precludes the Court from enquiring into the question whether the requisite proportion of votes was in fact given.*

Gold Co., *In re* (48 L. J. Ch. 281; 11 Ch. D. 701), *followed.*

Hadleigh Castle Gold-Mining Co., *In re* (69 L. J. Ch. 631; [1900] 2 Ch. 419), *approved.*

Horbury Bridge Coal, Iron, and Waggon Co., *In re* (48 L. J. Ch. 341; 11 Ch. D. 109), *distinguished.*

Appeal from Kekewich, J.

This action was brought to restrain the company and its directors from acting upon certain special resolutions which purported to have been passed by the shareholders for carrying out a scheme under section 161 of the Companies Act, 1862, for winding up the company and sale of its assets to a new company.

The plaintiffs, who were shareholders, who had neither come in under nor dissented from the scheme, relied on two grounds—first, that the resolutions had never been carried as special resolutions—that is, by a majority of three-fourths of the shareholders present at the meeting; and secondly, that a certain term of the scheme was *ultra vires*.

The plaintiffs moved for an interlocutory injunction, which Kekewich, J., refused.

The plaintiffs appealed.

On the second point the respondents now offered to give an undertaking not to deal with certain shares till the point was decided, which the Court considered satisfactory.

On the first point the evidence was that though the meeting was a little uproarious, the resolutions, of which due notice had been given, had been put to the meeting by the chairman and declared by him to be carried, and that the chairman had afterwards entered a minute in the minute-book to that effect. No poll was demanded.

The chairman made an affidavit on this motion, in which he stated that at the meeting a great many people were in favour of the resolutions and a few against them, but did not state what the majority was in their favour.

A. R. Kirby, for the appellants.—The resolutions were never passed as special resolutions. There is no evidence that the requisite majority of three-fourths of the shareholders present voted in their favour—Companies Act, 1862, s. 51.[1] The con-

(1) Companies Act, 1862, s. 51: "A resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting of which notice has been duly given, and held at an interval of not less than 14 days, nor more than one month,

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fusion at the meeting was such that no voting on the resolutions was possible, nor was it possible to say who voted for or against the resolutions.

J. W. Manning (with him *Warrington, K.C.*), for the respondents.—The declaration by the chairman is conclusive evidence that the resolutions were passed by the proper majority, without going into number of the votes—Companies Act, 1862, s. 51; *Gold Co., In re* [1879],[2] the fullest report of which is in the *Law Journal Reports*; and *Hadleigh Castle Gold-Mining Co., In re* [1900],[3] where Cozens-Hardy, J., refused to follow *Young* v. *South African and Australian Exploration and Development Syndicate* [1896].[4]

A. R. Kirby, in reply.—The declaration by the chairman is not conclusive if it is challenged—*Horbury Bridge Coal, Iron, and Waggon Co., In re* [1879].[5] In the present case the chairman makes an affidavit, but does not state that there was a majority of three-fourths in favour of the resolutions.

RIGBY, L.J., on the first point said: It is argued that there is evidence which ought to induce the Court to come to the conclusion that the resolutions in favour of the scheme were not properly put to or, at any rate, were not passed by the meeting. Upon all the evidence there is no doubt a good deal of contradiction and a good deal of exaggeration—it may be on both sides; but as the actual outcome of the evidence I consider that Mr. Justice Kekewich has come to a right conclusion—namely, that the chairman of the meeting did put the resolutions—notice of which had been given, and which had to be carried as special resolutions before the scheme could go on effectively—and that he did declare those resolutions carried, and that the entry of that declaration was made in the books of the company; and upon the authority of *Gold Co., In re*,[2] and of *Hadleigh Castle Gold-Mining Co., In re*,[3] before Mr. Justice Cozens-Hardy, in which the former case was followed and explained with regard to extraordinary resolutions, the conclusion ought to be, and our conclusion is, that the resolutions were duly passed as special resolutions. That would preclude any enquiry into the number of shareholders who voted for or against, and, of course, it would preclude enquiry—because no poll having been demanded it is not necessary to enquire—into the proxies. I think the explanation of what took place may be that which was suggested—namely, that there was possibly a majority of shareholders present at the meeting who were opposed to these resolutions, but that their opposition was made unavailable, and they recognised it to be unavailable, from the knowledge that there were a large number of proxies which, if a poll had been demanded, would have overruled such opposition. Whatever be the cause, I consider that the resolutions were duly declared to be passed, and must be taken to have been passed, by the requisite number of shareholders. [His Lordship then dealt with the other point, on which he held the undertaking sufficient, and continued:] I think that the result is that this appeal must be dismissed; and the appellant has been so far wrong, in our view, that he ought to pay the costs.

VAUGHAN WILLIAMS, L.J.—I entirely agree. I only want to add one word on the 51st section. It was argued that the case of *Horbury Bridge Coal, Iron, and Waggon Co., In re*,[5] was an authority to shew that, although in section 51 the word used is "conclusive," that word is not to be read as conclusive, but as *prima facie* conclusive. I do not agree with the argument; and I think that when the case of *Horbury Bridge Coal, Iron, and Waggon Co., In re*,[5] is looked at, it decides nothing of the sort. I thought at first that the interlocutory observation of Sir George Jessel in that case had reference

from the date of the meeting at which such resolution was first passed: At any meeting mentioned in this section, unless a poll is demanded by at least 5 members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same. . . ."

(2) 48 L. J. Ch. 281; 11 Ch. D. 701.
(3) 69 L. J. Ch. 631; [1900] 2 Ch. 419.
(4) 65 L. J. Ch. 638; [1896] 2 Ch. 268.
(5) 48 L. J. Ch. 341; 11 Ch. D. 109.

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to the words of the 51st section, but Lord Justice Stirling called my attention to the fact that that was not so, and that Sir George Jessel was referring really to the 37th article of association of that particular company, the material words of which, as set out in the report of that case, were, "a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution"; and it is in reference to those words that Sir George Jessel says, "Sufficient evidence in the absence of evidence to the contrary, but not conclusive evidence." He was not dealing with the 51st section at all; and really when one comes to look at the short statement of facts by Sir George Jessel the whole thing is quite plain. The question was whether Mr. Kippax had been properly appointed liquidator, and then Sir George Jessel states: "The facts are for this purpose beyond controversy. There were five persons present corporeally. One of the five held what was called a proxy, but it has been admitted, for the purpose of the argument, by the Respondents that that is not to be taken into account. Of the five persons present two only voted for Mr. Kippax. Three voted against him. The two who voted for him held more shares in the company than the three who voted against him, and according to the law of this company there was a vote for every share. No poll was demanded, and consequently no poll was taken. The next point is, whether the chairman was right in deciding that Mr. Kippax was duly elected because the two persons, including himself, who voted for Mr. Kippax held more shares in the company than the three who were against him." Then Lord Justice Bramwell in his judgment says: "First, a poll was not demanded, and secondly, there was no waiver of a poll." Under those circumstances it seems to me that that case, when it is looked at, does not affect the question as to the word "conclusive" under section 51 at all.

STIRLING, L.J.—I am of the same opinion. I have only this to add—that, as regards the passage in section 51, which has been commented upon by Lord Justice Vaughan Williams, I entirely agree with the reasoning of Mr. Justice Cozens-Hardy in the case of *Hadleigh Castle Gold-Mining Co., In re*,[3] which came before him; and as regards *Horbury Bridge Coal, Iron, and Waggon Co., In re*,[5] I only wish to add that it appears to me, as has been pointed out by the Lord Justice, that section 51 did not come at all in question there. The statement of facts in the report was this: "the company being in difficulties, a meeting was held, which had been summoned for the purpose of passing an extraordinary resolution under the Companies Act, 1862, s. 129, that it had been proved to the satisfaction of the company that it could not, by reason of its liabilities, continue its business." To that resolution, of course, section 51 would apply; but what happened was this: "Five shareholders only attended, and a resolution to the above effect was passed unanimously." That resolution having been unanimously passed, what they proceeded to do was to appoint a liquidator, and that was a resolution which was not required to be a special resolution. The evidence as to what followed it was said to be this: "A motion was made and seconded that Mr. Kippax should be appointed liquidator," and upon that there was a dispute as to who voted. Section 51 did not apply to that motion, but the 37th article of the company's articles of association did apply, and consequently it seems to me that that case is no authority against our present decision.

Appeal dismissed.

Solicitors—Armitage & Chapple, for appellant; Blair & W. B. Girling, for respondents.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

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[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
Feb. 5, 8, 18.

BRUTTON AND BURNEY, LIM., *In re*; AND BURNEY'S NEW CROSS BREWERY, LIM., *In re*.

Company—Issue of Fully Paid Shares for Consideration other than Cash—Omission to File Contract—Power of Court to Give Relief—Memorandum in Lieu of Contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1, *sub-s.* 4—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 33, 35, *and* 36.

The power of the Court to give relief under the Companies Act, 1898, *against the omission to file a contract under section* 25 *of the Companies Act*, 1867, *in the case of an issue of shares of a company as fully paid for a consideration other than cash has not been taken away by the Companies Act*, 1900.

Appeal from a decision of Byrne, J.

Brutton & Burney, Lim., was incorporated in 1899 for the purpose of purchasing and carrying on the business of spirit brokers and valuers carried on by Messrs. Brutton & Burney. The capital of the company was 60,000*l.*, divided into 3,000 5½ per cent. preference shares of 10*l.* each, and 3,000 ordinary shares of 10*l.* each. On August 16, 1899, Brutton & Burney, Lim., issued a prospectus inviting applications for 1,200 5½ per cent. preference shares of 10*l.* each at par. The prospectus contained the following statements: "It has been considered desirable now to form the present company in order to further extend the trade with the additional working capital now provided, and to give the customers and others connected with the business an opportunity of subscribing for the preference shares. The firm are intimately associated with Burney's New Cross Brewery, Lim., with whom they do a very extensive trade, the directors of that company being all directors of this company, and it is the intention of the Brewery Co. to acquire the shares of this company, and work the business in conjunction with their own. In order to carry out this arrangement, a meeting of the Brewery Co. has been held and a resolution passed authorising the necessary increase of capital for this purpose. The subscribers to the 5½ preference shares of this company will receive in exchange for each 10*l.* share a second preference share of 10*l.* carrying the same rate of interest in Burney's New Cross Brewery, Lim."

Then followed a statement of the capital and debenture stock of the brewery company, and the net profits of that business and of Messrs. Brutton & Burney's business; and a statement that the purchase-money for that business was to be 48,000*l.* paid as to 18,000*l.* in preference shares, and 30,000*l.* in ordinary shares, leaving 12,000*l.* for working capital.

Applications for shares were to be made on the form accompanying the prospectus. The application form, which was addressed to the directors of Brutton & Burney, Lim., contained this clause: "I authorise you, if you think fit, to allot the above-mentioned shares to any person or company who shall have procured me to be registered as a holder of a similar number of Second Preference shares of 10*l.* each, in Burney's New Cross Brewery, Lim., fully paid-up."

Messrs. Brutton & Burney sent with this prospectus a letter to their customers and friends, calling attention to the issue of the shares, and saying, "Our business is intimately connected with the business of Burney's New Cross Brewery, Lim., . . . and it is proposed to amalgamate the two businesses and to exchange the shares in our company when formed for preference shares in the Brewery Co."

The capital of the brewery company was originally 120,000*l.*, divided into 5½ per cent. preference shares and ordinary shares. It was subsequently increased to 180,000*l.*

According to the evidence of the secretaries of the two companies, it was intended that the arrangement between them should be effectuated—first, by the payment to the brewery company by Brutton & Burney, Lim., of the 12,000*l.* cash to be received by them from the

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applicants for shares, and the issue to the said applicants or nominees of Brutton & Burney, Lim., of the 1,200 second preference shares in the brewery company fully paid up in cash; and secondly, by the payment to Brutton & Burney, Lim., of 12,000*l.* in cash by the brewery company, and the issue to the brewery company of the 1,200 preference shares in Brutton & Burney, Lim., fully paid up in cash.

On November 10, 1899, James Watson & Co., Lim., applied for 200 of the 1,200 5½ per cent. preference shares in the form and upon the terms mentioned in the prospectus of August 16 and paid to the bankers of Brutton & Burney, Lim., 10*l.* per share in respect of such shares. In due course 200 5½ per cent. second preference shares of 10*l.* each in Burney's New Cross Brewery, Lim., were allotted to them as fully paid. There were 646 shares in all issued out of the 1,200. The form of the letter of allotment sent to the applicants for shares by the secretary of Brutton & Burney, Lim., was as follows: "I am directed to inform you that in compliance with your application . . . preference shares of 10*l.* each have been allotted to Burney's New Cross Brewery, Limited, who have, in exchange, allotted to you . . . second preference shares of 10*l.* each in their company, fully paid up."

The moneys payable by Brutton & Burney, Lim., on behalf of the applicants to the brewery company, and by the brewery company to Brutton & Burney, Lim., in respect of the 646 shares were not, in fact, paid at the dates of the issue of the shares to the allottees, and no part of such moneys was paid by either company until February 3, 1900, when each company paid to the other 6,460*l.* A question was raised whether these shares of the brewery company were paid for in cash, or whether a contract in writing ought not to have been filed with the Registrar of Joint-Stock Companies under section 25 of the Companies Act, 1867.

The brewery company, in February, 1900, moved for an order under sub-section 4 of section 1 of the Companies Act, 1898, that a memorandum in the form approved by the Court should be filed, and that upon its filing within the time mentioned it should, in relation to the shares in question in both companies, operate as if it were a sufficient contract in writing within section 25 of the Companies Act, 1867, and had been filed before the issue of the shares.

Byrne, J., on April 5, 1900, declined to make any order on the motion, being of opinion that the shares had not been issued for a consideration other than cash, and that payment in cash for the same had been made. He intimated that he would, if necessary, give James Watson & Co. leave to appeal. They, on April 27, 1900, gave notice of appeal.

Waggett, for the appellants.—The contract in this case was, in effect, a contract for the exchange of shares between the two companies. The shares of the brewery company were issued for a consideration other than cash, and a contract ought to have been filed under section 25 of the Companies Act, 1867—*Harmony and Montague Tin and Copper Mining Co., In re; Spargo's Case* [1873],[1] and *Johannesburg Hotel Co., In re* [1890].[2] The filing of a contract now is impracticable, and it is a case for the filing of a memorandum under sub-section 4 of section 1 of the Companies Act, 1898.

Section 25 of the Companies Act, 1867, has been repealed by the Companies Act, 1900, s. 33, and no proceedings under section 25 of the Act of 1867 are to be commenced after the commencement of the Act of 1900. That Act did not come into force until January 1, 1901, after these proceedings were commenced, and after the notice of appeal had been given.

As regards rights acquired or liabilities incurred before the Act of 1900 came into force, it may be that section 25 of the Act of 1867 is not repealed—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38, and *Palmer's Companies Act*, 1900 (2nd ed.), p. 63. Although no proceedings are to be taken under the section, it is not provided that shares issued for a consideration other than cash are to be deemed to be fully paid shares without the filing of any contract. The shares remain as before. The

(1) 42 L. J. Ch. 488; L. R. 8 Ch. 407.
(2) 60 L. J. Ch. 391; [1891] 1 Ch. 119.

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Act of 1900, in section 7, sub-section 1 (*b*), contains provisions for the filing of a contract in the case of the allotment of shares by a limited company for a consideration other than cash. It has not deprived the Court of the power of giving relief in such a case under the Companies Act, 1898. In section 36 it is enacted that the Act may be cited with the Companies Acts, 1862 to 1898. That recognises the existence of the Act of 1898. Under sub-section 4 of section 1 of the Act of 1898, the memorandum may be directed to operate when filed as if it were a sufficient contract within section 25 of the Act of 1867. There need not have been a contract in writing at all—*Tom-Tit Cycle Co., In re; Fisher's Case* [1899].[3] The Act was intended to apply to such a slip as occurred in this case—namely, the omission to put into writing and file the contract between the two companies for the exchange of fully paid shares in the one for fully paid shares in the other—*Whitefriars Financial Co., In re* [1898].[4]

E. J. Elgood, for the brewery company.

T. Douglas, for Brutton & Burney, Lim.

RIGBY, L.J.—We think that the view that the shares were issued in consideration of a cash payment cannot be maintained; but the memorandum proposed does not, in our opinion, sufficiently represent the facts of the case. The appeal will stand over to enable the parties to settle a memorandum, and after we have seen the amended memorandum we will deliver judgment in the case.

The amended memorandum agreed upon between the parties was as follows: "Whereas the several persons and firms whose names addresses and descriptions appear respectively in Columns 2, 3, and 4 of the Table annexed hereto applied for and (subject to the option reserved to Brutton & Burney, Ltd., as hereinafter mentioned) became entitled to allotments of Preference Shares in Brutton & Burney, Ltd., and the numbers of shares so applied for are set forth in Column 1 of the said Table. And whereas such several persons and firms paid in cash to Brutton & Burney, Ltd., the full sum of 10*l.* upon each of the shares so applied for by them respectively. And whereas the said several persons and firms on applying for such shares had agreed with Brutton & Burney, Ltd., that Brutton & Burney, Ltd., should be at liberty to issue and allot to Burney's New Cross Brewery, Ltd., as fully paid the shares so applied for in consideration of Burney's New Cross Brewery, Ltd., allotting to them the said several persons and firms a like number of 2nd Preference Shares of Burney's New Cross Brewery, Ltd., to be issued as fully paid, and corresponding in number with the number of shares in Brutton & Burney, Ltd., to which the said several persons and firms respectively became entitled as aforesaid. And whereas Brutton & Burney, Ltd., exercised such option and Burney's New Cross Brewery, Ltd., agreed to give effect to the exercise thereof. Now be it remembered that accordingly and for the considerations appearing in the premises the 2nd Preference Shares in Burney's New Cross Brewery, Ltd., identified by the distinctive numbers set out in Column 5 of the said Table were issued and allotted as fully paid to the said several persons and firms whose names, addresses and descriptions appear respectively in Columns 2, 3, and 4 of the said Table and the Preference Shares in Brutton & Burney, Ltd., identified by the distinctive numbers set out in Column 6 of the said Table were allotted as fully paid to Burney's New Cross Brewery, Limited."

Feb. 18.—RIGBY, L.J.—We have seen the memorandum that has been prepared, and there does not appear to be any objection to it. If filed, it will have a beneficial effect with regard to the shares in question.

The brewery company received no other consideration for the shares which they issued than an allotment of shares in Brutton & Burney, Lim., which had been subscribed for and paid up by persons of whom the appellants are the most active movers in the steps that are being taken. The company received shares and nothing else for the shares which they issued. This transaction took place at a time when

(3) 34 L. J. N. C. 168; W. N. (1899), 35.
(4) 68 L. J. Ch. 79; [1899] 1 Ch. 184.

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section 25 of the Companies Act, 1867, was in force, and it is a transaction which is obviously open to objection under that section, assuming it to be still in force. By the Companies Act, 1898, the Court was empowered, where no contract or no sufficient contract had been filed under section 25 of the Companies Act, 1867, to direct a sufficient contract to be filed, or, where there was any difficulty as to registering the actual contract, to make an order for the filing of a memorandum which was to operate as a sufficient contract in writing within the Act. That power has never, in my opinion, been taken away. Indeed, there is some foundation for the suggestion that was made that the powers of the Act of 1898 were kept alive by the very terms of the Act of 1900, reference being made in section 36 of that Act to "the Companies Acts, 1862 to 1898," whereas, if the Act of 1898 had been impliedly repealed by the later Act, which there is no reason for supposing, the reference to it would have been omitted.

No doubt, when the Act of 1900 came into force, on the first day of the present year, section 25 of the Act of 1867 was repealed. I will only say with reference to that, that at any rate a plausible argument might be raised under the Interpretation Act, 1889, that the repeal is not absolute with respect to cases which would fall within section 25 if not repealed, and upon which action was taken before the Act of 1900 came into force. I say no more than that at any rate a plausible argument might be raised as to that, but I do say that the appellants and persons in their position are not unduly pertinacious and troublesome when they urge that they do not know what their position will be in every possible event, supposing that section 25 of the Act of 1867 is still in force, though no proceedings could in their case be taken under it. An enactment which provides that no proceedings shall be thereafter taken under section 25 may not—I do not say more than that—but it may not cover the entire case. Suppose that the brewery company should come to be wound up, and the appellants wanted to obtain their share of the assets in the winding-up, is it so clear that they would obtain their share of the assets although no proceedings could be taken against them under section 25 of the Act of 1867? It might be doubtful. That they would not get their share is not an unreasonable contention. Whether or no it is well founded it is not necessary to discuss now. It might be years and years before any question arose, but in the meantime the position of these shareholders would be a very difficult one, and their power of dealing with their shares might be seriously imperilled. Under the circumstances we think that it is not unjust or inequitable that we should make an order under the Act of 1898 that the memorandum which has been produced to us should be filed, and that the order should in other respects be as asked by the notice of motion.

With regard to the costs there seems to me to have been a little want of grasp of the situation on the part of both the companies. A suggestion was made that there had been an exchange of cheques, but that does not seem to meet the case in any way, or to correspond with the true facts of the arrangement. I think that under the circumstances the matter was very properly brought forward, and it was most right and proper that the brewery company should bring it forward, but they ought to pay the costs both here and below.

VAUGHAN WILLIAMS, L.J.—I agree. If one is to assume, as one may, that the facts of the case are those set forth in this memorandum, I do not see any difficulty in making the order that is asked for. Had it not been for the agreement of the facts as appearing in the memorandum, I confess that I should have had some doubt, not as to the expediency of making the order, if the facts were such that an order could be made, but whether in truth and in fact there ever was any agreement determining that these shares should be paid for otherwise than in cash within the meaning of section 25 of the Act of 1867. Of course, if we do not arrive at that we cannot go any further, but according to the facts as appearing in this memorandum it seems that there was such an agreement.

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BRUTTON & BURNEY, LIM., IN RE, App.

STIRLING, L.J.—I agree, and I have nothing to add.

Appeal allowed.

Solicitors—Van Sandau & Co., for appellants; Laytons, for respondents.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
Feb. 15, 18.

EASTWOOD BROTHERS, LIM. *v.* HONLEY URBAN COUNCIL.

Local Government—Sewers—Prescriptive Right of Drainage—Trade Effluents — Pollution — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 21—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 7.

Where a local authority have for some years allowed effluents produced in the course of a trade or manufacture to be discharged into their sewers they are not justified under the provisions of the Rivers Pollution Prevention Act, 1876, *s.* 7, *in cutting off the connection made with their sewer merely because the nature of the trade effluent is such that it renders the disposal by irrigation or otherwise of the sewage-matter less efficient than it might otherwise be.*

Decision of BYRNE, J. (69 L. J. Ch. 470; [1900] 1 Ch. 781), *affirmed.*

Appeal from decision of Byrne, J. (69 L. J. Ch. 470; [1900] 1 Ch. 781).

The plaintiff company were the owners in fee of land and mills known as "Thirstin Mills," where they carried on the business of woollen and worsted manufacturers. They acquired the property in 1890 as successors in title to a firm of Eastwood Brothers, who in their turn had derived title through a firm of Bramley, Drury & Co.

In 1853 a drain was constructed from the mills which carried the trade effluent discharged in the processes of manufacture into a ditch or channel known as Thirstin Dyke; that channel discharged into a stream known as the Mag Brook, and the stream flowed into the river Holne. There was no interruption in the user of that drain for trade effluents so long as it discharged into the Thirstin Dyke.

In 1885 the Honley Local Board was the local sanitary authority for the district within which the mills were situated, and in that year projected and carried out a sewerage system under which they constructed a sewer near the Thirstin Dyke. It appeared from the evidence that the workmen of the board took up the drain from the mills at the point where it met the new sewer and made a connection between them. This was done without any special directions being given, and without previous communication with the then owners of Thirstin Mills. From 1885 to the present time the drain had ceased to discharge into Thirstin Dyke, and the effluent from the mills had passed into the sewer. Thirstin Mills had from 1853 been enlarged from time to time, and there was some evidence to the effect that the volume of the trade effluent had increased in recent years, but there had been no material change in its character or quality.

Under the Local Government Act, 1894, the Honley Local Board became the Honley Urban District Council. In 1896 a joint committee of the Honley Urban District Council and the South Croyland Urban District Council was formed for the purpose of making main sewers for the two districts, and in 1897 that committee acquired land for the construction of outfall and purification works. Under a provisional order of April 10, 1897, a joint sewerage board was constituted which superseded the joint committee, but its duties and functions only affected main sewers made by the joint board, and sewers already made by either of the two district councils remained vested in and under the control of the council in whose district they were situated.

The defendant council were advised that the discharge of the trade effluent

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from Thirstin Mills into their sewer was, on account of its temperature, and for other reasons, prejudicially affecting the disposal of the sewage-matter and exposing them to liabilities under the Rivers Pollution Prevention Act, 1876. They thereupon gave notice to the plaintiffs of their intention to cut off the connection between the sewer and the drain from Thirstin Mills.

The plaintiffs brought this action claiming an injunction to restrain the defendants from disconnecting the drain in accordance with their threat. The action was tried without pleadings, and upon affidavit evidence.

Byrne, J., held that effluents produced in the course of a trade or manufacture might, under the Public Health Act, 1875, s. 21,[1] be included among the matters discharged into a public sewer through a connection lawfully made, and that the provisions of the Rivers Pollution Prevention Act, 1876, s. 7,[1] did not justify the local authority in cutting off the connection made with their sewer, even if it could be shewn that the liquid discharged would prejudicially affect the disposal of the sewage-matter conveyed through the sewer. He therefore granted an injunction against the defendants.

The defendants appealed.

Asquith, *K.C.*, and *E. Clayton*, for the appellants.—The question is whether the plaintiffs have acquired a right to discharge their trade effluent into the sewer of the urban council with which the council cannot interfere. They have not acquired it by prescription, as the connection was only made in 1885. They may have certain rights against the riparian owners, but that does not affect the council. They have no right against the council apart from Act of Parliament. No right is given to them by section 21 of the Public Health Act, 1875.[1] The local authority made the connection between the drain and the sewer in 1885, and from that time the trade effluent has gone into the sewer, but that was only under a revocable licence.

The only right conferred on an owner or occupier by the Public Health Act is to have a connection made for the purpose of getting rid of domestic sewage. A manufacturer, carrying on, it may be, an obnoxious or offensive trade, has no right to discharge into the sewer any quantity of noxious fluid that he pleases. His only right is in respect of domestic sewage if any such is created in the manufactory. "Sewage" is not defined in the Act of 1875, but the right to connect with a sewer is confined to sewage in the ordinary sense of the word. Section 17 of the Act of 1875 speaks of "sewage or filthy water." That would mean water such as storm water, which possibly could not be kept out, and might be of a nature so filthy as to pollute a watercourse. That

(1) The Public Health Act, 1875, enacts by section 21: "The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communications. Any person causing a drain to empty into a sewer of a local authority without complying with the provisions of this section shall be liable to a penalty not exceeding twenty pounds, and the local authority may close any communication between a drain and sewer made in contravention of this section, and may recover in a summary manner from the person so offending any expenses incurred by them under this section."

The Rivers Pollution Prevention Act, 1876, enacts by section 7: "Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers: Provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise be injurious in a sanitary point of view: Provided also, that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, nor where such facilities would interfere with any order of any court of competent jurisdiction respecting the sewage of such authority."

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this is the right view of the Act is borne out by the provisions of the Rivers Pollution Prevention Act, 1876, in which the difference between sewage and polluting matter from a manufactory is shewn—see sections 3, 4, 7, and 16. The West Riding of Yorkshire Rivers Act, 1894 (57 & 58 Vict. c. clxvi.), which deals with the pollution of rivers in the district in question here, has provisions in substance similar to those in the Rivers Pollution Prevention Act, 1876, section 10 of that Act being identical with section 7 in the Act of 1876. The local authority cannot receive anything into its sewers which either alone or in combination with sewage is likely to cause a nuisance—Public Health Act, 1875, s. 27, and Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 17. The plaintiffs can come to the council for facilities to dispose of this effluent, and then it will be a matter for consideration on the circumstances what will be allowed. Byrne, J., followed Charles, J., in *Peebles* v. *Oswaldtwistle Urban Council* [1896].[2] In the Court of Appeal[3] and the House of Lords[4] it was only decided that an action for a *mandamus* was not the right means of enforcing the duty of a local authority to make necessary sewers. The question whether there was any duty on them to receive trade effluents was not gone into. In *Att.-Gen.* v. *Clerkenwell Vestry* [1891][5] it was held that a local authority could not stop up communications with their sewers which they had sanctioned; but that proceeded on the basis of a duty on the part of the local authority and a right on the part of the individual. Of course a local authority cannot refuse to do its duty, and will not be compelled to do anything interfering with that—*St. Mary, Islington, Vestry* v. *Hornsey Urban Council* [1900][6]—but here there is no duty on the part of the council, and no right on the part of the plaintiffs.

(2) 66 L. J. Q.B. 106; [1897] 1 Q.B. 384.
(3) 66 L. J. Q.B. 392; [1897] 1 Q.B. 625.
(4) *Sub nom. Pasmore* v. *Oswaldtwistle Urban Council*, 67 L. J. Q.B. 635; [1898] A.C. 387.
(5) 60 L. J. Ch. 788, 791; [1891] 3 Ch. 527, 534.
(6) 69 L. J. Ch. 324; [1900] 1 Ch. 695.

Danckwerts, *K.C.*, and *Waggett*, for the plaintiffs.—Byrne, J., came to the conclusion that it had not been proved that the discharge of the effluent into the sewer in question would prejudicially affect the disposal of the sewage-matter. If, which the plaintiffs do not admit, the council are in any difficulty in the matter, it is their business to find a way out of it—*Att.-Gen.* v. *Colney Hatch Lunatic Asylum* [1868].[7]

The plaintiffs' case does not depend solely on section 21 of the Public Health Act, 1875.[1] They put their case on three grounds, and first on that upheld by Charles, J., in *Peebles* v. *Oswaldtwistle Urban Council*,[2] that it is the duty of the local authority to receive this trade effluent into their sewers; secondly, they contend that if a local authority interferes with a man's drain they must give him something in its place; and thirdly, they say that they have a right under section 7 of the Rivers Pollution Prevention Act, 1876,[1] to have facilities for the discharge of their trade effluent into the sewers.

There is nothing to shew that the decision of Charles, J., was wrong as to the effect of section 21 of the Public Health Act, 1875. The section is quite general.

Since 1853, the owners of this mill had had and used a right of sending effluent into Thirstin Dyke, and so into Mag Brook, and so acquired a right as against the riparian owners. There is no evidence that it created a nuisance. When the local authority cut off the drain from the dyke and connected it with their sewer they deprived the owners of any right which they might have had under section 4 of the Rivers Pollution Prevention Act, 1876, and they cannot now refuse to allow the connection with the sewer. The licence they gave is not now revocable, as the plaintiffs have altered their position. Under section 15 of the Public Health Act, 1875, a local authority is bound to make such sewers as are necessary for effectually draining their district, and under section 18 they may alter the course of a sewer, or close it up, but they must provide an equally effectual sewer for the use of the persons deprived of the

(7) 38 L. J. Ch. 265, 267 L. R. 4 Ch. 146, 153.

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use of the sewer affected. The plaintiffs have a right to connect with the sewer in that way, or under section 21. Either section 21 of the Act of 1875 gives the right and section 7 of the Rivers Pollution Act, 1876, cuts it down and regulates it, or else section 7 of the Act of 1876 gives the right to have facilities for the discharge of the effluent. The speech of Lord Halsbury in *Pasmore* v. *Oswaldtwistle Urban Council*[4] supports that view. If this had been domestic sewage there is no question that it could not have been cut off—*Att.-Gen.* v. *Clerkenwell Vestry*[5] and *Ogilvie* v. *Blything Union Rural Sanitary Authority* [1891].[8] Section 21 of the Act of 1875 was quite general in its terms, and includes trade effluents. Section 68 deals specially with effluents from gas manufacture, which shews that section 21 is intended to include all other effluents.

The Legislature in the Public Health Acts Amendment Act, 1890, by sections 16 and 17 has construed the Act of 1875 by referring to chemical and other effluents which can only arise from manufacturing processes, and thus recognising the right of discharging such effluents. If facilities are once given under section 7 of the Act of 1876, they cannot be withdrawn. It has not been proved that there has been any prejudicial effect by the discharge of these liquids. There is ample remedy for any discharge injurious to health under the Public Health Acts Amendment Act, 1890, s. 17.

Asquith, K.C., in reply.—Section 7 of the Rivers Pollution Prevention Act, 1876, enables the local authority to cut off a discharge if the evils mentioned are caused. We are quite willing to receive the domestic sewage of the plaintiffs, but this does not compel us to receive the trade effluent as well as the sewage—*Charles* v. *Finchley Local Board* [1883].[9]

RIGBY, L.J.—I have found some difficulty in this case on account of the rather vague way in which the matter has been brought forward. But it is obvious that the sewage authority, of their own free will, allowed the effluent water from this manufactory to be introduced into their sewers a considerable time ago, and there is no allegation that I can find that the sewers of the district are insufficient for carrying that trade effluent as well as all other sewage required to be carried away by them. With reference to the first proviso in section 7 of the Rivers Pollution Prevention Act, 1876,[1] Mr. Justice Byrne, having had the evidence before him, has found that there is nothing to bring the case within the section; and I do not see that we have any reason to overrule that finding. Under the circumstances, the district council say: "We object because we find that the land for the purposes of irrigation to dispose of the sewage is really small in area in our district, and our engineers think that the nature of the trade effluent is such that it will render the processes of irrigation and filtration somewhat less efficient and therefore be objectionable"; but there is no objection that I can find on the ground that there will be pollution within any ordinary meaning or any applicable meaning of the word by the sewage-matter so as to prevent it being proper for conveyance into the sewer. I can find no grounds on which we ought to differ from Mr. Justice Byrne, and therefore I think that the appeal ought to be disallowed.

VAUGHAN WILLIAMS, L.J.—I entirely agree.

STIRLING, L.J.—I think, whether you look at section 21 of the Public Health Act, 1875, or at section 7 of the Rivers Pollution Prevention Act, 1876, no sufficient ground is shewn for reversing the decision of Mr. Justice Byrne. If section 21 of the Public Health Act, 1875, applies, then, according to the authorities, there is an absolute right on the part of the plaintiffs to discharge their effluent into the sewers. If, on the other hand, it is qualified by section 7 of the Rivers Pollution Prevention Act, 1876, then it seems to me, as has already been stated, the facilities which have been given for the dealing with this effluent by the district council ought not to be withdrawn unless the case is brought within one or

(8) 65 L. T. 338.
(9) 52 L. J. Ch. 554, 558; 23 Ch. D. 767, 774.

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EASTWOOD BROTHERS, LIM. *v.* HONLEY URBAN COUNCIL, App.

other of the provisoes in the two clauses which follow the first. I agree in thinking that the local authority have not brought the case within either clause, and consequently that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors—Jaques & Co., agents for Armitage, Sykes & Hinchcliffe, Huddersfield, for appellants; Van Sandau & Co., agents for Mills & Co., Huddersfield, for respondents.

[*Reported by A. J. Spencer, Esq., Barrister-at-Law.*

FARWELL, J. 1901. Jan. 17. } HOWARD; *In re*; TAYLOR *v.* HOWARD.

Will—Construction—Gift "so long as she remains unmarried."

A direction in a will to set aside a sum of 200*l. and thereout pay to the testator's widow a sum of* 3*l. monthly "so long as she remains unmarried or until the said sum of* 200*l. becomes exhausted, the said payment of* 3*l. monthly to cease on my said wife marrying again," is an absolute gift of the* 200*l.*

Rishton *v.* Cobb (9 L. J. Ch. 110; 5 Myl. & Cr. 145) *followed.*

The testator in the cause, by his will dated February 3, 1899, appointed the defendant executor and trustee thereof, and (amongst other provisions), after providing for the realisation of his estate, desired his executor and trustee "to set aside 200*l.*, and thereout pay to my said wife, the said Amelia Howard, the sum of 3*l.* monthly, so long as she remains unmarried, or until the said sum of 200*l.* becomes exhausted, the said payment of 3*l.* monthly to cease on my said wife marrying again."

The testator died on May 8, 1899, and his will was duly proved by the defendant on November 10, 1900. Amelia Howard died on May 31, 1900, having, by her will dated January 2, 1900, appointed the plaintiff sole executrix. Certain payments had been made to Amelia Howard on account of her annuity of 3*l.* monthly.

The plaintiff commenced the present proceedings by originating summons, asking that it might be determined whether, upon the true construction of the will of the testator, the plaintiff, as executrix of the widow of the said testator, was entitled to be paid by the defendant out of the said testator's estate so much of the sum of 200*l.* directed by him to be set apart, and any interest which might have accrued on any investments of that amount, which the said testator's widow did not herself receive, or which since her death had not been paid to her said executrix. The summons was adjourned into Court for argument.

S. Dickinson, for the plaintiff, referred to *Rishton* v. *Cobb* [1839] [1] and *Boddington, In re*; *Boddington* v. *Clairat* [1885].[2]

G. E. Fryer, for the defendant.

FARWELL, J.—I do not think it is necessary for me to determine whether the Court of Appeal is at liberty to disregard *Rishton* v. *Cobb*.[1] It is sufficient for me that Lord Selborne, notwithstanding his expressions of dissent, says that it is to be supported on the very ground which decides this case. I do not see how I can avoid following it. There will be a declaration in the terms of the summons that the plaintiff is entitled to the unapplied part of the 200*l.*, and any interest which has accrued thereon.

Solicitors—Colman & Knight; W. H. Martin & Co.

[*Reported by A. E. Randall, Esq. Barrister-at-Law.*

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(1) 9 L. J. Ch. 110; 5 Myl. & Cr. 145.
(2) 53 L. J. Ch. 475; 25 Ch. D. 685.

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COZENS-HARDY, J. 1901. Feb. 4. } NATIONAL BISCUIT CO.'S APPLICATION, *In re.*

Trade Mark—"Invented word"—Misspelling—"Words having no reference to quality"—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10.

A word such as "Uneeda," which merely consists of a misspelling of three common words put into one, is not "an invented word" within section 64 (*d*) *of the Patents, Designs, and Trade Marks Act*, 1883, *as amended by the Act of* 1888.

If such a word or phrase suggests that the purchaser of goods will find them comforting or advantageous, it cannot be registered under sub-section (*e*) *of that section as "having no reference to the character or quality of the goods."*

This was an appeal from the refusal by the Comptroller of an application by the National Biscuit Co., an American corporation, to register in class 42 (Biscuits, &c.) a Trade Mark No. 221738, consisting solely of the word "Uneeda."

The mark had been registered in the United States, and Uneeda Biscuits had been widely advertised there.

The reasons given by the Comptroller for his refusal were that the word "Uneeda" was a mere misspelling of the words "You need a," and misspelling could not be considered invention. It was not, therefore, an "invented word," and it could not be registered under sub-section (*e*) of section 64 of the Patents, Designs, and Trade Marks Act, 1883, as amended by the Act of 1888, as "a word or words having no reference to the character or quality of the goods," because it conveyed the idea that the prospective purchaser's personal comfort would be promoted by the acquisition of the article.

The trade mark had been upheld in the American Courts, and protected by injunction.

Moulton, K.C., and *E. F. Lever*, for the applicants.—Assuming that "Uneeda" is an ingenious misspelling of the three words "You need a," though it was not originally so intended, it is an invented word within the meaning of section 64 (*d*) of the Act. The test, as laid down by the House of Lords in *Eastman Photographic Materials Co.* v. *Comptroller-General* [1898],[1] is whether the registration of the word will interfere with the right of the public to use the English language in its ordinary sense. Tried by that test, "Uneeda" is perfectly harmless. It is true that there must be some invention, and Lord Halsbury said in the same case that merely misspelling a word would not do if its use would tend to deceive. Here there is no tendency whatever to deceive; and there is invention in so caricaturing a sentence as to make it a single word. Lord Halsbury was thinking of such a case as *Ripley, In re* [1898],[2] where registration was refused to "Pirle" on the ground that it was a mere misspelling of Pearl, which was held to have some reference to the character or quality of the goods.

If "Uneeda" is not an invented word, it is "a word or words having no reference to the quality or character of the goods," and may be registered under section 64 (*e*) of the Act.

The Attorney-General (*Sir R. B. Finlay, K.C.*) and *R. J. Parker*, for the Comptroller.—The decision of the Comptroller is right, and should be upheld. "Uneeda" is not an invented word—it is a mere misspelling of three common words in universal use, and the judgments of the House of Lords in *Eastman Photographic Materials Co.* v. *Comptroller-General*[1] shew clearly that a misspelt sentence is not an invented word. If the registration is claimed under section 64 (*e*), the words have some reference to the quality or character of the goods. They suggest that the purchaser will be benefited by their acquisition. They are quite as descriptive as "Pirle" or "Emollio," which were refused in *Ripley, In re*,[2] and *Grossmith, In re* [1889].[3] Moreover, the Comptroller has a discretion—*Eno* v. *Dunn* [1890],[4] *Turney & Son's Trade Mark, In*

(1) 67 L. J. Ch. 628; [1898] A.C. 571; 15 Rep. Pat. Cas. 476.
(2) 15 Rep. Pat. Cas. 151.
(3) 6 Rep. Pat. Cas. 180; 60 L. T. 612.
(4) 15 App. Cas. 252.

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re [1893] [5]—and has exercised it rightly. There must be some classes of words which ought not to be registered, even though they have no reference to quality —for example, "Importers of" could not be registered

Moulton, K.C., replied.

COZENS-HARDY, J.—This is an appeal from the Comptroller, who has refused the registration of the word "Uneeda" as applied to biscuits, or the class of goods in which biscuits are contained. The applicants seek to reverse the decision of the Comptroller mainly on the ground—I think I may say entirely on the ground—that this is "an invented word or invented words" within section 64 (*d*) of the Act. An affidavit has been made by Mr Crawford, who is the president of the American company who seek the registration, in which he makes a statement which is remarkable: "The word Uneeda was first invented by Mr. Kinney of Philadelphia Pennsylvania U.S.A. of the Advertising Department of the Applicant Company and was originally intended to be associated with a picture of an Indian Maiden and was therefore the name of an aborigine." I entirely decline to accept that. I have no doubt whatever that the word "Uneeda" was a very clever and very ingenious device to put in the form of one word the common expression properly comprised in three words, "You need a"; and although it might be associated with the picture of an Indian maiden, it would be ridiculous to say that it was therefore the name of an aborigine. The word, I take it, was, and was intended to be, a misspelling of the words "You need a" made into one word, the sound remaining identical. Now is that an invented word within the meaning of the Act? As I read what was said in the House of Lords in *Eastman Photographic Materials Co.* v. *Comptroller-General*,[1] it is impossible for me to hold it was an invented word. In the course of the argument I referred to what Lord Herschell said with regard to the word "Phit eesi." Counsel asked, "Is that an invented word?" Lord Herschell said, "Probably not, because it is a mere misspelling. It suggests at once the English words." Counsel for the applicants are quite entitled to say that that was a mere interlocutory observation, and that no Judge ought to be bound by any observation which he makes in the course of an argument; but when I come to the considered judgment of Lord Herschell, where he is dealing distinctly with this question of what is the meaning of "invented word" in this sub-section, he says this: "An invented word is allowed to be registered as a Trade Mark, not as a reward of merit, but because its registration deprives no member of the community of the rights which he possesses to use the existing vocabulary as he pleases. It may, no doubt, sometimes be difficult to determine whether a word is an invented word or not. I do not think the combination of two English words is an invented word, even although the combination may not have been in use before, nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form." Now I take that to be a binding guide for me in the interpretation of this statute. If I find, as I do find here, that this is merely a putting together of three of the commonest English words, and a misspelling of the first of them without change in the sound, I think that I am bound to hold, as Lord Herschell did, that it conveys to the ear precisely the same idea as the words of the English language properly spelt would convey; and that being so, it is not an "invented word" within the meaning of the section. That being so, the ground upon which the appellant relies, in my judgment, disappears.

Then it was argued that the word might come under sub-section (*e*) of section 64: "A word or words having no reference to the character or quality of the goods, and not being a geographical name." It seems to me that these words are, and are intended to be, commendatory, and suitable to describe something which a purchaser would find comforting and advantageous to use, as being of the quality and character which would be suitable for his wants.

(5) 11 Rep. Pat. Cas. 37.

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On both grounds, therefore, I think that the decision of the Registrar was right, and that this application must be refused.

Solicitors—Burn & Berridge, for applicants; Solicitor to the Board of Trade, for respondent.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

JOYCE, J. 1901. Jan. 25. } MIDDLEMAS *v.* STEVENS.

Settled Land—Lease by Tenant for Life—Power of Leasing—Bona Fide Exercise of Power—Determination of Tenancy for Life—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 53.

A widow, being under the Settled Land Acts tenant for life during her widowhood of settled estate, on the eve of her second marriage intended to grant a twenty-one years' lease of the settled estate to her intended husband:—Held, *that the granting of such lease must be restrained, as not being a bona fide exercise of the powers of a tenant for life.*

Motion.

The defendant was the widow of R. P. Stevens, who, by his will dated in 1897, gave her the use and enjoyment, rent free, of his house, known as The Hall, Sandiacre, Derbyshire, wherein she then resided, for so long during widowhood as she should personally reside in and occupy the same. The testator gave the defendant an annuity during her life of 500*l.*, and certain other legacies, and the whole of his real and personal estate, including the house, on the determination of his widow's interest therein, to trustees upon trust for sale.

The defendant intended to marry again, in which event she would lose her interest in the house This being so, she proposed, as being in the position of a tenant for life under the Settled Land Acts, to grant a lease of the premises for twenty-one years to her intended husband. A correspondence passed between the solicitors of the defendant and those representing the beneficiaries under the trusts of the will, in the course of which the defendant's solicitors wrote: "We have on behalf of our client taken the opinion of counsel, and he advises our client that she has the powers of a tenant for life under the Settled Land Acts, and that she has power under such Acts to lease the house for 21 years. Our client has no desire to conceal her intentions from the trustees or their solicitors, and you may, therefore, assume that it is her present intention to get married, in which event she will, prior to her marriage, exercise her power of leasing in accordance with the advice of her counsel." Thereupon the present action was commenced by the beneficiaries under the will as plaintiffs, and they now moved for an injunction to restrain the defendant from granting or purporting to grant a lease of the house.

Hughes, K.C., and *A. St. John Clerke*, for the plaintiffs.—Until the time of her marriage the defendant has the powers of a tenant for life, and by section 53 of the Settled Land Act, 1882, she is put in the position of a trustee for all persons entitled under the settlement; therefore she is a trustee for herself until marriage. But her own interest is infinitesimal, ceasing almost immediately—that is, on her marriage. Therefore, it cannot be alleged that the granting of the lease will be for the benefit of the tenant for life as such, or of the remaindermen as such. There cannot be any real bargain here, because the rent will not be paid to the defendant, but to the plaintiffs. The principles laid down in *Sutherland* v. *Sutherland* [1893][1] cover this case, and the lease ought not to be granted. If the lessor, the tenant for life, "has got more for himself than for others, that is decisive evidence against him"—*Queensberry Leases* [1817].[2]

Geo. P. Lawrence, for the defendant.—If the proposed lease is a beneficial one

(1) 62 L. J. Ch. 946; [1893] 3 Ch. 169.
(2) 5 Dow, 293, 344.

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for the persons who are entitled to receive the rent under it, it is none the less valid because it is granted to a person bearing a particular relation to the defendant and because she may have an interest or a benefit under it. The lease would be for the benefit of the estate and not prejudicial to it, and would therefore be a valid lease.

JOYCE, J.—The case is free from doubt. Here is a lady who may be said to be a tenant for life during her widowhood under the Settled Land Acts. Apart from any question as to the intended lessee or any other consideration, if I found a tenant for life whose tenancy was coming to an end to-day or to-morrow insisting on granting a lease which was objected to by those entitled in remainder, I should regard the case with some suspicion. But this case is worse. It is clear from the correspondence that the very object of the lady in granting the lease is that she herself may continue to occupy the house. That is not a *bona fide* exercise of the powers of a tenant for life under the Settled Land Acts. But the case does not rest there. Her solicitor says she is not going to grant a lease unless she does marry.

The plaintiffs are entitled to an injunction restraining the granting of a lease except with their consent or with that of the Court.

Solicitors—F. Kinch, agent for Eking & Wyles, Nottingham, for plaintiffs; Hind & Robinson, agents for Wells & Hind, Nottingham, for defendant.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

BUCKLEY, J. 1901. Feb. 21. } MOORE, *In re*; MOORE *v.* MOORE.

Revenue — Estate Duty — Incidence — Will—General Power of Appointment by Will—Property Passing to Executor "as such"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* (1).

A fund appointed by will under a general power passes to the executor "as such" within the meaning of section 9, *sub-section* (1) *of the Finance Act*, 1894, *and accordingly, in the absence of any direction to the contrary, the estate duty thereon is payable out of the appointor's residuary estate.*

Treasure, *In re*; Wild *v.* Stanham (69 L. J. Ch. 751; [1900] 2 Ch. 648), *on this point considered and not followed.*

Adjourned summons.

Under the will of her father, who died on August 15, 1869, a legacy and a share of residue were held upon trust for Marian Edith Moore for life, and, as to a moiety thereof, after her death (in the events which happened) upon trust as she should, whether covert or sole, by will appoint.

M. E. Moore died on August 26, 1899, having by her will dated August 4, 1899, appointed that all the property over which under the will of her father she had a general power of appointment should be held upon trust for certain of her relations living at her decease as therein mentioned. She devised and bequeathed all her property not otherwise disposed of to one of her nieces, who was also an appointee. She appointed an executor. Her will was duly proved.

Estate duty (amounting to 740*l.*) was duly paid by the executor in respect of the appointed fund.

This summons was taken out for the determination of the question how as between the appointees and the residuary legatee the duty should be borne.

Dauney, for the executor, stated the case.

P. F. Stokes, for the residuary legatee.—The appointed fund must bear its own

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duty. The case is exactly within the decision of Kekewich, J., on this point in *Treasure, In re; Wild* v. *Stanham* [1900],[1] where he held that a fund appointed under a general testamentary power was property which did not pass to the executor "as such." Section 9, sub-section (1) of the Finance Act, 1894,[2] enacts that in such a case the duty is chargeable on the fund in exoneration of the general residue. This was personal property, of which the deceased was competent to dispose at her death, and therefore the executor was primarily liable for the duty under section 6, sub-section 2. But under section 9, sub-section (1),[2] it was not property passing to the executor as such—namely, as executor. It is true it was available in his hands for the payment of the appointor's debts if it was required for that purpose, but it was only an equitable asset. The executor gets the appointed fund because, he taking out probate and having to pay debts, it is convenient he should. Prior to the decision of *Philbrick's Settlement, In re* [1865],[3] he did not get it. But as executor "as such" he only gets what comes to him as legal assets; "as such" he gets only his testator's own property. In *Cook* v. *Gregson* [1856][4] the distinction between legal and equitable assets is shewn, and light is thrown on the meaning of an executor "as such." The fund comes to the executor rather as trustee than as executor. It is not like the case of a leasehold coming to him, as is pointed out by Kekewich, J., in *Treasure, In re; Wild* v. *Stanham*.[1] The residuary estate, therefore, is not chargeable with the duty.

[*Hoskin's Trusts, In re* [1877],[5] was also referred to.]

Frank Russell, for the appointees.—The judgment of Kekewich, J., in *Treasure, In re; Wild* v. *Stanham*,[1] as to the fund not passing to the executor "as such," is a mere *dictum*, because he decided the case on a different ground, which does not exist here—the ground that estate duty is a "testamentary expense," which was there expressly directed to be paid out of residue. But, even if it is treated as a decision on the point, this Court should disregard it as wrong. The appointed fund was property passing to the executor "as such"—because he was executor—*Hoskin's Trusts, In re*.[5] The words "as such" refer to property which the executor takes, and which he would not take if he were not executor. The duty is, therefore, payable out of the residue, and not out of the appointed fund.

BUCKLEY, J.—The question which I have to decide is whether the sum of 740*l*., which the executor has paid for estate duty on the appointed fund, ought to be borne by the general residue or by the appointed fund. The matter turns upon section 9, sub-section 1 of the Finance Act, 1894.[2] [His Lordship read the material part of the sub-section:] If the appointed fund did pass to the executor "as such," the estate duty is payable out of the general residue; if it did not pass to the executor "as such," it is payable out of the appointed fund. The general law is plain that, where a fund is appointed under a general power of appointment, the appointed fund is liable for the payment of the appointor's debts. In *Philbrick's Settlement, In re*,[3] Lord Romilly decided that, where a married woman has a general power of appointment by will over a fund, and pursuant thereto executes a will and appoints executors, they, and not the trustees of the deed which creates the power, are the persons on whom the duty of administering the appointed fund rests. The substance of Lord Romilly's judgment is that, where a married woman having a general power of appointment by will over a fund, and having no power to make a will otherwise, exercises the power and appoints an executor, she must be taken as having appointed the executor for the purpose of dealing with the fund over which she had the general power of appointment; from which it follows that the trustees of the deed creating the power ought to hand over the fund to the

(1) 69 L. J. Ch. 751; [1900] 2 Ch. 648.

(2) Finance Act, 1894, s. 9, sub-s. (1): "A rateable part of the Estate Duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; . . .".

(3) 34 L. J. Ch. 368.

(4) 25 L. J. Ch. 706; 3 Drew. 547.

(5) 46 L. J. Ch. 274; 6 Ch. D. 281.

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executor so that he may administer it. The whole result of that case is that, as between the trustees of the deed and the executor, the latter replaces the former for the purpose of administering the fund. That case decides nothing as to the character in which the executor takes it as between creditors and appointees; it simply decides that the executor takes it as against the trustees. *Philbrick's Settlement, In re*,[3] was dealt with in *Hoskin's Trusts, In re*.[5] That, again, was the case of a married woman. It was an appeal by the trustees of the deed creating the power against an order to pay costs, and it was held that no appeal would lie; but Lord Justice James said, "I may add that if the merits had to be gone into, I should hold it to be established beyond all question that where a *feme covert*, or any other person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will and appoints an executor, the executor, when he has proved the will, is entitled to receive the appointed fund." I do not think it would be possible to find more appropriate language to point out that the material fact by virtue of which the executor becomes entitled to receive the fund is that he has proved the will, and so he gets the fund by reason of his being executor, and "as such."

Let me examine this a little further upon principle. When the executor has got the fund, what is his duty in regard to it? His duty is to use it for the payment of the appointor's debts if it is necessary to have recourse to it for that purpose. Then, when that is done, he has a duty towards the appointees—namely, to hand over to them whatever remains of the fund. The executor is not simply a trustee in the sense that he steps into the shoes of the trustees for the purpose of administering the fund; he has another duty—that of applying it, if necessary, in payment of debts. Whence did he get that duty? He got it from no other source except, as Lord Justice James says, that of having proved the will; and because he has proved the will and is executor he gets the duty of paying the debts out of the fund, and he only becomes a trustee of the fund in the sense of trustee for the appointees when the debts have been paid. On principle, therefore, it seems to me that this fund comes to the executor "as such."

But it is said that Mr. Justice Kekewich, in *Treasure, In re; Wild* v. *Stanham*,[1] has decided differently. There are two observations I may make upon that case. The learned Judge, in his judgment, gives decisions on two points, the second of which was sufficient to cover the whole matter which he had to decide. In that case the testator had directed that his executor should pay his testamentary expenses out of his residuary estate; and Mr. Justice Kekewich held that the payment of estate duty on the appointed fund was a testamentary expense, and therefore that, irrespective of any question on whom it would otherwise fall, it was payable out of the residue. But in the earlier part of his judgment he does deal with the question whether or not the appointed fund passed to the executor "as such," and he held that it did not. I apprehend that the proper mode of considering authorities is to discover the principle upon which they are based, and every Judge is bound, as regards an authority which is binding on him, to follow the principle involved in it, otherwise decisions may be often erroneously used. The principle I find in the early part of Mr. Justice Kekewich's judgment is that *Philbrick's Settlement, In re*,[3] and *Hoskin's Trusts, In re*,[5] have laid down certain rules. He finds that *Philbrick's Settlement, In re*,[3] decided that the executor took as trustee, and that *Hoskin's Trusts, In re*,[5] has extended the principle beyond the case of a married woman to the case of any general power of appointment. So far I entirely agree. But then—and here I fail to follow him—he comes to the conclusion that the fund does not pass to the executor "as such." If he means that in *Philbrick's Settlement, In re*,[3] and *Hoskin's Trusts, In re*,[5] it was decided that the executor took as trustee for the appointees, as distinguished from persons having the administration of the fund for all purposes—namely, for creditors first and then for the appointees—I cannot agree with him. I do not follow the decision, therefore, on two grounds: in the first place, because upon this point it

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is only *dictum*, having regard to the latter part of the judgment; and secondly, because I do not find in it any principle which, having regard to what had been previously decided in *Philbrick's Settlement, In re*,[3] and *Hoskin's Trusts, In re*,[5] I can treat as binding upon me.

I find, therefore, that the property here did pass to the executor as such, and consequently the duty ought to be paid by him out of the residue.

Solicitors—Parker, Garrett & Holman, for all parties.

[*Reported by Arthur Lawrence, Esq., Barrister-at-Law.*

JOYCE, J.
1901.
Jan. 15, 16, 17. Feb. 5.

COLES *v.* COLES.

Marriage Settlement — Assignment of Wife's Property and Fortune, "present and expectant or future"—Gift from Husband to Wife—Intention of Parties.

By the settlement made previously to her marriage the defendant's wife conveyed and assigned to the trustee thereof "all and singular" her "property and fortune whatsoever both present and expectant or future vested or contingent" upon trust, after the solemnisation of the marriage, for herself for life, and after her death upon trusts in favour of the children of the marriage. During the coverture the defendant gave his wife a sum of 280*l.* :—Held, *adopting the ground of* MALINS, V.C.'s *decision in* Dickinson *v.* Dillwyn (39 L. J. Ch. 266; L. R. 8 Eq. 546), *that the assignment could not have been intended to apply to such a gift from the husband to the wife, and that therefore the sum of* 280*l. was not bound by the settlement.*

Trial of action with witnesses.

In the year 1856 the defendant Thomas Edghill Coles married Anne Elizabeth Britten. By the settlement made in contemplation of that marriage, dated July 5, 1856, and made between the defendant of the first part, Anne Elizabeth Britten of the second part, and Michael Clark of the third part, after reciting that upon treaty or the said intended marriage it had been agreed that A. E. Britten should convey, assign, and assure all and singular her property and fortune whatsoever, both present or expectant and future, vested and contingent, unto the said M. Clark upon the trusts thereinafter expressed, it was witnessed that the said A. E. Britten did thereby, with the privity of the defendant, grant, release, convey, assign, transfer, and set over unto M. Clark, his heirs, executors, administrators, and assigns, "All and singular the property and fortune whatsoever both present and expectant or future vested or contingent of her the said A. E. Britten and all the estate right title interest property claim and demand whatsoever both at law and in equity of her the said A. E. Britten of and in the same so intended to be hereby assured or assigned and every part thereof. To have and to hold the same and all and singular other the property expressed and intended to be hereby assured and assigned unto the said M. Clark his heirs executors administrators and assigns to the use of the said M. Clark his heirs executors administrators and assigns according to the several natures or tenures thereof respectively" Upon trust to stand possessed "of the said trust premises intended to be hereby assured and assigned and the rents profits dividends interest and income thereof" after the solemnisation of the said intended marriage "Upon trust for the said A. E. Britten during her life for her sole and separate use and benefit," and from and after her decease upon trust for the child or children of the marriage as A. E. Britten should appoint, and in default of or subject to any such appointment "if there shall be only one child of the said intended marriage In trust for such only child and the heirs of his or her body, but if there shall be more than one child of the said intended marriage then In trust for all the children of the said intended marriage and the heirs of their respective bodies in equal shares as tenants in common. And if any

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one or more of the said children shall die without issue then as well as to the original share or shares of the child or children so dying as to the share or shares that shall have survived or accrued to such child or children or to the heirs of his her or their body or respective bodies In trust for the others or other of the said children and the heirs of their his or her respective bodies or body and if more than one in equal shares And in default of such issue in trust for the said A. E. Britten her heirs executors administrators and assigns absolutely."

The defendant contributed no property to the settlement, and took no interest under it. The only property which A. E. Britten had at the date of the settlement consisted of the equity of redemption of certain freehold houses at Bristol.

The houses were subsequently redeemed by the defendant and afterwards sold, and the proceeds of sale were handed over to him, and he paid interest thereon to his wife until her death in June, 1899. The defendant was her executor.

This was an action by a son of the marriage, one of the beneficiaries under the settlement, against the defendant for an account of the moneys received by him as representing or being the trust property comprised in the marriage settlement.

During the trial a question arose whether a sum of 280*l.* which the defendant had given his wife during the coverture was subject to the trusts of the settlement by virtue of the assignment of her property and fortune "expectant or future" therein contained. This was the only question calling for notice in this report.

Younger, *K.C.*, and *F. Thompson*, for the plaintiff.—The 280*l.* is caught up by the settlement. The recital does not agree with the operative part of the deed, but the latter must prevail. The words must be read as "present and expectant *and* future." "Expectant" refers to an expectancy at the date of the deed. "Future" means property to which there is no present chance of her becoming entitled, and no reason for supposing that she will become entitled. Although the gifts are to the children in tail the settlement is clearly meant to comprise both realty and personalty, for the *habendum* covers both kinds of property. An assignment of future book-debts was held good in *Tailby* v. *Official Receiver* [1888].[1] It has never been doubted that a woman can settle all her future property. The authorities undoubtedly shew that certain property is excepted from the operation of a covenant to settle all after-acquired property—for example, income and property acquired under the husband's will; but this was a gift of capital acquired during coverture, and is covered by the assignment, which applies to capital from whatever source derived.

Hughes, *K.C.*, and *G. F. Hart*, for the defendant.—The settlement only includes property to which the wife was entitled for her separate use, and to which she had at the time some sort of title. What she mainly had in mind was these three houses. "Future" is synonymous with "expectant." The "all estate" clause only goes to present property. The converse point to this arose under section 5 of the Married Women's Property Act, 1882, and the section was held to apply to cases where the original title accrued after the Act. There is no authority for the proposition that where an instrument such as this can be read as an assignment of present property it should be read as a contract to settle after-acquired property because there happens to be some ambiguity. But even if this deed is equivalent to a covenant to settle after-acquired property, it does not cover property like this. The object of such a covenant is to protect the property from the husband, and it would be very strong to say that it applied to gifts from him. There must be some limit to the scope of a covenant to settle after-acquired property, and it has been held not to embrace property coming to the wife under the husband's will—*Dickinson* v. *Dillwyn* [1869][2] and *Carter* v. *Carter* [1869],[3] referred to in *Edwards*, *In re* [1873].[4] Those cases shew that

(1) 58 L. J. Q.B. 75; 13 App. Cas. 523.
(2) 39 L. J. Ch. 266; L. R. 8 Eq. 546.
(3) 39 L. J. Ch. 268; L. R. 8 Eq. 551.
(4) 43 L. J. Ch. 265; L. R. 9 Ch. 97.

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some limitations have to be read into such a covenant by reference to its objects.

W. F. Hamilton, K.C., and *Ashton Cross*, and *C. Bathurst*, for other parties.

F. Thompson replied.

JOYCE, J.—The question which I have to decide is one of some difficulty. It is whether a sum of 280*l.* given by the defendant to his wife during the coverture is bound by the assignment of the wife's property and fortune contained in the settlement made upon their marriage. That settlement is very inaccurately and loosely framed, and the words of the recital do not agree with the words of the operative part. [His Lordship read and compared the recital and operative part, and continued:] A further inaccuracy occurs in a later part of the settlement, for the trusts for the children are expressed to be in favour of them and the heirs of their bodies, whereas it is clear on the face of the settlement that it was meant to include both personalty and realty. There is no clause subsequent to the assignment in the settlement containing any provision expressly relating to the wife's future property, or for the settlement of her after-acquired property. This sum of 280*l.*, therefore, if it is bound by the settlement at all, must be bound by way of the assignment therein of "all and singular the property and fortune whatsoever both present and expectant or future vested or contingent of her the said Anne Elizabeth Britten."

Now on the document itself it seems to me to be doubtful whether it was meant to be an assignment of any property in which the lady did not then have some interest. But assuming that it had the more extended meaning, even then some limitation would have to be put upon it. It could not, for instance, be held to include property coming to the wife after the determination of the coverture, nor mere income coming to the wife during coverture, notwithstanding the words used; and the result is that I am very doubtful whether it was meant to include all the wife's after-acquired property whatsoever. But I decide this case upon the ground on which Vice-Chancellor Malins decided *Dickinson* v. *Dillwyn*.[2] He says: "On the broad ground of intention, I am of opinion that the words of this covenant never could have been intended to apply to property which the wife should acquire from her husband." What I mean is this, that I in my own mind, whether rightly or wrongly, have no doubt that if I were to make this assignment extend to and comprise a gift by the husband to the wife, I should be doing what the parties never thought of or intended. I therefore hold that this sum of 280*l.* is not bound by the settlement.

Solicitors—H. J. & T. Child, for plaintiff; Bentwich, Watkin-Williams & Gray, for defendant; Sidney James and Ward, Bowie & Co., for other parties.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

FARWELL, J. 1901. Feb. 15.

GREENWOOD, *In re*; SUTCLIFFE *v.* GLEDHILL.

Will — Forfeiture Clause — Garnishee Order—Income Accrued Due—Construction—Forfeiture—Repugnancy.

Inasmuch as a garnishee order made against trustees attaches only to trust funds already accrued due in their hands, which have thus, in a sense, been already actually "received" by their cestui que trust, the making of such an order cannot be the cause of a forfeiture under a provision in a will to the effect that the interest of the cestui que trust is to be forfeited on the occurrence of any event whereby he shall be deprived of his "right to receive" the trust funds.

Semble, *a provision for the forfeiture, on the happening of some event, of trust funds which had already accrued due to the cestui que trust, but had not yet been actually paid to him and were still in the hands of his trustees, would be void on the ground of repugnancy.*

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GREENWOOD, IN RE.

Bates *v.* Bates (19 L. J. N.C. 67; W. N. (1884), 129) *not followed.*

Sutton, Carden & Co. *v.* Goodrich (80 L. T. 765) *and* Sampson, *In re*; Sampson *v.* Sampson (65 L. J. Ch. 406; [1896] 1 Ch. 630), *followed.*

Adjourned summons.

By her will dated November 4, 1891, the late Mary Greenwood devised and bequeathed all her real and personal estate to certain trustees therein mentioned upon trust, after the conversion into money of the said real and personal estate and the investment of the proceeds thereof, and after payment of her debts and funeral and testamentary expenses, to stand possessed of the income thereof upon the following trusts—that is to say, "Upon trust, if my . . . son [John Arthur Greenwood] shall not at the time of my death be an undischarged bankrupt, or shall not have executed, done, or suffered any act, deed, or thing, or if no event shall have happened, whereby the trust next hereinafter declared would, if subsisting, be determined, then to pay the said income to my said son, John Arthur Greenwood, during his life, or until he attempts to alien, charge, or anticipate the same, or any part thereof, or is adjudged a bankrupt, or takes proceedings for liquidation in Bankruptcy, or makes any arrangement or composition with his creditors having the effect of a charge upon or alienation of the said income, or any part thereof, or until he does, or attempts to do, or suffers, any other act, or thing, or until any other event happens whereby, if the same income were payable to him absolutely for his life, he would be deprived of the right to receive the same, or any part thereof, in any of which cases, as well as on the death of the said John Arthur Greenwood, which first happens, the trust hereinbefore declared for payment to him of the said income is to determine. And if the same trust should fail or determine in his lifetime, then Upon Trust during the residue of the life of the said John Arthur Greenwood to apply the said income for the maintenance and support or otherwise for the benefit of all, or any one or more exclusively of the other or others, of the said John Arthur Greenwood, his wife, and his issue, as the Trustees, or Trustee, shall in their, or his sole, discretion . . . think fit, or if there should be no wife or issue of my said son, or such wife or issue should fail during his lifetime, then for the maintenance, or support, or otherwise for the benefit of all or any one or more exclusively of the other, or others, of my said son and the person or persons who would, if he were actually dead, be entitled to the trust fund, or the income thereof, as the Trustees, or Trustee, in their, or his sole, discretion . . . think fit." And the testatrix thereby declared that after the death of the said John Arthur Greenwood, her trustees should hold the capital and income of the said trust fund upon certain further trusts therein more particularly mentioned.

The testatrix died on May 7, 1895, without having altered or revoked her said will, which was proved on August 12, 1895.

On January 4, 1899, judgment was recovered against the said J. A. Greenwood, at the suit of E. Williams, for the sum of 250*l.* 6*s.* and 4*l.* 14*s.* costs.

On May 6, 1899, a garnishee order *nisi* was obtained against the trustees of the will of the said Mary Greenwood in respect of the said judgment debt. On July 3, 1899, this order was made absolute.

The trustees of the will of Mary Greenwood, in accordance with the provisions of the garnishee order, thereupon paid to the said E Williams the sum of 259*l.* 9*s.* in respect of the said judgment debt out of moneys in their possession which had at that time already accrued due to J. A. Greenwood under the terms of the will.

An originating summons was now taken out by the trustees of the will of Mary Greenwood, asking (*inter alia*) whether, in the events which had happened, a forfeiture or cesser had taken place of the life interest of J. A. Greenwood.

P. F. S. Stokes, for the trustees of the will.

Upjohn, *K.C.*, and *Edward Ford*, for one of the defendants to the summons. —The making of a garnishee order in a case such as this is clearly causes a

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forfeiture—*Bates* v. *Bates* [1884] [1] and *Sartoris, In re; Sartoris* v. *Sartoris* [1891].[2]

[FARWELL, J., referred to *Combined Weighing and Advertising Machine Co., In re* [1889],[3] and *Rogers* v. *Whiteley* [1892].[4]]

Lochnis, for a judgment creditor of the tenant for life.—There is no forfeiture in the present case. The question is, Has J. A. Greenwood deprived himself of his right to the income at the moment it comes into the hands of the trustees?—*Sampson, In re; Sampson* v. *Sampson* [1896] [5] Now, a garnishee order operates only on funds which are already in the hands of the trustees at the moment it is served. There is nothing in it to prevent a *cestui que trust* from receiving from his trustees subsequent moneys as soon as they become due to him—*Webb* v. *Stenton* [1883].[6] The cases were considered by Kennedy, J., in *Sutton, Carden & Co.* v. *Goodrich* [1899],[7] which is in distinct opposition to *Bates* v. *Bates*,[1] and is a distinct authority in my favour.

There was held to be no forfeiture in *Cox* v. *Bockett* [1865],[8] in which a charge was given to secure a debt, and stress was laid upon the fact that it was not shewn that the debt exceeded the arrears of income.

MacSwinney, for J. A. Greenwood, the tenant for life.—If the argument in favour of a forfeiture were correct, then arrears in the hands of the trustees would also be forfeited. This, however, is not the case—*Stultz, In re* [1853].[9] Any attempt to forfeit arrears would be clearly repugnant. The sole object of the testator in the present case was to restrain from anticipation, just as in the case of a married woman. A provision that she should not "deprive herself of the benefit," &c., of her income would not, in the case of a married woman, hamper her as to income already accrued due. The accrued income of a married woman can be garnished.

[FARWELL, J., referred to *Dugdale, In re; Dugdale* v. *Dugdale* [1888].[10]]

Upjohn, K.C., in reply.—The argument against forfeiture rests on the proposition that trustees hold accrued moneys merely as agents or debtors for their *cestuis que trust*, whereas the truth is that they hold also in the capacity of trustees. There is, therefore, no question of repugnancy. In *Stultz, In re*,[9] the language of the forfeiture clause was very limited. Counsel for the tenant for life has no right to cut down the elaborate provisions in this case to the meagre proportions of the former. It was the opinion of eminent Judges in *Hood-Barrs* v. *Cathcart* [1894] [11] and *Hood-Barrs* v. *Heriot* [1895] [12] that the restraint of a married woman applies till the money due to her is actually in her hands. *Sampson, In re; Sampson* v. *Sampson* [5] turned, again, on the particular language of the will.

FARWELL, J.—In this case I have come to the conclusion that the order absolute does not operate as a forfeiture. What has happened is this: A creditor has obtained, first of all, an order *nisi* and then an order absolute, garnishing the income accrued due and then actually in the hands of the trustees. That that is the case is plain from the decisions on the rules about garnishing. You can garnish the debt only after it has become due. For that proposition I will take the words of Lord Justice Lindley in *Webb* v. *Stenton* [6]: "is a trustee a debtor to his *cestui que trust*? You cannot say he is unless he has got in his hands money which it is his duty to hand over to the *cestui que trust*; then of course he is a debtor and there is no difficulty in attaching such a debt under this Order. But take the case of a trustee of consols for me for my life. Is he in any proper sense my debtor so long as he has no dividends which are payable to me? Clearly not,

(1) 19 L. J. N.C. 67; W. N. (1884), 129.
(2) 60 L. J. Ch. 634; [1892] 1 Ch. 11.
(3) 59 L. J. Ch. 26; 43 Ch. D. 99.
(4) 61 L. J. Q.B. 512; [1892] A.C. 118.
(5) 65 L. J. Ch. 406, 409; [1896] 1 Ch. 630, 636.
(6) 52 L. J. Q.B. 584; 11 Q.B. D. 518.
(7) 80 L. T. 765.
(8) 35 Beav. 48.
(9) 22 L. J. Ch. 917; 4 De G. M & G. 404.
(10) 57 L. J. Ch. 634; 38 Ch. D. 176.
(11) 63 L. J. Q.B. 602; [1894] 2 Q.B. 559.
(12) 64 L. J. Q.B. 717; [1895] 2 Q.B. 212.

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he individually may never receive those dividends; there may be a change of trustees before the next dividend day. You cannot possibly say that a trustee is a debtor to the *cestui que trust* before he has, or but for some fault of his might have had, the money which it is his duty to hand over." The garnishee order, therefore, proceeds on the footing that the trustee is not only a trustee, but has also been turned, by the operation of the true construction of the will and by the rules of law and equity, into a debtor as well. It is by virtue, not of a continuing trusteeship, but of the new relation of debtor and creditor, that the garnishee order can be made at all; and, that being so, it seems to me that those who maintain that there is a forfeiture are in this dilemma—either the garnishee order is ineffectual, because there is no debt at all and therefore it is a mere nullity, or, if it is effectual, it has operated because there is a debt, and a debt arising as between the trustee and the tenant for life, which shews that the income has actually become payable in such a way as to make a debt. In my opinion, that is the true view of this will. I bear in mind, first of all, that the Courts do not construe gifts subject to forfeiture so as to extend the limits within which the forfeiture works beyond the fair meaning of the words. Forfeiture is not regarded with favour, and one does not apply one's mind to a case with any particular desire to extend the terms of a forfeiture clause in the case of a gift such as the present one. In my opinion, the following words of the will—and they are the only words which are really material to the present case—"or until any other event happens whereby, if the same income were payable to him absolutely for his life, he would be deprived of the right to receive the same, or any part thereof"—mean, "if he would be deprived of the right to receive the same, or any part thereof, on the day it becomes due." That seems to me not only a fair and reasonable construction of the words of this particular will, but also to be in accordance with the necessary requirements of the law in order to make this a valid proviso. I think that the argument of the late Sir John Rolt in *Stultz, In re*,[9] was well founded, and that you cannot give a man the income during his life, payable on the quarter days on which it becomes due, or the half-yearly days on which it becomes due, and then take it away from him by reason of any event that happens after the day on which it has actually become due. To do so would be repugnant to the absolute gift. Counsel who argued for forfeiture tried to avoid that difficulty by saying that here there is no absolute gift. I do not agree with that contention. The first gift is to pay the income to John Arthur Greenwood during his life. Then, according to the construction I put on this clause, the defeasance portion of the clause is limited to each particular quarterly or half-yearly period until the accruing income becomes actually payable. When once it becomes payable, there is a trust to pay, and the trustee is turned into a debtor as well as a trustee, and is bound to pay, under the trusts of this will, to John Arthur Greenwood. That being so, it is not competent to the testator to attempt to deprive John Arthur Greenwood of the income after the period at which he is entitled to give a receipt, by reason of any matter subsequent to the day on which he was entitled to give such receipt.

I am confirmed in the view that I take by the case of *Sutton, Carden & Co.* v. *Goodrich*[7] before Mr. Justice Kennedy, and still more by the decision of Mr. Justice Stirling in *Sampson, In re; Sampson* v. *Sampson*,[5] where the learned Judge puts the proposition which I have been trying to adapt to this will in a way that seems to me to be applicable not only to the will then before him, but also to the will now before me. His Lordship says: "I think that the epoch at which the destination of any instalment of income is to be determined is the moment when that instalment either accrues due or is in the hands of the trustees ready for application in accordance with the trusts of the will." Any other construction would, as it appears to me, lead to results which would be startling, assuming that it were legal. For example, the *cestui que trust* might go to his trustee the day after the income was received, obtain his money, and then go round and pay his bills; but

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GREENWOOD, IN RE.

if he were ill in bed he could not send a request to his trustee to be good enough to go round and pay the bills for him, and write at the same time to his creditors and say: "I am ill; do not trouble me; my trustee is coming round to pay you with the income which is already mine." That would be a conclusion I should be very reluctant to arrive at, unless I were actually driven to it; but on the cases that have been cited I do not think that I am driven to it.

The matter that has really caused me the most trouble has been the decision of Mr. Justice Pearson in *Bates* v. *Bates* [1] I cannot avoid the conclusion that I am dissenting from that case, because the result of my decision is that a garnishee order cannot create a forfeiture. Mr. Justice Pearson apparently held in *Bates* v. *Bates* [1] that a garnishee order did operate as a forfeiture. I can only say, with every possible respect to that very eminent Judge, that the judgment is reported only as a weekly note, that no reasons are given for it, and that I am unable to follow it. It has not been followed by Mr. Justice Kennedy in *Sutton, Carden & Co.* v. *Goodrich*,[7] and I think that it is not consistent with *Stultz, In re*,[9] in the Court of Appeal. That disposes of the order absolute, and *a fortiori* of the order *nisi*.

Solicitors—W. J. & E. H. Tremellen, agents for Eastwoods & Sutcliffes, Todmorden, for defendant judgment creditor; Ridsdale & Son, agents for Sutcliffes, Hebden Bridge, for all other parties.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

COZENS-HARDY, J. 1901. Jan. 11, 12, 21. } NEW YORK TRUST AND SECURITIES CO. *v.* KEYSER AND CO.

Conflict of Laws—Lunacy—Domicil—Committee Appointed by Foreign Court—Payment to Foreign Committee—Discretion of Court.

A committee appointed by a foreign Court of the estate of a lunatic residing within its jurisdiction, but domiciled in England, cannot recover, as of right, personal property of the lunatic situate in England. But the English Court has a discretion, and may exercise the discretion by paying over the property to such a committee without requiring evidence that the whole of such money is needed for the maintenance of the lunatic.

Mathilde Eliza Samuel, one of the plaintiffs in this action, was an American by birth, but in 1882 intermarried with Robert Samuel, and acquired his domicil, which the Court held to be English.

Robert Samuel died in February, 1896. Mrs. Samuel was then residing with him, but had previously been confined for some time in a lunatic asylum in Berlin. After his death she was again placed in a lunatic asylum in Brussels, where she remained until 1899. In that year she was removed by some of her relations to New York, and placed in an asylum there. She was duly found lunatic by inquisition by the Supreme Court of New York on January 31, 1900, and the New York Security and Trust Co. were by the same order appointed committees of her person and estate.

Mrs. Samuel was entitled, under a post-nuptial settlement made by her husband and under the will of his father, to the income of certain trust funds invested in English securities in the names of trustees residing in England, and to certain accumulations of the income of these trust funds, which had been paid by the trustees to her account with Keyser & Co.'s Bank in London.

This action was brought by the New York Securities and Trust Co. as such committee, and Mrs. Samuel by her next

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friend, A. T. Tallant, as co-plaintiffs, against the trustees of the settlement and of the will, and the bank, asking for payment to the committee of the money at the bank and all future income. The bank had paid into Court the money in their hands on the account of the lunatic, and had been dismissed from the action. This was a petition for payment to the committees according to the claim in the action.

It was proved that by the law of the State of New York the property of the lunatic did not vest in a committee, but the committee was entitled to recover and give good receipts for it.

Danckwerts, *Q.C.*, and *T. T. Methold*, for the plaintiffs.—There is evidence that by the law of New York State the Court has the right of custody of a lunatic residing within the State; that the Court appoints a committee, and the committee can, subject to the control of the Court, maintain an action and give good receipts for any property of the lunatic. In that state of things the English Court will pay over the property to the committee—*Didisheim* v. *London and Westminster Bank* [1900].[1] There is no question as to the jurisdiction of the New York Court. It does not depend on domicil, but on the fact that the lunatic is there, and must be taken care of. The cases of *Houstoun, In re* [1826],[2] and *Princess Bariatinski, In re* [1843],[3] shew that the English Courts would have exercised the jurisdiction in the same circumstances. But in this case the lunatic is suing herself by her next friend, as provided by Rules of Supreme Court, Order XVI. rule 17. The judgment in *Didisheim* v. *London and Westminster Bank*[1] shews that it was the settled practice in Chancery for a lunatic, not so found, to bring an action by his next friend, and the Court would order payment to the next friend.

Macnaghten, *Q.C.*, and *G. S. Alexander*, for the trustees.—As a matter of right the committee appointed in New York has no claim. If the lady had been domiciled in New York there would be no question. *Didisheim* v. *London and Westminster Bank*[1] decides that point; but Lindley, M.R., expressly says that he should hesitate to apply the rule if the domicil was English. All questions of *status* are governed by domicil. That is so in cases of infancy—*Cooper* v. *Cooper* [1888][4]; of marriage—*Sottomayor* v. *De Barros* [1879][5]; and in bankruptcy—*Artola Hermanos, In re*; *Châle, ex parte* [1890],[6] where the question whether bankruptcy proceedings in England should be stayed and money paid over to a trustee in a foreign bankruptcy was treated as depending wholly upon the domicil of the bankrupt. We do not dispute that the Court has a discretion to order this money to be paid to the committee in New York; but it will only exercise that discretion upon evidence that the money is wanted for the maintenance of the lunatic—*Garnier, In re* [1872].[7]

Danckwerts, *Q.C.*, replied.

Jan. 21.—COZENS-HARDY, J. (after stating the facts of the case as above).—Under these circumstances the action is brought by the committee and Mrs. Samuel, a person of unsound mind, by A. T. Tallant, her next friend, as co-plaintiffs, against the trustees. Now, if the lady had been domiciled in New York, the decision of the Court of Appeal in *Didisheim* v. *London and Westminster Bank*[1] would have been a direct authority. But the Master of the Rolls says in his judgment in that case, "If, as in *Garnier, In re*,[7] the lunatic were an Englishman temporarily abroad, and confined as a lunatic abroad, we should feel considerable difficulty in holding that the Courts of this country were bound to recognise the title of a foreign curator to sue in this country." The point thus left open now arises for my decision.

The lady sues by a next friend as provided by Order XVI. rule 17, which refers to the old practice of the Chancery Division. There is nothing in that Order or in the established practice of the Court

(1) 69 L. J. Ch. 443; [1900] 2 Ch. 15.
(2) 1 Russ. 312.
(3) 13 L. J. Ch. 386; 1 Ph. 375.
(4) 13 App. Cas. 88.
(5) 49 L. J. P. 1; 5 P. D. 94.
(6) 59 L. J. Q.B. 254; 24 Q.B. D. 640.
(7) 41 L. J. Ch. 419; L. R. 13 Eq. 532.

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of Chancery prior to that Order, which entitles the next friend—who may be anybody—to receive and give a discharge for the lady's money. It is only on the footing that the action is for the benefit of the lady, and in so far as it is for her benefit, that the Court allows such an action to proceed—see *Light* v. *Light* [1858],[8] *Beall* v. *Smith* [1873],[9] *Jones* v. *Lloyd* [1874],[10] and *Porter* v. *Porter* [1888].[11]

I cannot regard the action as being for all purposes the same as it would be if Mrs. Samuel were of sound mind, and suing in her own right. But the lady joins as co-plaintiffs persons who are competent to receive and give a good discharge for her money, and she asks that payment may be made to them, not to Mr. Tallant, her next friend. I am not satisfied that the lady suing by her next friend can as a matter of strict right insist upon such payment, but in the exercise of my discretion I can see no reason why the order should not be made in the present case. The lady is by birth an American, her relations reside there; the New York Court has jurisdiction over her by reason of her residence in the State, and, wholly inspective of any question of domicil, I am satisfied that everything that is proper and kindly is being done for her custody and her comfort. *Scott* v. *Bentley* [1855],[12] as explained and corrected by the Court of Appeal in *Didisheim* v. *London and Westminster Bank*,[1] seems to me to warrant the view which, apart from authority, I should be prepared to adopt.

The defendants are abundantly justified in the course they have taken of requiring the protection of an order of the Court. Their costs as between solicitor and client, including any charges and expenses properly incurred, must be paid out of the fund in Court; and the balance of that fund, together with the sums of cash now in the hands of the trustees, must be paid to the plaintiffs as committees. With regard to future income, I think it will be better simply to give liberty to the respective trustees to pay to the committees until further order. And general liberty to apply will be reserved.

(8) 25 Beav. 248.
(9) 43 L. J. Ch. 245; L. R. 9 Ch. 85.
(10) 43 L. J. Ch. 826; L. R. 18 Eq. 265.
(11) 37 Ch. D. 420.
(12) 24 L. J. Ch. 244; 1 K. & J. 281.

Solicitors—R. S. Taylor, Son & Humbert, for petitioners; Montagu, Mileham & Montagu, for respondents.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
STIRLING, L.J.
1901.
Jan. 29.

TAYLOR, *In re*; EDMONTON UNION v. DEELEY.

Lunatic — Pauper — Maintenance — Arrears—Debt—Claim in Administration of Deceased Lunatic's Estate.

A pauper lunatic who had been maintained by the guardians since November 1, 1889, *became entitled on October* 14, 1895, *to a sum of money as one of the next-of-kin of an uncle. The guardians, in February*, 1898, *applied in lunacy for the appointment of a receiver of the fund and payment thereout of the cost of the lunatic's maintenance for the then preceding six years. On January* 31, 1899, *an order was made in lunacy appointing a receiver and directing him to pay to the guardians* 95*l.* 14*s. for the maintenance of the lunatic from October* 14, 1895, *to February* 14, 1899, *and to apply the balance for the future maintenance of the lunatic. The lunatic died on June* 29, 1899:—Held, *that the claim of the guardians for the maintenance of the lunatic for the part of the six years prior to October* 14, 1895, *was a valid legal debt and was not affected by the order in lunacy, and the guardians could enforce their claim against the lunatic's estate now that she was dead.*

Appeal from a decision of Kekewich, J.

Ann Taylor, a person of unsound mind, being a pauper, became chargeable to Edmonton Union on November 1, 1889, and was maintained by the guardians. On October 14, 1895, she became entitled on the death of an uncle to 261*l.* as one of his next-of-kin. On February 24, 1898,

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the guardians applied to a Master in lunacy for the appointment of a receiver of that fund and for payment thereout of the cost of the lunatic's maintenance for the then preceding six years, claiming 169*l.* 3*s.* 10*d.* for that period. On January 31, 1899, an order was made in lunacy appointing a receiver of the 261*l.*, and directing him (after payment of costs) to pay "95*l.* 14*s.* due to the guardians for the maintenance" of the lunatic from October 14, 1895, to February 14, 1899, and to apply the balance of the money to be received by him in the future maintenance of the lunatic at 11*s.* per week. The lunatic was from that time maintained by the guardians, and they were paid for her maintenance out of the fund until her death. She died on June 29, 1899, intestate, and the defendant was her administratrix. At the time of her death there was a balance of over 100*l.* remaining out of the 261*l.*

The guardians took out an originating summons asking for an account of what was owing to them for past maintenance of the lunatic from February 24, 1892 (six years before the application in lunacy), to October 14, 1895, and payment by the defendant or administration. They claimed a sum of 73*l.* 9*s.* 10*d.* to be due to them for past maintenance.

Kekewich, J., dismissed the summons with costs.

The guardians appealed.

H. Greenwood, for the appellants.—The amount expended by the guardians in the maintenance of the lunatic is a legal debt which can be enforced in a creditor's action, although the guardians may have taken no steps to enforce their claim in the pauper's lifetime — *Webster, In re; Derby Union* v. *Sharratt* [1884].[1] There were six years' arrears due to the guardians when the order in lunacy was made, and those arrears did not cease to be a debt because part was paid under the order in lunacy.

The lunatic's comfort and maintenance is the first consideration with the Court in lunacy, and the Court will not allow creditors to be paid if the result is that the lunatic is left penniless. Now that the lunatic is dead there is no reason for retaining money in hand, and the creditors ought to be paid before the next-of-kin receive anything.

Ashton Cross, for the defendant.—The matter is really *res judicata*. The order in lunacy was not made without prejudice to any claim for the balance of the arrears of maintenance.

[He referred to *Watson, In re; Stamford Union* v. *Bartlett* [1898].[2]]

RIGBY, L.J.—The Court in lunacy, whether the Master or the Judge, has really no jurisdiction to deal with the claim of a creditor of a lunatic to the extent of binding him as regards proceedings in the High Court. It has jurisdiction when a creditor comes against the property of a lunatic to make provision for the lunatic's present and future comfort and maintenance before allowing the creditor's claim to be satisfied, but there is no question of that now. The order clearly directed payment only in respect of maintenance for a particular period, and the claim of the guardians in respect of the rest of the six years remains, and can be enforced now that the lunatic is dead. I cannot hold that the matter is *res judicata*.

STIRLING, L.J.—I am of the same opinion. The claim is for a valid legal debt. The lunacy proceedings are not in the nature of an action of debt. The order in lunacy was merely a direction that certain payments should be made, one of which was for part only of the amount owing for past maintenance.

Appeal allowed.

Solicitors — Howard & Shelton, agents for F. Shelton, Tottenham, for appellants; A. Hammond, for respondent.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*]

(1) 54 L. J. Ch. 276; 27 Ch. D. 710.

(2) 68 L. J. Ch. 21; [1899] 1 Ch. 72.

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[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
Jan. 21, 22. Feb. 22.

CITY OF LONDON ELECTRIC LIGHTING CO. *v.* LONDON CORPORATION.

Metropolis—Act Authorising Commissioners of Sewers to do Works—Construction—Contract between Commissioners and a Company—Commissioner Shareholder in Company—"Interested or concerned in any contract"—Avoidance of Contract—City of London Sewers Acts, 1848 (11 & 12 *Vict. c. clxiii.*), *ss.* 5, 33–42, *and* 116—*City of London Sewers Act*, 1851 (14 & 15 *Vict. c. xci.*), *ss.* 53 *and* 57.

The City of London Sewers Act, 1848, *vested in the Commissioners of Sewers the powers of cleansing, lighting, and paving within the City, and provided* (*section* 33) *that it should be lawful for the Commissioners to contract with any persons for the execution of any works by the Act authorised to be done by the Commissioners, or for furnishing materials or labour, or for any other matters or things necessary for enabling them to carry the purposes of the Act into effect. The sections immediately following contained provisions as to contracts by the Commissioners, and section* 42 *provided that no person being a Commissioner or an Alderman or Common Councilman of the City should be directly or indirectly interested or concerned in any contract entered into by the Commissioners for the execution of any works by the Act authorised to be done, or for furnishing materials or labour, or for any other matter or thing whatsoever, upon pain that every such contract should be null and void. Section* 116 *empowered the Commissioners to enter into contracts with gas companies or other persons for lighting the City, but that was the first place in which contracts for lighting were expressly mentioned. The City of London Sewers Act*, 1851, *which continued and amended the Act of* 1848, *provided* (*section* 53) *that no Commissioner who was a shareholder in, or surveyor, solicitor, or agent for any gas, water, or paving company, or any undertaking, the contracting with or carrying out of which should be discussed at any meeting of the Commissioners, should be eligible to sit or vote as a Commissioner while such subject was under discussion:*—Held, *on the construction of the Acts, that section* 42 *of the Act of* 1848 *applied to every possible contract that the Commissioners could enter into by virtue of the Act, and consequently to lighting contracts; and that section* 53 *of the Act of* 1851 *was intended to extend still further the disabilities of the Commissioners, not to relax them.*

Held, *also, that a Commissioner, Alderman, or Common Councilman who was a shareholder in a company contracting with the Commissioners was "interested" in the contract within section* 42 *of the Act of* 1848, *and the fact that he was so interested made the contract void; but if no such person was a shareholder in the company at the date of the contract, the fact that the contract was afterwards assigned to a company in which such persons were shareholders, the rights of the Commissioners under the contract being maintained intact, did not make it void.*

Appeal from a decision of Farwell, J.

The action was brought for a declaration that three several agreements—first, an agreement dated May 19, 1890, made between the Brush Electrical Engineering Co., Lim., and the Commissioners of Sewers of the City of London; secondly, an agreement dated May 28, 1890, made between the Laing Wharton and Down Construction Syndicate, Lim., and the said Commissioners; and thirdly, an agreement dated February 5, 1891, made between the Brush Electrical Engineering Co., Lim., and the said Commissioners—were valid and subsisting, and that the defendants were bound by the same, and by the conditions and obligations thereof respectively.

The two agreements with the Brush Co. were for the lighting by electricity of the central and western districts of the City of London respectively, and the agreement with the Laing Wharton Syndicate was for the lighting of the eastern district. The benefit of the three agreements was assigned to the plaintiff company by two indentures both dated August 21, 1891. The defendants were the successors in title of the Commissioners of Sewers. The City had been

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lighted under these contracts since 1891, but in 1899 the defendants repudiated the contracts, and the action was brought.

The defendants in their statement of defence alleged (paragraph 4) that at the respective times when the contracts and indentures aforesaid were respectively made or entered into, and thereafter, persons being Commissioners of Sewers and persons being members of the Court of Aldermen, and persons being members of the Common Council of the City of London were, or became directly or indirectly, interested or concerned in the said respective contracts, and that by reason thereof, and by virtue of section 42 of the City of London Sewers Act, 1848, the said contracts were and became null and void.

Particulars were given of the names of Commissioners, Aldermen, and Common Councilmen who were shareholders in the Brush Co. and the plaintiff company at the times in question, and the number of the shares held by them respectively.

At the date of the contracts with the Brush Co., a Common Councilman, and a Commissioner, and the Lord Mayor for the time being, who was an Alderman and *ex officio* a Commissioner, were shareholders in the company.

At the date of the contract with the Laing Wharton and Down Syndicate no Commissioner, Alderman, or Common Councilman was a shareholder in the syndicate; but on August 21, 1891, when the benefit of that contract was assigned to the plaintiff company, several Commissioners, Aldermen, and Common Councilmen were shareholders in the plaintiff company.

The facts as to the transfer of this contract to the plaintiff company were stated by Stirling, L.J., in his judgment as follows: By virtue of a provisional order of the Board of Trade confirmed by the Electric Lighting Orders Confirmation (No. 15) Act, 1890, the syndicate became the undertakers within the meaning of the Electric Lighting Act, 1882, for the supply of electricity within a portion of the City of London. By clause 60 of the provisional order the syndicate was empowered, with the consent of the local authority (namely, the Commissioners of Sewers) and the Board of Trade, to transfer their undertaking to a company duly constituted under the Companies Acts, 1862 to 1886, which should satisfy certain conditions immaterial to be here stated. In February, 1891, application was made to the Commissioners of Sewers and the Board of Trade for their consent to the transfer of the undertakings of the Brush Co. and the syndicate to the plaintiff company, to which it was also proposed to transfer the contracts entered into by the Brush Co. and the syndicate with the Commissioners. This application, and a communication from the Board of Trade with reference thereto, came before a meeting of the Commissioners held on February 21, 1891, and were referred to the Streets Committee for consideration and report. At a meeting of the Commissioners held on June 23, 1891, there was read a report from the Streets Committee "recommending that it be signified to the Board of Trade that the Commissioners see no objection to the transfer of the provisional orders, and the respective contracts to the proposed new company, provided the due constitution of the company and the subscription of the capital be evidenced to the satisfaction of the Board of Trade and the Commissioners, and that a similar reply be given to the undertakers with the addition that the rights of the Commissioners under the respective contracts are to be maintained intact." The Commissioners resolved that the Court agree with the committee in their report, and ordered accordingly.

On August 18, 1891, the chairman of the Commissioners of Sewers wrote a letter to the Secretary of the Board of Trade stating that there could be no meeting of the Commissioners before September 22, and consequently no formal resolution assenting to the contemplated transfer could be evidenced until after that date. He further stated that he was advised by the solicitors to the Commissioners that he was satisfied as to the constitution of the plaintiff company and the subscription of three-fourths of its capital, and had every reason to believe that the Commissioners would at their next meeting pass the necessary

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resolution recording the fact of their being satisfied. Accordingly, at the meeting of the Commissioners on September 22 resolutions were passed approving the action of the chairman and solicitor, and consenting to the transfer of the three provisional orders affecting the City to the plaintiff company. In the meantime, by the deed of August 21, 1891, the undertaking of the syndicate and the benefit of the contract with the Commissioners was transferred to the plaintiff company. To that deed the parties were—first, the syndicate; secondly, the City of London Electric Lighting (Pioneer) Co.; and thirdly, the plaintiff company. By the first witnessing part the first two parties conveyed to the plaintiff company the provisional order of the Board of Trade and all rights and privileges thereby conferred, upon the terms and subject to the provisions thereof. By the second witnessing part the same parties transferred and assigned to the plaintiff company the benefit of the agreement between the syndicate and the Commissioners of Sewers. The deed also contained a covenant on the part of the plaintiff company to indemnify the syndicate against all liability under the agreement.

The questions at issue depended upon the construction of the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), and the City of London Sewers Act, 1851 (14 & 15 Vict. c. xci.). The Act of 1848, after repealing certain earlier Acts and (section 5) vesting the powers of cleansing, lighting, and paving within the City in the Commissioners, and providing for the appointment of the Commissioners and their meetings, and the mode of conducting their business, enacted in section 33: "And be it enacted, that it shall be lawful for the Commissioners, or any committee appointed by them, to enter into and contract in the name of the Commissioners with any persons for the execution of any works directed or authorized by this Act to be done by the Commissioners, or for furnishing materials or labour, or for any other matters or things whatsoever necessary for enabling them to carry the purposes of this Act into full and complete effect, in such manner, and upon such terms, and for such sums of money, and under such stipulations, regulations, and restrictions as the Commissioners or such committee shall think proper. . . ." And it provided that every such contract should be in writing and should specify certain matters. Section 34 provided that "every such contract" should be executed by any seven or more of the Commissioners or by their clerk on their behalf, and also by the person contracting to perform the work, or supply the materials or labour. Section 35, that estimates were to be obtained before "any contract for the execution of any works under the provisions of this Act" to the amount of 100*l.* should be entered into. Section 36, that before "any contract" to the amount of 200*l.* and upwards should be entered into, ten days' notice at the least should be given in two London daily morning newspapers. Section 37, that the Commissioners might compound for breach of contract by any person who should have entered into "any such contract" in pursuance or under the authority of the Act. Section 38 authorised the Commissioners to employ any fit person, whether free of the City or not, in or about all or any of the works, matters, or things which they should cause to be performed in pursuance of the Act, and to contract with any such person for the performance thereof. Section 39 provided that during the execution of any contract which might be entered into by the Commissioners the works in course of being done, and all the materials brought upon such works for the purpose of being used in the execution of such contract, should be held to be the property of the Commissioners. Section 40 provided how actions were to be brought and indictments preferred by the Commissioners against persons who should injure or steal their property. Section 41 provided that nothing in any deed or contract authorised by the Act to be made by or on behalf of the Commissioners should make the Commissioners or their clerk personally liable. Section 42 enacted as follows: "That no person, being a Commissioner, or a member of the Court of Aldermen, or of the Common Council of the City, shall be directly or indirectly

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interested or concerned in any contract which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour, or for any other matter or thing whatsoever, upon pain that every such contract shall be null and void, and that the person who, being a Commissioner, or a member of the said Court of Aldermen or of the Common Council, shall be so interested or concerned therein, shall for every such offence forfeit and pay the sum of 100*l.* to any person who shall sue for the same, to be recovered in any of the superior Courts by action of debt or on the case."

The Act also (sections 52–54) vested in the Commissioners all the sewers within the City, and empowered them to construct sewers, and to widen and deepen or alter sewers; and section 55 empowered them to contract for a supply of water for public purposes. Section 81 empowered the Commissioners to cause houses in a filthy or unwholesome condition to be whitewashed and purified; and section 116 empowered them to enter into contracts with gas companies and other persons to supply gas, or to light the City by any other mode. Section 119 vested in the Commissioners the pavements and streets of the City; and section 120 empowered them to make regulations for paving the streets; and section 143 to make contracts with the several companies and persons authorised to take up any of the pavements of the streets for the restoring of the same. Under section 264 the Act was only to continue in force for two years, from January 1, 1849, and thence to the end of the then next session of Parliament.

The City of London Sewers Act, 1851, repealed section 264 of the Act of 1848, and made various amendments and additions to that Act, and provided (section 53) as follows:

"That no person, being a Commissioner, who is a shareholder in, or surveyor, solicitor, or agent for, any gas company, water company, paving company, or any work, undertaking, or speculation the contracting with or the promotion or carrying out of which shall be discussed at any meeting of the Commissioners, shall be eligible to sit or vote as a Commissioner while such subject is under the discussion of the Commissioners." Section 57 incorporated the provisions of the earlier Act except in so far as the same were varied, altered, or repealed by, or were repugnant to, the provisions of the later Act.

Farwell, J., was of opinion that the Act of 1848 contemplated contracts of two kinds—First, for the construction of works or supply of materials to the City which were to become their own property, and which he called "construction contracts"; and secondly, for the supply of water for cleansing, or of gas or other illuminant for lighting the City by companies or persons owning waterworks or gasworks or the like; that sections 33 to 42 formed a group of sections dealing with construction contracts, and section 42 applied to construction contracts only.

In his opinion the contracts in question fell under the second head, and his view of the construction of the Act was borne out by section 53 of the Act of 1851, for, if a shareholder in the contracting company was a person indirectly interested in the contract within section 42 of the earlier Act, no such contract as was contemplated by section 53 of the later Act could be entered into, and therefore it would have been idle for the Legislature to enact the provisions of section 53 of the Act of 1851. While admitting that the Court had no power to depart from the plain words of an Act of Parliament on any ground of supposed hardship, or the like, his Lordship was nevertheless of opinion that the Act of 1848 was fairly susceptible of two meanings; and therefore, adopting the principle stated by Lord Blackburn in *Rothes* v. *Kirkcaldy* [1882] [1]—namely, that when an Act was open to two constructions the Court might adopt the more reasonable of the two—he held that these contracts did not fall within the prohibitions of section 42 of the Act of 1848, but were still valid and subsisting, and that the plaintiff company were entitled to a declaration to that effect.

The defendants appealed.

(1) 7 App. Cas. 694, 702.

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CITY OF LONDON ELECTRIC LIGHTING CO. *v.* LONDON CORPORATION, App.

Swinfen Eady, Q.C., Danckwerts, Q.C., and *A. J. Walter*, for the appellants.—The words of section 42 of the City of London Sewers Act, 1848, are very wide. Section 33 empowers the Commissioners to enter into contracts. The distinction which has been drawn between contracts for works and contracts for supply is untenable. Section 42 applies to all the powers of contracting vested in the Commissioners.

The contract here is both for the construction of works and supply of materials.

Section 53 of the Act of 1851 does not repeal, but extends section 42 of the Act of 1848. It does not cover the whole ground covered by the earlier section. It makes no mention of Aldermen or Common Councilmen, who are mentioned in section 42 of the earlier Act. Further, it refers only to companies of three classes—gas, water, and paving—and must be taken to be confined to them. Sections like section 42 have been inserted in Acts relating to the City of London for about a century. It was not a new enactment in 1848.

A shareholder of a company contracting with the Corporation is interested in the contract—*Todd* v. *Robinson* [1884].[2] The original contracts which were assigned to the plaintiff company are invalid under the statute by reason of the taint of interest. Aldermen, Commissioners, and Common Councilmen were shareholders in the Brush Company at the time of the contracts being entered into, and the contracts with that company are void *ab initio*. There were no Commissioners, Aldermen, or Common Councilmen shareholders in the Laing Wharton Syndicate at the date of the contract with them; but the contract became void upon the company in which such persons were interested taking up the contract. That was the same, in effect, as a new contract. These persons were practically making themselves judges in their own cause, and that has never been allowed—*Dimes* v. *Grand Junction Canal* [1852].[3]

(2) 54 L. J. Q.B. 47; 14 Q.B. D. 739.
(3) 3 H.L. C. 759, 786.

Crippe, Q.C., and *Roskill*, for the respondents.—The question simply depends on the construction of the sections of the Acts of 1848 and 1851, and the view which Farwell, J., has taken is right.

It is not disputed that as a general rule a shareholder in a company is indirectly interested in a contract between his company and the Corporation, but section 53 of the Act of 1851 shews that for the purposes of these Acts a shareholder is not interested in a contract with the Commissioners. If that were so, section 53 would have been altogether unnecessary; section 42 of the Act of 1848 would have been sufficient. The contracts in question here are not within section 42 of the Act of 1848. That section is limited to a particular class of contract. Sections 33, 35, and 39 are none of them applicable to contracts such as these, though they are applicable to construction contracts carried out by the Commissioners. Sections 33 to 42 must be taken as applying to that class of contract only.

The disqualification section (193) of the Public Health Act, 1875, amended by section 2 of the Public Health (Members and Officers) Act, 1885, refers only to officers and servants employed by a local authority.

[VAUGHAN WILLIAMS, L.J., referred to rule 64 of schedule 1 to the Public Health Act, 1875.]

Under the Municipal Corporations Act, 1882, s. 12, a person is not to be deemed to have an interest in a contract with the municipality so as to disqualify him for being a councillor by reason only of his having a share or interest in a company which has entered into a contract for the supply of light or water to the borough; but section 22, sub-section 3, prevents a councillor who has a pecuniary interest in any matter before the council from voting or taking part in the discussion when the matter is under discussion. The Local Government Act, 1894, s. 46, sub-section 1 (*e*), prohibits a person concerned in a contract with a county council from being a councillor, but that does not apply in this case.

Swinfen Eady, Q.C., replied.

Cur. adv. vult.

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Feb. 22.—RIGBY, L.J. (whose judgment was read by Lord Justice VAUGHAN WILLIAMS).—After careful consideration of the provisions of the Act of 1848, of the judgment of Mr. Justice Farwell, and of the arguments addressed to us, I am quite unable to concur in the construction put upon the Act by the learned Judge. This, speaking broadly, consists in treating all the sections of the Act from 33 to 42, both inclusive, as dealing only with what the learned Judge calls construction contracts, leaving all other contracts, as, for instance, lighting contracts, outside their provisions, with the remarkable result that, notwithstanding the provisions of section 42, there is nothing to prevent any Commissioner, Alderman, or Common Councilman from having the largest interest in any contract with the Commissioners not a construction contract. In contradiction of this construction, I hold that the sections above-mentioned do, in one part or another, deal with every possible contract that the Commissioners can enter into by virtue of the Act, and that the proviso contained in section 42, whatever its effect, is to be applied to every such contract; and I proceed to refer to the different sections of the Act, so far as it seems to me necessary for establishing that proposition.

Section 33 authorises the Commissioners or any committee appointed by them (no authority to any such committee is conferred elsewhere in the Act) to contract for the matters hereinafter mentioned: (*a*) The execution of any works directed or authorised by the Act to be done by the Commissioners. This would plainly authorise a contract for constructing sewers, though the power to deal with sewers is not, except by general terms, given or referred to by sections 33 to 42 inclusive, or previously to section 53. (*b*) The furnishing of materials. This would clearly authorise a contract with quarry owners in Wales, for instance, to furnish hundreds of tons of granite sets to be delivered at any appointed place in the City. Such a contract could by no ingenuity be described as a construction contract. (*c*) The furnishing of labour. This might extend to the laying down of the granite sets so as aforesaid purchased or other dealings with material supplied, or to some totally independent purpose unconnected with the supply of materials —for example, the watering or sweeping of the streets. Some of these contracts might possibly, others could not be properly, described as construction contracts. (*d*) Any other matters or things whatsoever necessary for enabling them to carry the purposes of the Act into full and complete effect. I can hardly imagine words better calculated to exclude any *ejusdem generis* construction than these last, even if it were possible to indicate any one genus to which all the contracts coming under heads (*a*), (*b*), and (*c*) could be referred, which I do not think it is. Obviously, a lighting contract would be within these general words, and I do not know any contract for purposes of the Act which could be excluded. If the precedent words of the section were to be treated as cutting down the generality of the subsequent words, it would only be by a construction which would render both the execution of works and the supply of materials or labour essential to every contract. For this there can be no reason, and such a construction cannot be accepted.

After this examination of the words of section 33, it appears hardly necessary to go further; but I may observe that it is not only to contracts falling within section 33 that the provisions of section 34 as to contracts being signed by seven or more Commissioners or their clerk will apply. Obviously they are to apply to all contracts entered into by the Commissioners. Section 36, as to advertisement of contracts to the amount of 200*l.*, applies in terms to all contracts. Section 41 applies in terms to all contracts authorised to be made by or on behalf of the Commissioners for any of the purposes of the Act, and certainly is not confined to construction contracts. These instances, without enquiring whether there may not be others, make it plain that the sections preceding section 42 apply to all manner of contracts authorised by the Act generally, and must do so, whether section 42 is treated as a proviso on section 41, or on the prior sections. It does not require argument to prove that all contracts dealt

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with in section 33 are also referred to and dealt with in section 42, and it is almost impossible to suppose such one-sided legislation as would apply the stringent provisions of that section to construction contracts only, and leave it lawful to any Commissioner, Alderman, or Common Councilman to have the largest interest in any contract with the Commissioners that is not a construction contract.

As to the meaning of section 42, the important point for decision is whether a corporator or shareholder of an incorporated company is or is not interested directly or indirectly in any contract entered into with the company. It was admitted on behalf of the plaintiff company that as a general rule he is so interested, and indeed to deny that would be equivalent to saying that in case of a contract with an incorporated company no person whatsoever is interested though the whole fortunes of the corporators or shareholders may depend upon the contract—a contention which is manifestly absurd. But, beyond what I think may fairly be called the main contention—namely, that only construction contracts are within section 42—the plaintiffs have contended, and the learned Judge has held, in their favour, that the Act of 1851, and particularly section 53 thereof, proves that under the special legislation affecting the Commissioners of Sewers a shareholder is not considered as being interested in a contract made by his company, though he must necessarily share in any profits or loss that might be the result thereof. If there were words in the Act of 1851 necessarily involving that conclusion, effect must have been given to them; but no mere conjecture, though based on probable grounds, would be sufficient for the purpose. The argument of the plaintiffs adopted by the learned Judge, turns entirely upon section 53 of the Act. That is a section not relating to concluded contracts, but to discussion and votes antecedent to contracts. It refers only to Commissioners, and not to Aldermen or Common Councilmen, though they are dealt with by section 42 of the Act of 1848. The section was obviously intended to extend still further the disabilities of Commissioners, and there is nothing to indicate that any relaxation of the provisions of the earlier statute was intended. But whilst providing that no Commissioner being a surveyor, solicitor, or agent of a company with whom it is intended to enter into a contract shall sit or vote, it applies naturally the same provision to a shareholder of the company. It would be strange, indeed, if a surveyor, solicitor, or agent were prevented from sitting or voting and a shareholder permitted to do both. But from the fact that a Commissioner shareholder is prohibited by section 53 from sitting or voting upon the question of entering into a contract with his company it has been argued that he could not be possessed of such an interest, as under section 42 of the Act of 1848 would render the contract, if and when made, null and void. It would be unnecessary, it was argued, to prevent him from sitting and voting if the fact of his holding shares would of itself avoid the contract. The argument loses sight of the fact that a shareholder Commissioner might, by taking part in and voting as to the expediency and policy of a contract with his company, exercise perhaps a decisive influence on the entering into such contract, and yet might not, when the contract was signed, be any longer a shareholder or any longer a Commissioner, in either of which cases the contract would be unaffected by section 42. There is, in fact, no necessary connection between section 42 of the earlier and section 53 of the later Act, and it would be illogical and merely conjectural to assume that the later section should interpret the earlier. The conclusion I arrive at is that a shareholder Commissioner, Alderman, or Common Councilman is interested within section 42, and that the existence of his interest is sufficient to render a contract with his company null and void. The fact that express provision has been made by Parliament that a member of an ordinary municipal council shall not be precluded, by being interested only as a shareholder of an incorporated company, from taking part in making a contract between his company and the corporation of which he is a member, only emphasises the distinction in this respect between ordinary municipal corporations and the City Cor-

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poration, as to which no similar Parliamentary provision exists, or apparently ever has existed. Counsel for the appellants pointed out that in legislation relating to the City Corporation clauses substantially similar in effect to section 42 of the Act of 1848 have been regularly inserted from a time long anterior to the date of the Municipal Corporations Act, 1882, down to the present time. This disposes of the suggestion that the legislation of 1848 was a mere experiment, which, being found unsatisfactory, was amended in 1851.

Turning now to the facts of the present case, so far as they are relevant, we find from the statement of claim, and the particulars to paragraph 4 of the defence, which are admitted to be accurate, the facts hereinafter stated. With regard to the central and western districts the Brush Co. obtained provisional orders, with the consent of the Commissioners of Sewers as local authority, and those orders were confirmed by an Act of Parliament not containing any statutory power of assigning the contracts which might be made with the promoters. The Brush Co. entered into contracts with the Commissioners of Sewers, dated, as to the central district, May 19, 1890, and, as to the western district, February 5, 1891, as to electric light. At each of those dates a Common Councilman was a shareholder in the Brush Co., and each of those two contracts was null and void *ab initio*. Notwithstanding this, by indenture dated August 21, 1891, the Brush Co affected to convey the contracts to the plaintiff company, but this assignment could not render valid the contracts, which were already null and void. We have only to give effect to the provisions of the statutes, and have no dispensing power, even if we were disposed to exercise it.

With regard to the contract as to the eastern district, dated May 28, 1890, it appears that the Laing Wharton and Down Construction Syndicate, Lim., the contracting parties, had no shareholder whose existence would render null the contract; and, although it appears that the Board of Trade might have revoked the provisional order but for the assurance of the Commissioners of Sewers that the syndicate would be financed and the contract taken over by the Pioneer Co. and the City of London Co. respectively, and that both those companies were disabled from entering into any valid contract with the Commissioners of Sewers, yet, on the assumption, which I see no reason to doubt, that the contract of May 28, 1890, was originally entered into in good faith, I find no provision in the Acts of 1848 and 1851, or either of them, entitling us to set it aside.

Vaughan Williams, L.J.—I agree with the judgment of Lord Justice Rigby.

Stirling, L.J.—The question in this case turns on the true construction of section 42 of the City of London Sewers Act, 1848. Mr. Justice Farwell has decided in favour of the plaintiffs on two grounds—first, that the contracts referred to in that section do not include contracts for the lighting of the City with electric light entered into pursuant to section 116 of the Act; secondly, that upon the true construction of the section, when read in connection with section 53 of the City of London Sewers Act of 1851, the shareholder of a company with which the Commissioners of Sewers have made a contract is not a person directly or indirectly interested or concerned in the contract within the meaning of the section. These two points call for separate examination.

The contracts specified in section 42 are those "which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour, or for any other matter or thing whatsoever." With reference to similar words contained in section 33 of the Act the learned Judge observes: "It is said by the defendants that those words are perfectly general with nothing to restrict their generality; but, if this be so, the three preceding lines of section 33—'for the execution of any works directed or authorised by this Act to be done by the Commissioners, or for furnishing materials or labour'—are superfluous. It is idle to specify two particular sets of contracts if

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you follow them up with the words 'all contracts.'" This observation has some force, but does not carry us very far, for I apprehend that as a rule general words are to be read in their natural meaning unless on a consideration of the whole instrument the Court is satisfied that they are used in a more limited sense. The learned Judge accordingly refers to other parts of the Act for the purpose of shewing that some restriction ought to be placed on these general words, and, in the first place, he relies on sections 33–42, which he describes as a *fasciculus* of clauses relating to what he terms construction contracts only, meaning thereby contracts for the construction of works or supply of materials to the Commissioners which will become their own property, and not including such contracts as those for the supply of water or gas or other illuminants for lighting the city by companies or persons owning waterworks or gasworks or the like. I am unable to agree with this view of the learned Judge. I had intended, and was prepared, to examine these sections in some detail, but they have already been criticised by Lord Justice Rigby, whose judgment I have read, and I agree with his comments, and forbear repeating in different language what in substance he has already said.

Mr. Justice Farwell further places reliance on the language of several subsequent sections in which fresh powers of contracting are conferred on the Commissioners, as, for example, section 55 for the supply of water, section 116 for lighting, and section 143 for restoring pavements; and he observes that if the defendants were right in their contention, that every form of contracting within the powers of the Commissioners was authorised by section 33, it would have been needless to create by section 116 a further power to enter into contracts with gas companies and other persons for lighting the City. This observation is certainly entitled to weight; but there are certain considerations to which regard must be had. In the first place, section 116 has the effect of delegating to gas companies and other persons a portion of the duties imposed on the Commissioners by section 5 of the Act; and, in the absence of such a clause as section 116, questions might well be raised whether such contracts as are thereby sanctioned were within the powers of the Commissioners. Further, if, as is concluded by the learned Judge, section 116 is not within section 42, it would be lawful for the Commissioners to contract with any person whomsoever, and consequently any Commissioner, for the lighting of the City—a result which cannot, I think, have been contemplated by the framers of the Act. On the whole, I am unable to find anything in the Act which satisfies me that a limitation ought to be placed on the general words found in sections 33 and 42, and, in my opinion, the latter section ought to be held to apply to contracts made under section 116.

On the second point—namely, the effect of section 53 of the Act of 1851 upon the construction of section 42 of the Act of 1848—I find myself in agreement with Lord Justice Rigby, and for the same reasons. It was admitted that *prima facie* a shareholder in a company which contracts with the Commissioners is indirectly interested in the contract, and, in my opinion, section 53 of the Act of 1851 does not shew that section 42 of the Act of 1848 ought to be read otherwise. It is also admitted that the words "null and void" in section 42 are to be read in their natural sense, and do not mean "voidable" merely.

Now at the time when two out of the three contracts which the plaintiffs assert to be valid—namely, those entered into with the Brush Co.—were made, it appears that a Common Councilman and Commissioner of Sewers, a Common Councilman not a Commissioner, and the Lord Mayor for the time being (an Alderman and *ex officio* a Commissioner) were shareholders in the company. It follows that these two contracts were void *ab initio*. Nothing has subsequently happened to give them validity, and the action fails as to them.

With reference to the third contract—namely, that with the Laing Wharton and Down Construction Syndicate—a further question arises. At the time when that contract was entered into no Commissioner, Alderman, or Common

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Councilman was a shareholder in the syndicate. Consequently, the contract was not invalid under the section in its inception. Subsequently, by deed dated August 21, 1891, the benefit of that contract was assigned to the plaintiff company. At that date several Commissioners, Aldermen, and Common Councilmen were shareholders in the plaintiff company. It is contended that the contract, though originally valid, became null and void as from August 21, 1891. Now, section 42 of the Act of 1848 is one of a highly penal character, and ought to be strictly though fairly construed. It appears to me that section 42 is limited to invalidating contracts in which a Commissioner, Alderman, or Common Councilman is directly or indirectly interested or concerned when the contract is made or entered into, and does not extend to avoiding a contract good in its inception by reason of such a person subsequently becoming, for example, by purchase or otherwise, the owner of a single share in the contracting company. To hold otherwise might, it seems to me, be productive of great injustice, and in my judgment such a construction ought not to be adopted in the absence of clear words.

It was, however, contended that a direct contract between the plaintiff company and the Commissioners of Sewers had been entered into by way of novation, and that this new contract was invalid under section 42. It becomes necessary to see exactly what has taken place in this respect. [His Lordship referred to the facts on this part of the case, as above stated, and continued:] Under these circumstances I am unable to see that the syndicate has ever been discharged by the Commissioners from liability under the original contract. The resolution of the Commissioners of June 23, 1891, expressly provided that the rights of the Commissioners under the contract should remain intact. The resolution of September 22 did not mention the contracts, and I think that what has been done has not impaired the validity of the original contract with the syndicate.

The judgment should be reversed so far as relates to the agreements dated May 19, 1890, and February 5, 1891, and so much of the order discharged as relates to such agreements, and in lieu thereof a declaration should be made that the said agreements were and are null and void, and that the defendants are not bound thereby. No costs should be allowed either here or below.

Order varied.

Solicitors—The City Solicitor, for appellants; Ashurst, Morris, Crisp & Co., for respondents.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
Jan. 28. Feb. 25.

MASON, *In re*; OGDEN *v.* MASON.

Will—Construction — Specific Devise—Failure — "Residuary devise"—Restriction as to Tenure—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 25.

A devise of "all other my freehold messuages or tenements at W. and elsewhere" is a good "residuary devise" within section 25 *of the Wills Act*, 1837, *so as to include the subject-matter of a previous specific devise by the testator which has failed. It is not necessary in order to constitute a good residuary devise that it should apply to real estate of any tenure, copyhold as well as freehold.*

Springett *v.* Jenings (40 L. J. Ch. 348; L. R. 6 Ch. 333) *distinguished.*

Decision of KEKEWICH, J. (69 L. J. Ch. 475; [1900] 2 Ch. 196), *reversed.*

Appeal from a decision of Kekewich, J. (69 L. J. Ch. 475; [1900] 2 Ch. 196).

By his will dated January 27, 1862, Thomas William Jennings Mason, of Wimbledon, after a specific and pecuniary legacy to his wife, devised and bequeathed all that his freehold house, shop, and all and singular other the premises used by him at the time of his decease in his several trades or businesses carried on by him at Wimbledon, and all his trade and house

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fixtures, ready money, securities for money, stock-in-trade, goods, chattels, and effects not thereinbefore or thereinafter specifically bequeathed by him, to his son Thomas Mason, subject as therein mentioned; and, after giving various other specific legacies, the testator made the following residuary devise: "And as to all other my freehold messuages or tenements at Wimbledon aforesaid and elsewhere and all my leasehold estates whatsoever and wheresoever I give devise and bequeath the same unto my dear wife for and during the term of her natural life for her own use and benefit"; and after the decease of his wife he bequeathed the last mentioned freehold and leasehold messuages and hereditaments unto his nephew William Mason, and his son T. F. Mason, upon trust to sell the same, and to hold the proceeds upon the trusts therein mentioned in favour of his three daughters and their children.

The testator died in May, 1865. At the date of his death he had certain freehold houses at Wimbledon, in addition to the house and shop specifically devised, and also some freeholds at Kingston. He had no copyholds.

His will, and a codicil thereto, were attested by his son, T. F. Mason, so that the devise to him was void under section 15 of the Wills Act, 1837.

By a deed of August 31, 1865, the testator's widow and her daughters, with the view of carrying out the testator's intention, granted and released to T. F. Mason the freehold house and shop at Wimbledon. He took possession of the same, and remained in possession until his death.

On October 10, 1871, T. F. Mason died, having by his will dated September 30, 1871, left all his property, including this freehold shop, to his executors, the defendant Herbert Mason and William Michael Ogden, upon trust to carry on the business and pay the rents and profits of his estate to his wife for life, or until re-marriage, and then in trust for his son, the defendant Thomas George Mason.

The plaintiffs in the action were the children of Mrs. Ogden, deceased, a daughter of the testator, and Mrs. Arnold (another daughter) and her child, who were beneficiaries under the will of Thomas William Jennings Mason, and they took out an originating summons against the trustees of the will of T. F. Mason and Thomas George Mason for the determination of the question whether the freehold house, shop, and premises devised by T. W. J. Mason to T. F. Mason (which devise failed) were comprised in the subsequent devise of all other the testator's freehold messuages and tenements at Wimbledon and elsewhere; or whether they were undisposed of and passed to T. F. Mason as heir-at-law of his father.

Kekewich, J., held, on the authority of *Springett* v. *Jennings* [1871],[1] that inasmuch as the ultimate gift in the testator's will did not extend to land of any tenure, but to freehold land only, it was not a real residuary devise within section 25 of the Wills Act, 1837,[2] and therefore did not pass the freehold house and shop at Wimbledon devised to T. F. Mason.

The plaintiffs appealed.

Renshaw, K.C., and *Sargant*, for the appellants.—There is a good residuary devise here within section 25 of the Wills Act, 1837. The use of the word "other" does not prevent this gift being residuary —*Bernard* v. *Minshull* [1859],[3] *Cogswell* v. *Armstrong* [1855],[4] and *Blight* v. *Hartnoll* [1883].[5] The restriction to freehold property does not make it specific, for down to the time of the Wills Act a surrender of copyholds to the uses of a will was necessary, and a general devise of freeholds and copyholds was not possible. In *Powell on Devises* (3rd ed., 1827), vol. i. p. 736, there is a precedent of a will containing what is called a "residuary

(1) 40 L. J. Ch. 348; L. R. 6 Ch. 333.

(2) Wills Act, 1837, s. 25: "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will"

(3) 28 L. J. Ch. 649; John. 276.

(4) 2 K. & J. 227.

(5) 52 L J. Ch. 672; 23 Ch. D. 218.

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devise," which only included freeholds. There might since the Wills Act be two residuary devises, one of freeholds and the other of copyholds. In *Springett* v. *Jenings*[1] the restriction was one of locality, not of tenure. It was really a case of two specific devises. Section 15 of the Wills Act makes the devise to T. F. Mason "utterly null and void." The will must therefore be read as if it were not in it at all, and if that were so the subsequent general devise would clearly pass this property. Apart from the Wills Act the gift is of a particular residue, and would include the property as not already disposed of—*De Trafford* v. *Tempest* [1856],[6] *Champney* v. *Davy* [1879],[7] and *Farwell on Powers* (2nd ed.), p. 246. There must be an intention to exclude—*Bagot, In re; Paton* v. *Ormerod* [1893].[8] There may be a residuary gift of land of a particular legal quality. The common residuary gift is of freeholds, copyholds, and leaseholds, but the inclusion of leaseholds is clearly not necessary to make it residuary, nor is that of copyholds. The gift may be residuary, though it is not universal. In *Lancefield* v. *Iggulden* [1874][9] the general devise did not include copyholds, but the question was there decided on the footing that it was a sufficient residuary devise, though if the respondents are right it was not a residuary devise at all, and the question did not arise. In *Brown, In re* [1855],[10] the reasoning is in the appellant's favour.

[They also referred to *Brown* v. *Oakley* [1715].[11]]

Warrington, K.C., and *George Henderson*, for the respondents.—The question is, what is the meaning of "residuary devise" in section 25 of the Wills Act, 1837? According to *Springett* v. *Jenings*[1] and *Brown, In re*,[10] it must be a real residuary devise.

[STIRLING, L.J., referred to *Robertson* v. *Broadbent* [1883].[12]]

In *Springett* v. *Jenings*[1] it was held that a devise which did not sweep up all the testator's real estate of any tenure was not a residuary devise. The Act contemplates one residuary devise only. A devise which is limited to property of a certain quality is specific.

Sargant, in reply.—In *Springett* v. *Jenings*[1] there was a restriction of tenure as well as of place, but no argument was founded on that.

Cur. adv. vult.

Feb. 25.—RIGBY, L.J.—This is an appeal raising a question of some interest and importance on the construction of the Wills Act, 1837, particularly section 25. The testator, who was a grocer residing at Wimbledon, made a will, the important part of which I will refer to. [His Lordship read the material part of the will, and continued:] The question raised is whether there was an intestacy as to the specific real estate devised in the first place to Thomas Frederick Mason, or whether that was taken up by a residuary devise which is said to be contained in the words "all other my real estate" given by the testator to his trustees.

Before discussing the particular terms of the Wills Act, 1837, in connection with the devise contained in this will, I think it convenient to make some general observations as to the state of the law at the time when the Act was passed. I do not, of course, intend to give an exhaustive statement, but I will only refer to such well-known facts in relation to the then existing law as appear to me to throw light upon and to aid in arriving at the construction of this will. In the first place, there were great differences between personal estate and real estate. The will spoke as at the testator's death with regard to the personal estate, but had no such operation with regard to the real estate. The result as to real estate was that the only possibility—the only thing that the testator could do, however he expressed himself—was to give that real estate which he had when he made his will; and of course, although he might use general words, he was really doing nothing more than or different from what would have been done if he had enumerated

(6) 21 Beav. 564.
(7) 48 L. J. Ch. 268; 11 Ch. D. 949.
(8) 62 L. J. Ch. 1006; [1893] 3 Ch. 348.
(9) 43 L. J. Ch. 570; L. R. 10 Ch. 136.
(10) 1 K. & J. 522.
(11) 1 P. Wms. 302.
(12) 53 L. J. Ch. 266; 8 App. Cas. 812.

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the particulars of the real estate which he possessed, and the gift was necessarily specific. In the case of personal estate a rule of construction obtained, the peculiarity of which does not strike us, because it has been so familiar to all for such a length of time. For instance, if a testator gave "10,000*l.* Consols now standing in my name," indicating with precision and accuracy the Consols that he possessed, and went on to dispose of "all the residue of my personal estate," that word "residue" was not construed, according to the obvious meaning of it, as referring to all other personal estate except the 10,000*l.* Consols. For if the gift of the 10,000*l.* Consols failed, they fell by virtue of the word "residue" into the gift of that residue. I say that construction was peculiar because nothing can prevent the word "residue" meaning everything except the Consols; and, nevertheless, it was held to include the Consols themselves and prevent the gift of them failing. It was not by any special virtue in the word "residue" that that took place, for other words of the same purport and effect would have had the same result. The word "rest," for instance, or the word "remainder," and even in certain cases, as to which there has been an attempt to shew they were irregular or improper, the word "other"; so that, if a man gave the Consols and "all other" personal property to different persons, the word "other," like the word "residue,' was held to have the peculiar effect that it attracted to itself and disposed of the Consols, though they appeared to be separately dealt with. That result was not possible in the case of real estate, because of real estate there could be, as the law then stood, no "residue" at all in the sense in which that word is applied to personalty. Every gift of real estate at that time must have been a specific gift. But there is another thing which I wish to notice, that it was not in every case in which the word "residue" was used in regard to personalty that it had the effect of making what I call a genuine residuary gift—the effect of drawing to itself and including gifts already made which for any reason whatever failed. A familiar instance of that was in cases where the word "residue" was applied to personal property which was, as it were, standing out from the rest by a barrier created by a description or created by the fact that a power was given which the testator could exercise. In both cases the mere use of the word "residue," or the mere use of an analogous word, such as "rest" or "remainder" or "other," or the use of them altogether did not constitute of itself a true residue. For instance, if a power were given by settlement to settle certain personal estate, which of course must be defined and the amount described by the will, supposing the testator to have power to appoint by will, and if the testator appointed a particular part of the settled property, and went on to say, "and all the residue I appoint to a different person," that did not constitute a true residue so that it would of necessity, and from the very force of the word "residue," pick up and attract to itself and dispose of the whole, even though the specific portion of the fund which had been given might have failed owing to the death of the intended appointee during the testator's lifetime, or upon any other ground which would make the gift null and void. The gift of the residue *simpliciter*—I say advisedly *simpliciter*—did not create a residue; and the gift of what remained of the fund was as specific as the gift of the first described portion. I perfectly well know that it was within the power of a testator to express himself in such language as to shew that his intention was that the gift of what he called "residue" should comprise the specifically appointed fund if it failed for any reason, and there are numerous cases in which that took place; but words had to be found which were proof of the intention, whereas, in the case of a real residue, no such words were necessary—the word "residue" was sufficient of itself. There were many such cases not necessarily confined to powers, but extending to the testator's own property, as, for instance, the case of *De Trafford* v. *Tempest*,[6] referred to and explained by Lord Justice Mellish in *Springett* v. *Jenings*[1] (which I shall refer to in greater detail presently), where a testator gave to his wife certain chattels in or about his mansion, and then went

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on to bequeath to Sir Humphrey de Trafford all his chattels not otherwise disposed of. He did not say "not hereinbefore mentioned," but "not hereinbefore otherwise disposed of," which must of course mean, and has always been taken to mean in a similar context, "not hereinbefore effectually disposed of," making the intention clear that if the gift to the wife failed, that which he had attempted to give to her was to be included in the gift to Sir Humphrey de Trafford. Such cases were numerous. They applied also to the case of a limited fund—a fund which was subject to a power, or in other ways limited and, as it were, taken out of the general personalty; and the testator could, if he chose to use the language, make it plain that the residue was to include the gifts which failed. But I may say distinctly that if the personal fund that was being dealt with was in its nature cut off and separated from all other personal estate, a gift of the residue of it would not become a residuary gift; it would become a specific gift. For instance, I believe it to be the law that if a man said "All the Consols to which I am entitled at the time of my death," or gave certain stocks and said "All the residue of the Consols or all the residue of the stocks which I shall be entitled to," that could not be a residue, for it did not possess the quality of a residue of picking up all and sundry the personal property round about, and it was held to be a specific gift.

Now, as I said before, no such questions arise with regard to real estate before the Wills Act, 1837, because a "residue" of real estate could not be created in the proper sense of the word. Before I proceed further I may refer to copyholds, and shew that they were in a very different position from freeholds. By 55 Geo 3. c. 192, a serious attempt was made to improve the law as to wills of copyholds, and before that time there could be no gift by will of copyholds, unless the tenant had gone through the process of surrendering his interest to the lord to be held upon the uses to be declared by the will. The Act provided that the testator might dispense with that, or, not having done it, he might still dispose by will of his copyholds, provision being made or attempted, and I think successfully attempted, for preserving the interest of the lord, so that he should get all such fines and the steward should get all such fees as they would have been entitled to if the more regular course of surrendering to the uses of the will had been gone through. The Wills Act, 1837, repealed that Act with the view of making what were considered to be more effectual provisions. Under 55 Geo. 3. c. 192 I think that a devise of copyholds operated only as it had done before, as an appointment authorising the appointee, on payment of the proper fines and fees, to get himself admitted. The Act was repealed by the Wills Act, 1837, and it was made, in point of language, permissible to devise copyholds. Careful provisions were contained in the Act for securing to the lord and to the steward all those rights which they would have been entitled to if the older course had still been proceeded with; but I say no more than that the gift of copyholds by a will, even now, is totally different in its effect to the gift of freeholds. Really, whether it operates strictly as an appointment or not, it operates quite differently: it does not give the legal estate, but only the right to call for it; it does not give that absolutely, but only subject to payment of what may be very important sums of money—namely, the fees and fines.

Now I go to the question with which we are immediately concerned—and that is, the construction of section 25 of the Wills Act, 1837. Section 24 alters one difference between real and personal estate, in that it makes the will speak as if it had been executed immediately before the death of the testator, and thereby gets rid of the difficulty which was found insuperable, down to that time, of a testator disposing of real estate acquired by him after the date of his will. The question we have really to determine under this will is whether under section 25 there is a residuary devise in which the specific freehold property which was devised to the elder son of the testator, the devise being rendered null and void by the fact of his having been a witness to the will, ought to be included. I have the satisfaction, in considering the decision to which I feel

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myself bound to arrive upon this will, of knowing that Mr. Justice Kekewich, in all probability, according to his own mind, would have arrived at the same conclusion that I do—which is, that there is a sufficient residuary devise to take up null and void specific devises—unless he had felt himself bound by one or other of two cases—*Brown, In re*,[10] a decision of Vice-Chancellor Page-Wood, and *Springett* v. *Jenings*,[1] a decision of the Court of Appeal, the Court consisting of Lord Justice James and Lord Justice Mellish. Now, as regards *Springett* v. *Jenings*,[1] it goes without saying that if I came to the conclusion that that case had decided the principle of the present one, I should do nothing but follow it; but I will discuss those cases to shew that, according to my view, they have no effect whatever, when properly considered, on a case like the present. *Brown, In re*,[10] was a case that dealt with real estate comprised in a power of appointment given to a certain lady, who professed to execute it by will. She gave a certain part, easily recognisable, well-known, and specific, to one person, and "the residue," or words to that effect, in a different direction Afterwards she revoked the part of the gift which was clearly specific, and made it null and void; and the question was whether that specific portion passed under the gift which, according to the words, looked like a residuary gift. Vice-Chancellor Page-Wood ruled that it did not; because he held, from the nature of the case, this being a specific property, a taking out of it of a specific portion and dealing with the residue really only constituted two specific gifts, and upon failure of one it did not fall into the other at all, but was undisposed of. *Springett* v. *Jenings*[1] was a case of a gift to a particular person of a specific part of the testator's property at a named place in a named parish, and a gift of all the residue in another direction. Now the question was, whether the failure of the first part of the gift, by reason of its being proved in that case that there was a secret trust for charity, which made the whole null and void at law, had the effect of passing the specific portion intended to be for charitable uses into residue; and Lord Justice James, who delivered the first judgment in the case, went strictly upon the lines of the Vice-Chancellor Page-Wood in *Brown, In re*,[10] and held that the gift was not a residuary gift or in the nature of a residuary gift; but that it was specific, and being specific it could not take up the other specific gift which failed. That really is the decision arrived at in that case. If that were this case, we should certainly be bound to follow it. Lord Justice Mellish, however, professing to agree with Lord Justice James, made some references to section 25 of the Wills Act. I observe that was quite unnecessary for the decision of that case, and even if what he said in some respects conflicted in principle with the conclusion at which I am arriving I should be obliged to say that his remarks were *obiter dicta*, and not capable of being treated as deciding the case. But I do not propose to take that view, for upon a fair interpretation of what Lord Justice Mellish said, I think that he must be considered as confining himself to cases somewhat of the nature of the case before him, and not extending to cases altogether different. Then he says that it appears to him that the section assumes that there can be only one residuary devise in a will. What he was dealing with was a specific gift of property, and he meant that you cannot make a residuary gift out of a number of specific gifts, although the specific gifts may, in fact, together mount up to a clear devise of everything that the testator had; and he said that he thought a residuary devise must be universal. Now that is exactly what I have been pointing out was requisite for a residuary gift of personalty. If it were in its nature confined to particular classes of personalty, then it could not be residuary, because a residuary gift must have generality, which I apprehend to be the same thing as the universality referred to in Lord Justice Mellish's judgment. I do not think that he meant what has been attributed to him; but I must say that if he did I think he was going outside the case before him, and without perhaps sufficient argument stating what his view was upon section 25 of the Act in a manner that does not bind this Court.

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MASON, IN RE, App.

Now let us consider section 25. Clearly I think, and for the purpose of this judgment I hold, that a gift, for instance, in these terms, "All my real estate I give, as to freeholds, to A, and, as to copyholds, to B," would be a perfect residuary gift within the meaning of section 25. If that be so, the Act not being intended to deal with the particular way in which any particular testator or draftsman may choose to express himself, it would seem to follow that gifts of this sort, "I give all the residue of my freehold estates to A, and the residue of my copyhold estates to B," though there are two sentences instead of one, would constitute together a valid residuary disposition of all the residue in the testator's hands. Certainly I think it would do so if the testator took the trouble to explain himself somewhat in this manner: "And I make the following residuary disposition of my real estate—viz. all my residuary freeholds to A; all my residuary copyholds to B." One cannot suppose that the Legislature intended anything so fantastic as to make it law that the residuary gift shall be in a particular form or not at all. If it meant that, it would have said so in plain language. If that be true, and if a man can make a residuary gift of freeholds, and a residuary gift of copyholds, what reasonable difference is there if he leaves out the first clause? The gifts cannot interfere with one another, and one cannot assist the other in any way. The residuary gifts of freeholds for all purposes would act upon the freehold properties that are insufficiently dealt with by the will; and the residuary gift of copyholds will act only upon the copyhold properties. I conclude that in this case the residuary clause, which I hold to be a good residuary clause—although the testator uses the word "other"—takes effect although it is confined to freeholds. I have tried hard to, but I cannot imagine any object that the Legislature would have in saying that such a gift should not be a residuary devise, and I read the words "residuary devise" as any residuary devise that there may be applicable to the facts of the case.

The result will be that the impression of Mr. Justice Kekewich as to the law applicable which he entertained before he thought himself bound by *Springett* v. *Jennings* [1] was a right impression, and that he ought to have come to the conclusion that the trustees (I do not trouble about the *cestuis que trust*) took by virtue of the residuary gift of freeholds the property intended in the first place for Thomas Frederick Mason, the gift of which was made null and void by his attesting the will.

VAUGHAN WILLIAMS, L.J.—I entirely agree. I hesitate to add anything to the exhaustive judgment that Lord Justice Rigby has just delivered, and I should not do so if it were not for the fact that not only are we reversing the decision of the Court below, but also are dealing with a rule which must come up for application in other cases besides this one.

Now, the particular words we have to deal with here are these: "And as to all other my freehold messuages or tenements at Wimbledon aforesaid and elsewhere and all my leasehold estates whatsoever and wheresoever, I give devise and bequeath," &c. That is the devise to the trustees, and we have to construe those words as I understand it for the purposes of determining whether those particular words constitute a residuary devise, or whether they constitute a particular devise. To decide that, it is necessary to look back and see what is the particular devise which is mentioned in the earlier part of this will, which has failed by reason of the devisee being a witness to the will. It is enough to say, shortly, that it was a devise to the eldest son of houses and land at Wimbledon. Now, if these words which I have read are to be construed as words merely creating a particular devise, it follows that section 25 of the Wills Act, 1837, has no application. That is a section which, as I understand it, did this: Before the Wills Act there was a presumption in respect of residuary bequests of personalty which did not, and could not, apply to realty, because, in the nature of things, you could not have really a residuary devise of realty. Every devise of realty was specific. Then came the Wills Act, which, by section 24, in principle altered all this, because it made a will in

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respect of realty speak, as it had always done in the case of personal property, from the death, instead of speaking, as it had done in the case of real property, from the date of the will—the devise in the will being treated as in the nature of a conveyance. That being so, section 25 goes on to say that the presumption which had been applied to residuary bequests of personalty would also now apply to residuary devises of realty; and that is what I understand to be the effect of section 25.

Now, whether that presumption is to take effect here must depend upon whether there is a residuary devise. If there is a particular devise and no residuary devise, one has nothing to do with the presumption; and if one cannot take advantage of the presumption I do not understand that it has been argued that the words of the will themselves are sufficient to include in the particular devise, if it is a particular devise, the property in question. In the case of *Springett* v. *Jennings*[1] on the facts there was no real difficulty. There was a devise of a portion of the testator's property in a particular parish, and then you had a devise really of the residue of that property, and that devise of that residue was held—as it almost obviously must have been held—not to come within the terms of section 25. But there are passages in the judgments, in particular of the judgment of Lord Justice Mellish, which made Mr. Justice Kekewich come to the conclusion that such a rule had been established that nothing could be a residuary devise within the meaning of section 25 unless it had the quality of universality; and that if the devise dealt with freeholds and did not mention copyholds, that quality of universality was absent, and it was not a residuary devise within the meaning of the section. I can only say, speaking for myself, that I do not understand Lord Justice Mellish to lay down any such rule, but I do understand him to lay down the rule that if the residue is a residue of an entirety which only exists in the definition of the testator in the will, that is necessarily a particular residue, and is not a residuary devise within the meaning of section 25. Of course, if that is the rule, and you have the artificial entirety of the testator's property in the parish of Hawkhurst, the residue of that property was a particular residue of the entirety defined only by the will. But it seems to me that that is not true of a devise of freehold property, and I think that, freehold property being a *genus* of property existing as a *genus* or entirety independently of the will of the testator, you may, and ought to, read the words of this will as giving to the trustees property under a residuary devise, and not under a particular devise.

I only wish to say, speaking for myself, that the only doubt I had in the matter was this: I was not quite sure for a time that the repetition of the words about Wimbledon did not go to shew that there was a definition of property here on the part of the testator. Of course, if the words had run "and as to all other my freehold messuages or tenements at Wimbledon aforesaid I give and devise," there could be no doubt that this would have been a particular devise; and what prevents this being a particular devise is the mere use of the words "and elsewhere." I was not quite sure at one time that you ought not to treat the Wimbledon property as an artificial entirety and this as a particular gift of the residue, and deal with the words "and elsewhere" as you necessarily deal with the words "and all my leasehold estates whatsoever and wheresoever," as words dealing with subject-matter in addition to and outside the Wimbledon property; but on consideration I think that is wrong, and, that being so, I entirely agree with the result arrived at by Lord Justice Rigby.

STIRLING, L J.—According to the law as it stood before the passing of the Wills Act, 1837, a testator could only devise such real estate as he was entitled to at the time when he made his will For the present purpose it is immaterial to enquire how this doctrine came to be established; but it is important to bear in mind some consequences which follow from it. First, every devise, however wide in its terms, whether general or residuary, was held to be in its nature

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specific. Secondly, a will was ineffectual to pass real estate acquired by the testator subsequently to the date of its execution. Thirdly, a residuary devise in the will was ineffectual to pass real estate comprised in specific devises which failed by lapse or by being void *ab initio*. Among the cases decided in accordance with this third proposition may be mentioned *Wright* v. *Hall* [1724],[13] where the residuary devise was of "all the rest and residue of my messuages, lands, tenements and hereditaments in Edmonton, Enfield, and elsewhere"; *Doe d. Morris* v. *Underdown* [1741],[14] where the residuary devise was of "the rest residue and remainder of my goods chattels cattle stock ready money plate linen bedding and all other my estate whatsoever both real and personal not hereinbefore given and bequeathed"; and *Doe d. Wells* v. *Scott* [1814],[15] where the residuary devise was of "All the rest and residue of my messuages, farms, lands and tenements, late the estate and inheritance of my said late cousin M. Addyes, or otherwise, wheresoever situate." These rules produced consequences which were considered inconvenient or unjust, and alterations were introduced into them by the Wills Act, 1837, in a way which is thus described by Lord Cairns in *Lancefield* v. *Iggulden*[9]: "It was competent for the Legislature to have said that real estate should be treated like personal estate for all intents and purposes; but this was not done. The provisions of the Act were most carefully framed, not by way of altering philosophically the general rules of law, but by taking each particular evil intended to be cured, and dealing with it separately by particular enactments." Accordingly, by section 24 it was provided that unless a contrary intention should appear by the will every will should as to the real and personal estate comprised in it be construed to speak and take effect as if it had been executed immediately before the death of the testator; and by section 25, that unless a contrary intention should appear lapsed and void devises should be included "in the residuary devise (if any) contained in such will." The result is that a residuary devise is now effectual to pass real estate acquired by the testator after making his will and also real estate comprised in lapsed and void devises. It has, notwithstanding, been held that a residuary devise must still be regarded as a devise specific in its nature —*Lancefield* v. *Iggulden*.[9]

The question in the present case is whether a devise of "all other my freehold messuages or tenements at Wimbledon aforesaid or elsewhere" is a residuary devise within the meaning of section 25 of the Wills Act, 1837. Mr. Justice Kekewich has held that it is not because it "is not so worded as to apply to all land not otherwise disposed of, if the testator had or might have had between the date of his will and the date of his death any copyholds." This, so far as I can discover, has never before been relied on as a ground of decision. Before the statute 55 Geo. 3 c. 192, copyholds which had not been surrendered to the use of a testator's will were held not to pass under a residuary devise of real estate—see *Doe d. Clarke* v. *Ludlam* [1831][16]; and consequently could not have been passed under the residuary devises which were the subjects of decision in *Wright* v. *Hall*,[13] *Doe d. Morris* v. *Underdown*,[14] and *Doe d. Wells* v. *Scott*,[15] already mentioned, if the respective testators had chanced to possess any copyholds when those wills were made; yet that circumstance is nowhere alluded to as being in any way a governing consideration. In *Lancefield* v. *Iggulden*[9] the devise was of the residue of and all the testator's estate not thereinbefore disposed of in his freehold and leasehold messuages, lands, and hereditaments; yet both in argument and in the judgments of Vice Chancellor Bacon, Lord Chancellor Cairns, and Lord Justice James, this was treated as a true residuary devise. In my judgment the residuary devise referred to in section 25 of the Wills Act, 1837, is one which is of a form similar to the devises dealt with in cases decided before the passing of that Act to which I have

(13) Fortescue, 182; *sub nom. Wright* v. *Horne*, 8 Mod. 222.
(14) Willes, 293.
(15) 3 M. & S. 300.
(16) 9 L. J. C.P. (o.s.) 74; 7 Bing. 275.

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referred, irrespective of the consideration whether they were effectual to pass all real estate to which the testator was entitled at the date of the will or might ultimately prove to be entitled. In each case the question to be answered may be stated, in language used by Lord Justice James in *Springett* v. *Jenings*,[1] to be whether the devise is of a true general residue or of a "particular residue" only. Difficulties no doubt arise in answering such a question, but in the present case the devise appears to me to fall within the former category. I have the less hesitation in so saying inasmuch as Mr. Justice Kekewich tells us that in the first instance he arrived at the same conclusion, and only set it aside in deference to the authority of *Brown, In re*,[10] and *Springett* v. *Jenings*,[1] more particularly the latter case.

Now neither case covers the present in point of decision, for in each a devise of a particular residue was dealt with. Again, in neither was the point raised in the present case in any way considered. There are indeed expressions in the judgment of Lord Justice Mellish to the effect that the devise must be a universal residuary devise, a devise of all the testator's lands; but these, as it seems to me, were not necessary for the decision; and though I am sensible of the weight which is justly due to anything which fell from that very able and learned Judge, I nevertheless venture to think that if they were really intended to apply to a case such as the present they unduly narrow the effect of section 25 of the Wills Act, 1837.

Appeal allowed.

Solicitors—H. S. Bridge, for appellants; H. J. Mannings, for respondents.

[*Reported by A. J. Spencer, Esq., Barrister-at-Law.*

WRIGHT, J. 1901. Jan. 18.

RADFORD AND BRIGHT, LIM., *In re* (*No.* 2).

Company — Winding-up — First Meetings of Creditors and Contributories—Committee of Inspection—Unrepresented Creditors—Power of Court to Re-summon First Meetings—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 91—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 6, *sub-s.* 1.

The Court has power under section 91 *of the Companies Act*, 1862, *to re-summon first meetings of creditors and contributories to consider whether an additional member shall be added to an already appointed committee of inspection, in order to give representation to substantial creditors who had not yet proved their debt, and were not accordingly able to vote, at the time of the appointment of the already existing committee of inspection.*

Application in the winding-up of Radford & Bright, Lim., by La Société Anonyme L'Industrielle Russo-Belge (hereinafter called the Russo-Belge Co.), asking that fresh first meetings of the creditors and contributories of the company might be summoned in order to determine whether effect should be given to a resolution passed at a general meeting of the creditors of the company held on December 19, 1900, to the effect that it was desirable, having regard to the large interests of the Russo-Belge Co., that they should be represented on the committee of inspection; and to determine whether this should be effected by removing a present member of the committee or by appointing an additional member thereof.

At the time of the original first meeting of creditors on April 23, 1900, when a liquidator and committee of inspection were appointed, the Russo-Belge Co., not having proved its debt, was, under rule 6 of the First Schedule of the Companies (Winding-up) Act, 1890, not entitled to vote as a creditor.

On August 9, 1900, the proof of the Russo-Belge Co. for 45,000*l.* was admitted by the liquidator. The matter had already been before the Court on a summons issued by the Russo-Belge Co. for an

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order that the liquidator should summon a general meeting of the creditors of the company for the purpose of ascertaining their wishes as to whether or not a representative or attorney of the Russo-Belge Co. should be appointed a member of the committee of inspection, or, in the alternative, that directions might be given for summoning a fresh first meeting of creditors.

The facts of the case are more fully set out in the report of the hearing of this summons (*ante*, p. 78; [1901] 1 Ch. 272), when Wright, J., ordered that the liquidator should summon a general meeting of the creditors to consider whether they should, or should not, exercise the power that they possessed, under section 9 of the Companies (Winding-up) Act, 1890, of removing one or more members of the committee of inspection; and whether any other person or persons should be appointed in the room of any of those who should thus be removed. In case, however, the meeting should resolve that it was desirable, instead of removing any member of the committee, to add another member to that body, the learned Judge expressed an opinion that anything technically wrong in so doing might be put right by then re-summoning the first meetings of creditors and contributories as a matter of arrangement; and if the creditors then chose to vote for a committee of inspection consisting of seven members, including one representative of the Russo-Belge Co., and if the contributories approved, all would be well. And the learned Judge indicated that in his judgment the Court probably had jurisdiction, at its discretion, to order fresh first meetings or further meetings to be summoned for the purposes of section 6 of the Companies (Winding-up) Act, 1890.

The amounts of the debts of the creditors present or represented at the first meeting of the creditors already held on April 23, 1900, excluding that of the Russo-Belge Co., was about 43,000*l.*; and it was stated at the hearing of the above-mentioned summons on November 21, and 24, 1900, that there were two other foreign creditors for about 20,000*l.* each, the proofs of whose debts had not at that time been admitted.

A general meeting of the creditors was accordingly summoned by the liquidator in compliance with the order of November 24, 1900, on December 19, 1900, and a resolution was duly submitted to the meeting to the effect that a member of the existing committee of inspection should be removed, and that a representative of the Russo-Belge Co. should be therewith appointed in his place. This resolution, however, was not carried; and the meeting contented itself with an expression of opinion in general terms to the effect that it was desirable, having regard to the large interests of the Russo Belge Co., that they should be represented on the committee of inspection.

Under these circumstances the Russo-Belge Co. issued the present summons.

S. O. Buckmaster, for the applicants, was stopped by the Court.

Kenyon Parker, for the liquidator.—Even if a fresh first meeting be summoned, it can be summoned only for those purposes which are authorised by section 6 of the Companies (Winding-up) Act, 1890—that is, to elect a liquidator and to appoint a committee of inspection. Yet here a liquidator has already been elected and a committee of inspection appointed.

[WRIGHT, J.—I should limit, if possible, the objects for which the meeting was called to the appointment of a new member on the committee of inspection to represent the Russo-Belge Co.]

The Court cannot limit, at its discretion, the directions of an Act of Parliament. Even supposing the Court has any jurisdiction at all to summon a fresh first meeting of creditors, yet it can only summon it for the purposes specified by the section. Again, it is admitted that there are other creditors whose debts have not yet been proved. Are these to be at liberty to come in their turn and ask that the first meeting may again and again be re-summoned? The inconvenience of such a course is obvious.

[WRIGHT, J.—Yet it is obvious that it might be very desirable, if creditors were afterwards to come forward to the amount, let us say, of 100,000*l.*]

Anyhow, such a course is unnecessary, for the liquidator can always be compelled by

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RADFORD & BRIGHT, LIM., IN RE (No. 2).

any of the creditors to come to the Court and do his duty.

S. O. Buckmaster replied.

WRIGHT, J.—I think that, under section 91 [1] of the Companies Act, 1862, it is intended that the Court should have almost unlimited power in the matter of summoning meetings of creditors or contributories. If it were not so, it is obvious that in the infinite variety of events that occur in the winding-up of a company emergencies might very easily arise with which no one would have any power to deal, with the result that great injustice might thus be inflicted. I think, however, that I have power in this case under section 91 [1] to direct that the first meetings of the creditors and contributories should be re-summoned in order to determine whether effect shall be given to the resolution passed at the general meeting of creditors on December 19, 1900; and also to consider whether this should be done by making an increase in the number of the committee of inspection, or by removing one of the existing committee and appointing some one else in his place. Supposing, however, that the Court of Appeal should hold that I have no power to make any such order, it has been suggested to me that it is possible for me to appoint an additional liquidator with a new committee of inspection in the interest of the foreign creditors. But if the other course be possible, it is the one that I prefer to follow. I may say, however, that I am quite prepared to take any step in my power in order to give representation to the interests of the foreign creditors.

Application granted.

Solicitors—Church, Rendell, Todd & Co., for applicants; Downing, Bolam & Co., agents for Bolam & Co., Sunderland, for liquidator.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

(1) Section 91 of the Companies Act, 1862: "The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the Court directs, for the purpose of ascertaining their wishes. . . ."

BYRNE, J. 1900. Dec. 12, 13.

MARTEN, *In re*; SHAW *v.* MARTEN.

Will—Construction—General Power—Appointment — Severance — Income — Specific Gift.

An appointment, under general powers over two funds, of the sum of 5,000*l.* *and the stocks, funds, and securities representing the same and "such part of the stocks, funds, shares, and securities comprised in the first schedule as shall with the said sum of* 5,000*l.* *make up the sum of* 9,000*l.*" *is a specific gift, and the income during the first year after the testator's death goes to the appointees.*

By a settlement executed in 1880, made on the marriage of the testatrix with her late husband, certain securities specified in the first schedule thereto and a sum of 5,000*l.* cash were transferred to trustees upon trust for investment, and upon trust for the husband, wife, and the children of the marriage, and in default of children (which event happened) as to the securities specified in the said schedule in trust for the appointees of the wife, with a gift over in default of appointment; and as to the sum of 5,000*l.* in trust for her appointees (other than her husband), with a gift over in default of appointment.

The testatrix, by her will dated March 1, 1893, appointed that the trustees should stand possessed of the sum of 5,000*l.* and the stocks, funds, securities representing the same, "and such part of the stocks funds shares and securities comprised in the first schedule as shall with the said sum of 5,000*l.* make up the sum of 9,000*l.*," in favour of certain persons. The testatrix then proceeded to dispose of the remainder of the securities comprised in the first schedule. The will also contained a residuary devise and bequest subject to the payment of debts.

The testatrix survived her husband, and an originating summons was taken out by the executors and trustees raising the question whether the income during the year after the testatrix's death of the

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MARTEN, IN RE.

sum so appointed to make up the 9,000*l.* passed to the appointees.

J. M. Stone, for the trustees.

A. Underhill, for an appointee of the 9,000*l.*—*Tatham* v. *Drummond* [1864] [1] is distinguishable. That was a case of a general legacy. Here the testatrix has severed the gift from the rest of the estate. She does not give 9,000*l.*, but specific stocks, funds, and securities of the value mentioned. That brings the case within *Dundas* v. *Wolfe Murray* [1863].[2]

[BYRNE, J.—I see that *Dundas* v. *Wolfe Murray* [2] was followed in *Inman, In re*; *Inman* v. *Rolls* [1893].[3]]

Were this an appointment under a special power the case would be unarguable. The only suggestion is that, being a general power, she has by the appointment first made the fund her own, and then given a sum of 9,000*l.*

Levett, Q.C., and *J. Chester*, for persons entitled in default of appointment.—It has never been suggested that a legacy which comes out of a particular fund is specific. You must have a definite fund severed from a definite part of the estate. It is really a gift of a sum of money with a demonstration how it is to be raised. *Dundas* v. *Wolfe Murray* [2] is distinguishable, as an actual severance is not directed.

Mulligan, Q.C., and *Manby*, for the residuary legatees; and *S. O. Buckmaster*, for the next-of-kin, argued to the same effect.

A. Underhill, in reply, referred to *Sleech* v. *Thorington* [1754].[4]

BYRNE, J.—This question, whether the appointment is wholly or partially specific, must be answered in the affirmative. With respect to the 5,000*l.* it is clearly specific. The other part of the case is a little more difficult, but I think the gift which the testatrix makes of "such part of the stocks funds and securities comprised in the first schedule as shall make up the sum of 9,000*l.*," is also specific. I accordingly hold that the income for the first year after the death of the testatrix goes to the appointees.

(1) 2 H. & M. 262.
(2) 32 L. J. Ch. 151; 1 H. & M. 425.
(3) 62 L. J. Ch. 940; [1893] 3 Ch. 518.
(4) 2 Ves. sen. 560.

Solicitors — A. Toovey, agent for Bennett, Boycott, Orme & Goodman, Buxton; Ullithorne, Currey & Jennings, agents for Neve, Cresswell & Sparrow, Wolverhampton; J. & R. Gole, agents for Dixon & Syers, Liverpool.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

COZENS-HARDY, J. 1901. March 1.

NEW GOLD COAST EXPLORATION CO., *In re.*

Company — Winding-up — Application to Remove Liquidator—Circular to Shareholders — Pending Proceedings — Charges against Liquidator—Contempt of Court.

Where a summons to remove a liquidator in a voluntary winding-up is taken out on behalf of the applicant and all other shareholders, the Court will not, on the ground of contempt, restrain the applicant from issuing a circular to the shareholders asking their support to the summons, though it contains charges against the liquidator, made ex parte, to justify the application.

The New Gold Coast Exploration Co. had passed resolutions for a voluntary winding-up, and appointed a liquidator. A summons was taken out by a shareholder expressed to be on behalf of himself and all other shareholders to remove the liquidator on the ground of misconduct. The applicant had upon an *ex parte* application obtained an injunction restraining the liquidator from dealing with the assets of the company.

He had sent a circular to all the shareholders stating the alleged misconduct of the liquidator, on which the summons was founded, and enclosed a form for signature: "We the undersigned being shareholders of the company, do hereby testify our consent and approval of the proposed removal of S. as liquidator of the company and the appointment of some fit and proper person in his place, as asked for by the summons herein."

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NEW GOLD COAST EXPLORATION CO., IN RE.

The liquidator now moved to restrain circulation among the shareholders of this circular while the proceedings were pending, as being a contempt of Court.

Eve, K.C., and *W. H. Cozens-Hardy*, for the motion.—The statements in the circular are not true, and are very damaging to the liquidator. The circulation among the shareholders is more likely to interfere with the course of justice than circulation among the general public would be. It is getting by unfair means the support of the shareholders, to whose opinion the Court which tries the case will attach conclusive weight.

[COZENS-HARDY, J., referred to *Plating Co.* v. *Farquharson* [1881].[1]]

In *Bowden* v. *Russell* [1877][2] the circulation of a statement of claim was restrained. This is an *a fortiori* case, for the statement of claim in that case was settled by counsel — *General Exchange Bank, In re* [1866],[3] *Crown Bank, In re; O'Malley, In re* [1890],[4] and *Coats* v. *Chadwick* [1894].[5]

P. Rose-Innes, for the applicant.—There is no authority whatever for saying that circulation of such a notice among shareholders, who are in fact co-plaintiffs with the applicant, is contempt. In *Reg.* v. *Payne* [1896][6] the Divisional Court criticised and refused to follow the cases cited for the motion. That case and *Plating Co.* v. *Farquharson*[1] are conclusive against the application.

Eve, K.C., in reply.—Any publication of affidavits or other *ex parte* statements while proceedings are pending is a contempt of Court, and will be restrained—*Matthews* v. *Smith* [1844],[7] *Kitcat* v. *Sharpe* [1882],[8] and *Sir John Moore Gold-Mining Co., In re* [1877].[9]

COZENS-HARDY, J.—In my judgment this application is misconceived. There is a voluntary winding up of the company, and a liquidator has been appointed. [His Lordship stated the effect of the summons, and continued:] It purports to be, and is on the face of it, an application by Mr. Saunders not merely as an individual, but on behalf of himself and other the shareholders of the company. The other shareholders are in fact co-applicants with him. They are a very numerous body, and they are not joined individually as applicants; but the summons purports to be, and I certainly do not mean to express an opinion that it is not properly, an application on behalf of Mr. Saunders and all other shareholders. Mr. Saunders has filed an affidavit and obtained an injunction under certain circumstances, about which I say nothing. I do not wish any words to fall from me which will indicate any view of mine of what may be the decision on the summons when it comes before Mr. Justice Wright. That being the case, Mr. Saunders issues a circular which he sends, not to the public at large, not to persons who are in no way interested, but simply to individuals who are co-applicants with him.

He sends it to the shareholders and informs them of what he has done, and encloses a form asking them to testify their support. [His Lordship read the form set out above.] It is said that the statements in this circular are not well founded, and will not prove to be true. That may be so. I am not now considering whether this is or is not a libellous circular. I am only asked to consider, and I can only consider, whether it is or is not a contempt in the view of the Court, as being calculated to interfere with the due administration of justice. Put in this way, I am bound to say that I think the question admits of only one possible answer. I regard it as ludicrous to say that this circular will in any way interfere with or prejudice the due trial of this matter.

Now certain reported decisions have been cited in which, no doubt, Judges have taken a view on the subject of contempt which I have very high authority for saying would not now be followed by the Court. I think that the guiding rule is to be found in the case which I mentioned during the argument of *Plating*

(1) 50 L. J. Ch. 406; 17 Ch. D. 49.
(2) 46 L. J. Ch. 414; 36 L. T. 177.
(3) 14 L. T. 582.
(4) 59 L. J. Ch. 767; 44 Ch. D. 649.
(5) 63 L. J. Ch. 328; [1894] 1 Ch. 347.
(6) 65 L. J. Q.B. 426; [1896] 1 Q.B. 577.
(7) 3 Hare, 331.
(8) 52 L. J. Ch. 134.
(9) 37 L. T. 242.

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Co. v. *Farquharson*,[1] in which the Court of Appeal laid down some doctrines which I intend to follow. It is true that in that case the motion was made against proprietors of newspapers for publishing what was said to be a contempt, but Lord Justice James said: "If the motion had been made against the defendant himself, I think it must have failed." Lord Justice Cotton said: "I should like to add one word, namely, that I entirely disapprove of motions to commit where there is no real case for committing the party against whom the motion is made, and where the counsel in opening the case says, 'I do not ask for a committal; all that I ask for is an apology and payment of costs.' Motions made in that sense and view are, in my opinion, a mere waste of the time of the Court, and ought to be discouraged. My own view is that where there is no case for a committal the party moving ought to have no costs of his motion. I mention this on the present occasion that the Court of Appeal may not in future be troubled with motions where there is really no case for committing the person against whom the motion is made." On this Sir George Jessel, M.R., said: "I think I ought to express my entire concurrence with what Lord Justice Cotton has said." Lord Justice James went further: "I certainly in such cases would not only not give the party moving his costs, but I should be inclined to make him pay costs. I think these motions are a contempt of Court in themselves, because they tend to waste the public time." It does not rest there. Counsel for the respondent called to my recollection that the whole matter came before a Divisional Court, consisting of the late Lord Chief Justice and Mr. Justice Wright, in *Reg.* v. *Payne*[6]—a criminal case, in which probably it was more strictly the duty of the Court to prevent any interference with the course of justice than in civil cases. In that case the late Lord Chief Justice said: "We have been referred to certain cases in the Chancery Division of the High Court as authorities in support of the present application. I will not refer to those decisions further than to say that, in my opinion, in some instances, the Courts have gone rather too far." The cases which had been cited to the Court, to which those observations were addressed, were *Crown Bank, In re*,[4] and *Coats* v. *Chadwick*,[5] two of the cases which have been relied on by the counsel for the applicant in the present case. The Lord Chief Justice also cites the following passage from the judgment of Lord Justice Cotton in *Hunt* v. *Clarke* [1889],[10] where, after referring to the judgment of Sir George Jessel, M.R., in *Clements, In re; Republic of Costa Rica* v. *Erlanger* [1877],[11] he said: "Now that I apply and adopt as the principle which ought to regulate these applications—that there should be no such application made unless the thing done is of such a nature as to require the arbitrary and summary interference of the Court in order to enable justice to be duly and properly administered without any interruption or interference, that is what we have to consider, and in my opinion, although as I say there is here that which is technically a contempt, and may be such a contempt as to be of a serious nature, I cannot think there is any such interference or any such fear of any such interference with the due conduct of this action, or any such prejudice to the defendant who is applying here, as to justify the Court in interfering by this summary and arbitrary process." I think every word of that passage applies to the present case. I think that there is no ground whatever for invoking the aid of the Court on the footing of contempt, and that the application must be made on that footing in order to succeed.

Application dismissed with costs.

Solicitors—Cox & Lafone, for liquidator; Saunders, Valpy, Peckham & Chaplin, for applicant.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

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(10) 58 L. J. Q.B. 490.
(11) 46 L. J. Ch. 375.

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JOYCE, J.
1901.
Feb. 12. March 14.

MOORE, *In re*;
PRIOR *v.* MOORE.

Will—Bequest for Repair of Tomb—"Longest period allowed by law"—Twenty-one Years from death of Survivor of all Persons living at Testator's Death—Void Gift—Uncertainty—Perpetuity.

A testatrix bequeathed a legacy to trustees upon trust for the maintenance and repair of a tomb "for the longest period allowed by law, that is to say until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death":—Held, *that, whether the bequest was void as a perpetuity or not, it was, at any rate, void for uncertainty.*

Adjourned summons.

By her will dated September 27, 1897, Martha Mary Moore, widow, the above-named testatrix, bequeathed (*inter alia*) the sum of 500*l.* New Consols to her trustees upon trust to apply the dividends thereof in maintaining and keeping in a state of proper repair, condition, and protection, the grave or tomb therein mentioned "for the longest period allowed by law, that is to say until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death," and subject to that trust the testatrix directed that the said sum of 500*l.* New Consols should form part of her residuary personal estate, and be held upon the trusts thereof.

The testatrix died on January 3, 1898, and her will was proved on February 22, 1898.

This was a summons taken out by the trustees of the will against the residuary legatee for the determination (*inter alia*) of the question whether the above-mentioned bequest was valid and effectual.

Hughes, K.C., and *S. Dickinson*, for the trustees.—The gift is not bad as transgressing the rule against perpetuities—*Cadell* v. *Palmer* [1833][1]; nor is it bad for uncertainty—*Pownall* v. *Graham* [1863].[2]

(1) 1 Cl. & F. 372.
(2) 33 Beav. 242.

Younger, K.C., and *H. Fellows*, for the defendant residuary legatee.—This gift is void for perpetuity. The testatrix has named too many lives. The number of lives must not exceed that to which testimony can be supplied as to whether the persons are alive or not—*Thellusson* v. *Woodford* [1805][3] with which case neither *Pownall* v. *Graham*[2] nor *Cadell* v. *Palmer*[1] is inconsistent. Here the testatrix has not been content to rest satisfied with saying "for the longest period allowed by law"—which would have been good—but she goes on to define what she means by that, and the definition, which has to be substituted for the phrase defined, makes the gift void for perpetuity.

[The following cases were also mentioned during the course of the arguments: *Pirbright* v. *Salwey* [1896],[4] *Dean, In re; Cooper-Dean* v. *Stevens* [1889],[5] *Pettingall* v. *Pettingall* [1842],[6] and *Exmouth* (*Viscount*) v. *Praed* [1883].[7]]

Hughes, K.C., replied.

W. F. Hamilton, K.C., and *T. T. Methold*, for another defendant.

JOYCE, J.—I need not go into the question whether or not this bequest is void for perpetuity, because I am of opinion that the bequest is void for uncertainty, and I so hold.

Solicitors—Tamplin, Tayler & Joseph, for plaintiffs; Evans, Foster & Wadham, for defendant residuary legatee; Johnson & Master, for other defendant.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

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(3) 11 Ves. 112.
(4) W. N. (1896), p. 86.
(5) 58 L. J. Ch. 693; 41 Ch. D. 552.
(6) 11 L. J. Ch. 176.
(7) 52 L. J. Ch. 420; 23 Ch. D. 158.

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COZENS-HARDY, J. 1900. Dec. 6. } PLAYER AND SONS' TRADE MARK, *In re.*

Trade Mark — Double Registration — Time for Disclaimer—Patents, Designs, and Trade Marks Acts, 1883–1888 (46 & 47 *Vict. c.* 57–51 & 52 *Vict. c.* 50), *ss.* 62 *and* 72.

When a disclaimer is required under the Patents, Designs, and Trade Marks Acts, 1883–1888, *it must be made in the application for registration, and cannot be made afterwards.*

When a trade mark has been registered with words the exclusive use of which is not claimed, and which are not essential to the trade mark, a second registration of the same mark will not be allowed with different words and other non-essential particulars.

On February 12, 1891, the applicants' predecessors in business had registered a trade mark (No. 154,011) for tobacco, whether manufactured or unmanufactured, consisting of a lifebuoy, in the centre of which was a sailor's head with the word "Hero" on the cap, with the sea and two ships in the background, and the words "Player's Navy Cut" round the lifebuoy. They stated in their application: "The applicants will in use vary the use of the words 'Navy Cut' by substituting therefor the names of other articles included in the specification of goods." The essential particulars were "the combination of devices," without any right to the exclusive use of the added matter except the applicants' name.

On July 24, 1891, the applicants endeavoured to register a label in colours almost identical with the above, the only differences being that the nose of the sailor was slightly different, and the face was that of a younger sailor; registration was refused by the Comptroller of Trade Marks, and his decision was affirmed on appeal by the Board of Trade.

On August 2, 1899, an application was lodged by the applicants, John Player & Sons, Lim., for registration of a trade mark (No. 225,035) in class 45 for manufactured tobacco, practically identical with the mark registration of which had been refused in 1891, except that the words on the lifebuoy were "Player's Navy Mixture" instead of "Player's Navy Cut." The essential particulars were "the combination of devices" and the word "Hero," without any right to the exclusive use of the added matter except the applicants' own name.

There was evidence to shew that if the present application was refused the applicants might be seriously hampered and prejudiced in their business by their inability to register their trade mark in foreign countries without a certificate of previous registration in England. They asked at the hearing to be allowed to disclaim the exclusive use of the word "Hero."

After a lengthy correspondence the Comptroller finally refused registration, and the matter was referred on appeal to the Court.

John Cutler, *Q.C.*, and *Sebastian*, for the applicants.—Our new mixture "Navy Mixture" is entirely a fancy name; it is made up of Navy Cut and scarce Eastern tobaccos. The real question is whether the trade mark now applied for is so near others now on the register as to be calculated to deceive. If we had no registration for "Navy Cut" we could now get registration both for "Navy Cut" and "Navy Mixture," and we are asking registration of a mark which is possibly for some purposes already protected but is not on the register. The Comptroller, by refusing registration, is preventing a British trader from protecting his goods from infringement abroad. Where a device together with a word has been registered, a separate registration of the same device with a different word has been allowed, so that the same one essential particular was separately registered twice, with immaterial additions—*Fox & Co., In re* [1881].[1]

The Attorney-General (*Sir R. B. Finlay*, *Q.C.*), and *R. J. Parker*, for the Comptroller.—Although the applicants have asked to be allowed to disclaim the exclusive use of the word "Hero," it is too late at this stage to amend, and it is not the practice of the Court to allow any amendment—

(1) Sebastian on Trade Marks (4th ed.), p. 337.

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PLAYER'S TRADE MARK, IN RE.

Apollinaris Co.'s Trade Marks, In re [1890].[2] The present design is not in reality the same as the previously registered design. The sailors' heads are not alike, and would lead to confusion; but even if they are identical, they are trying to re-register what is already registered—*Baker* v. *Rawson* [1890].[3] If it is a new design, then they cannot register it because they have already used it with the addition of the word "Registered"—*Fuente's Trade Marks, In re* [1891].[4]

John Cutler, Q.C., replied.

COZENS-HARDY, J.—I think this application fails—first, in point of form, and next in point of substance. The application with which the Comptroller has declined to proceed is one asking for the registration of a mark the essential particulars of which are stated to be "The following combination of devices and the word 'Hero,'" the applicants disclaiming any right to the use of the added matter except in so far as it consists of the use of their own name. It is now alleged by the Comptroller, and is admitted by the applicants, that they themselves had disclaimed the word "Hero" as being an essential part of the mark, and that it may not now be properly regarded as being an essential part of the mark. I think, according to the decision of Mr. Justice Chitty in *Meeus' Application, In re* [1890],[5] and Mr. Justice Kekewich in *Apollinaris Co.'s Trade Marks, In re*,[2] that it is too late now for me to allow an amendment of the application, and on that ground I think this application by way of appeal before me might be disposed of; but I prefer not to deal with it on that ground alone.

Supposing that difficulty were got over, the matter, putting it most favourably for the applicants, would stand thus: They apply to register a mark No. 225,035, which is identical in all the essentials of the mark with No. 154,011. I say that, assuming in their favour that the representation of the sailor, though in some respects very unlike the other, is really, for business purposes, the same sailor. When No. 154,011 was applied for, the application was accompanied with this: "The applicants will in use vary the use of the words 'Navy Cut' by substituting therefor the names of other articles included in the specification of goods." They did not claim "Navy Cut" as essential to the trade mark. They disclaimed any right to that, and at the same time they said that they would in the use of their mark reserve the right to substitute the names of other articles included in the specification of goods. It is, therefore, I think, perfectly clear that the existing registration No. 154,011 covers, and absolutely covers, this which they now desire should be registered—namely, "Player's Navy Mixture," disclaiming, as they must do, the words "Navy Mixture," and also the word "Hero." That being so, if they have got an existing registration, absolutely and entirely protecting in this country what they want to register, why should they register anything more? I think the very point was decided by Mr. Justice North in *Baker* v. *Rawson*,[3] where he says, "the defendants have had their trade mark, the winged cross, on the register from the year 1877 down to the present time, and they are now asking to register that mark again, *plus* the circles, *minus* the same. They ask that their well-known trade mark may be registered with the addition of the circles, accompanied by a note that the circles are not part of the trade mark. That application seems to me an absurd one." This application put in that way seems to me also to be an absurd one. I think I ought not to allow the mark to be put on the register. The registration is absolutely superfluous, so far as English law is concerned, and would, I think, cumber the register needlessly and unnecessarily, simply on the suggestion that it may be a convenience in some foreign countries, with a view to some other proceedings, to have a duplicate registration of their mark.

In the view which I take, it is not necessary for me to say a word about "Navy Mixture," or about the use on the cigarette-boxes of what in substance is the new mark with the statement that it is

(2) 61 L. J. Ch. 625; [1891] 2 Ch. 186.
(3) 45 Ch. D. 519.
(4) 60 L. J. Ch. 308; [1891] 2 Ch. 166.
(5) 60 L. J. Ch. 96; [1891] 1 Ch. 41.

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registered. I do not base my judgment on those points at all, though I think they would both be worthy of consideration should necessity arise.

Application dismissed.

Solicitors—C. Urquhart Fisher, for applicants; Solicitor to Board of Trade, for Comptroller.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
Feb. 27.

COLLINGHAM *v.* SLOPER.

Trust — Compromise — Distribution of Fund amongst Bondholders — Absent Parties—No Limit of Time Originally Fixed — Application to Limit a Time within which Absent Parties must come in—Rules of the Supreme Court, 1883, *Order XVI. rule* 9A.

In a bondholders' action to administer a trust fund, the Court in 1894 *sanctioned a scheme of compromise binding upon absent parties under Order XVI. rule* 9A, *whereby a sum of money was appropriated for distribution in respect of* 61,383 *outstanding bonds when and so soon as the holders thereof should be ascertained, at the rate of* 2*l.* 10*s. per bond. The bonds were issued by a railway company and were to bearer. The holders of all but* 1,700 *of the outstanding bonds had been ascertained, and had come in under the scheme. After the lapse of six years, the railway company applied for an order limiting a short time within which the holders must come in or be deemed to have elected not to take the benefit of the scheme:* —Held, *by* RIGBY, L.J., *and* STIRLING, L.J. (*dissentiente* VAUGHAN WILLIAMS, L.J.), *that it would be wrong to introduce a time-limit into the scheme to the disadvantage of the unascertained bondholders, and that no order ought to be made.*

Held, *by* VAUGHAN WILLIAMS, L.J., *that a reasonable time-limit ought to be read into the scheme and a proper order now made on that footing.*

Original motion.

The Saragossa and Mediterranean Railway Company was a Spanish company formed in the year 1884 under the name of the Val de Zagan and San Carlos de la Rapita Railway Company, for the purpose of constructing a railway in five sections from La Puebla de Hijar to San Carlos on the Mediterranean coast, under a concession granted by the Spanish Government in 1882.

The company was empowered to issue 75,000 mortgage debentures or "obligations" to bearer of 20*l.* each bearing interest at 3 per cent., to be redeemed in ninety-three years from the date of issue, and forming a first charge on the railway.

In 1889, under an arrangement between the company and the contractors of the railway, the whole of the 75,000 obligations were offered for public subscription upon the terms that three persons, appointed commissioners in London, were to receive the net proceeds arising from the issue, and were to apply the balance, after payment of certain expenses, to the completion of the line. The greater portion of these obligations were subscribed for.

Pecuniary difficulties subsequently arose, and it became doubtful whether the railway could be completed within the required time; and in 1892 three actions were brought by holders of the obligations for the execution of the trusts of the moneys in the hands of the commissioners.

North, J., declared that the trusts ought to be carried into execution as far as possible, and made an elaborate order directing certain enquiries, as reported in *Foreign, American, and General Investments Trust Co.* v. *Sloper* [1893].[1]

An appeal was presented, but pending the appeal a scheme of compromise was agreed to between the parties to the actions, subject to the approval of the Court, and a petition was presented to North, J., to obtain the sanction of the Court thereto; and the petitioners asked that, as many of the holders resided abroad and could not be easily ascertained,

(1) 62 L. J. Ch. 416; *sub nom. Collingham* v. *Sloper* in [1893] 2 Ch. 96.

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the holders of 37,285 out of 61,383 outstanding obligations might be appointed to represent all the holders.

The scheme stated that the moneys in the hands of the commissioners amounted to 218,734*l.*, which, if free from all claims other than costs, would be sufficient to pay 3*l.* 18*s.* 10*d.* per obligation, and proposed to deal with these moneys as follows: (*a*) For the costs of the commissioners in the actions and for collection and other expenses, 7,474*l.*; (*b*) That for distribution in respect of the 61,383 outstanding obligations of 20*l.* each, when and so soon as the holders thereof should be duly ascertained, being at the rate of 2*l.* 10*s.* per obligation, within fourteen days after presentation of the same for payment, upon such obligation being delivered up to be cancelled, there should be set aside 153,457*l.* 10*s.*; (*c*) To form a fund for the settlement of various specified claims and to complete the first section of the railway, 57,802*l.*

North, J., held, on the evidence, that it was not for the advantage of the absent holders of obligations that the scheme should be carried out, and refused to sanction the scheme.

An appeal was brought, and on August 9, 1894, the Court of Appeal, being satisfied that the compromise was for the advantage of the absent holders, sanctioned the scheme as a compromise binding on absent persons under Order XVI. rule 9A,[2] and ordered that the scheme should be carried out—see *Collingham* v. *Sloper* [1894].[3]

The scheme as sanctioned was largely advertised in England and abroad, but the holders of some 1,700 obligations had not come in under the scheme, and were still unascertained, and their proportion of the 153,457*l.* 10*s.* still remained in the hands of the commissioners.

This was a motion by the company, asking that three months, or some other time, might be limited within which the holders must come in under the provisions of the scheme or be deemed to have elected not to take the benefit of the scheme, and to rely on their charge on the railway works created by the obligations, and that such holders might be excluded from the benefit of the scheme and of the order sanctioning it. The motion was served on the plaintiffs in the action.

Upjohn, *K.C.*, and *Martelli*, for the motion.—We ask the Court to limit a time within which, subject to such directions as the Court thinks fit, absent bondholders must come in; and if they do not, then that the balance of the fund may be paid over to the company. A time-limit is recognised as a necessary part of a scheme under the Companies Act, 1862, s. 161—*Postlethwaite* v. *Port Phillip and Colonial Gold-Mining Co.* [1889][4] and *Zuccani* v. *Nacupai Gold-Mining Co.* [1889][5]—and a time-limit ought to be read into such a compromise as this as a necessary term.

Butcher, *K.C.*, and *A. F. Peterson*, for the respondents, were not called on.

RIGBY, L.J.—The present application is made by a railway company to, as I understand it, alter the form of an order for compromise made by the Court of Appeal under a jurisdiction vested in them by Order XVI. rule 9A. That rule gives to the Court an extraordinary—and it may be a very useful—power to bind absent persons who have had no opportunity of seeing the terms of the compromise or of bringing forward their own views on the subject, or indeed of even so much as knowing that a compromise has been suggested. I say it is an extraordinary power, without venturing for a moment to suggest that it is not a power which may very usefully be exercised by

(2) Order XVI. rule 9A, provides: "Where in proceedings concerning a trust, a compromise is proposed and some of the persons interested in the compromise are not parties to the proceedings, but there are other persons in the same interest before the Court and assenting to the compromise, the Court or a Judge, if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on such persons would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts."

(3) 64 L. J. Ch. 149; [1894] 3 Ch. 716.

(4) 59 L. J. Ch. 201; 43 Ch. D. 452.

(5) 61 L. T. 176.

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a Court of law, which holds an absolutely equal balance between the parties present and absent, especially in those cases in which alone, I think, it would be put into force—namely, where a great majority of the persons who are in the same position as the absent persons who are sought to be bound are of opinion that the compromise is a beneficial one for themselves, and therefore for persons who, though absent, have similar interests. Now, without going into details, the railway company in the present case, having a considerable scheme for carrying out the construction of railway lines, borrowed money on debentures, the security proposed to be given by them being a security on the whole line so intended to be made. I do not know why, or how—and it is not necessary that we should know—that railway company failed absolutely in carrying out the scheme—by which I mean the whole of the scheme—which it had represented to the debenture-holders that it intended to carry out; so much so, that a sum of money which had found its way from the debenture-holders, the money being advanced by them into the hands of certain commissioners in London, was looked upon as practically the only source for the repayment of the bondholders. They looked, in fact, to the money which they had themselves advanced to get, not, of course, the whole, but a partial repayment of the moneys which they had advanced. Under those circumstances the matter came before Mr. Justice North, in the case of *Foreign, American, and General Investments Trust Co.* v. *Sloper*,[1] in which Mr. Justice North made an order, which is said to have been without precedent, but which it is unnecessary to consider, because, whilst that order was under appeal, a scheme of compromise was brought forward, and an application was made to Mr. Justice North for his sanction. He declined to give it, for reasons which it is not important to enquire into. But an appeal was brought to this Court from that refusal of his to sanction this scheme; and, on consideration of all the facts, the Court of Appeal came to the conclusion that the scheme of compromise was one that could be properly sanctioned, and they made an order to sanction the scheme accordingly. The appeal then pending from the former order of Mr. Justice North had therefore no longer to be considered, and, in fact, that former order was stayed. There could be no resort to rights given to the debenture-holders, present or absent, under that former order, because the scheme of compromise settled their rights altogether. Now, as I said before, it is a very strong jurisdiction to give to any Court to enable it to bind people who are not parties and have not had an opportunity of laying their views before the Court; but still, under that order of the Court of Appeal, the scheme of compromise sanctioned by the Court became binding on all the debenture-holders, present or absent. Since that time by far the greater number of debenture-holders have come in and been paid under it, some being debenture-holders who were strangers to the actual compromise, who have come in slowly, and as they happened either to learn for the first time of the compromise or, it may be, to make up their minds under it; but they have come in slowly, and they have not yet ceased to come in, for I understand that on or about the 8th of the present month, through the medium probably of bankers abroad or financial agents abroad, holders of between 2,000 and 3,000 bonds have come in, and they are now asking for payment under the compromise. Therefore, although the operation of the order is slow, it cannot be said to be entirely terminated, and we do not know what may take place. It is said (though the exact figures are not important) that there are a considerable number—about 1,700—bonds outstanding. Now the important clause in the scheme that we have to consider is the clause that appropriates a fund for distribution in respect of the 61,000 obligations issued by the railway company "When and so soon as the holders thereof shall be duly ascertained, being at the rate of 2*l.* 10*s.* per obligation, within fourteen days after presentation of the same for payment, upon such obligation being delivered up to be cancelled there shall be set aside" a sum—and then the sum is mentioned.

Now I look upon that as the sum which

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is to be set aside to be distributed as, when, and so soon as the holders thereof shall be duly ascertained. The holders of the 1,700 bonds have not been ascertained. What right has any one to say, we will do away with that condition, which is a condition precedent to payment, and we will set the fund free before they are ascertained at all? Then there are the words "within fourteen days after presentation," and it may be that when the bondholder was ascertained, when it was known who he was and where he was, and when an intimation of his rights had been given to him, there might—I do not say that on the mere construction of the agreement there would—but there might have been a right to call upon him either to present his bond for payment and delivery up in return for payment of 2*l.* 10*s.*, the amount fixed for payment on each bond, or the Court might, in the exercise of a reasonable jurisdiction, have said: "You must come within a reasonable time." But I cannot imagine with what force the railway company can now say, "Fix a reasonable time." How can a reasonable time be fixed in the case of a man who is not ascertained and of whom we know nothing? We only know that there is a bond distinguished by a certain number, and that we cannot tell who is the owner of that bond. How is it possible to say that we can fix a reasonable time for the holder of that bond to come in? It is impossible, and I think that consideration is all that is necessary for the decision of this case as I am deciding it. Obviously the responsibility in the first place of arriving at an order sanctioning the compromise as against absent parties was very considerable, but it is a mere nothing, in my opinion, compared with the responsibility which the Court is now asked to undertake of altering the whole scheme. The Court has chosen—and, I assume, has justly and properly chosen—to say this is a proper scheme to be made binding upon all the debenture-holders. Are we to add something which the Court of Appeal in sanctioning the order did not express? Is a construction which we cannot find in the language to be deemed to be there, or, I should rather say, is a construction to be deemed to be there which can be shewn conclusively not to be there, for the whole scheme is to take place only when and so soon as the holders of the bonds are ascertained? For my part, I decline to acquiesce in such a responsibility. The result may be that a sum of a few thousand pounds will be locked up. Why should it not be, even on the merest possible chance that a bondholder will come in? What sort of right or equity has this defaulting railway company to insist upon such a term being for the first time introduced into the scheme? In my opinion, they have absolutely no right, and I cannot see any injustice in the money remaining locked up. It seems to me that the company has got out of the effect of their default in a very easy manner, all things considered, and that the expense of their default has been to a very considerable extent borne by the debenture-holders, and not by the company, and I am not at all disposed, even if I felt myself justified in doing so, to make any order simply because it is convenient to the company and would be pecuniarily profitable to the company to make the order. In my judgment, therefore, no order can be made in the matter.

VAUGHAN WILLIAMS, L.J.—I am sorry to say that I do not quite agree. Having regard to the view of the other members of the Court, it is not necessary, nor would it be convenient, that I should consider what should be the terms of the order which we might make if the Court were going to make an order. Nor is it necessary or convenient that I should consider what would be a reasonable time in respect of these absent persons who by the order of the Court were to be bound by the compromise, because, as I understand the view that has been expressed by Lord Justice Rigby, the Court really has no power to make an order at all. Nor shall I trouble myself with the question whether it is to the interest of the community that a sum of money should remain for an indefinite time tied up in Court because of a difficulty in ascertaining who are the people entitled to certain interests in it. I have no right to deal with such a difficulty. There the difficulty is, and there it must remain until the Legislature has

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removed it. To my mind, what I have to do here is to construe this order, and, taking the view that I do, that is only another mode of saying that what I have to do is to construe this agreement to compromise, because the scheme of arrangement here is sanctioned by the Court, and it is a scheme which should be carried out. One has to look at this scheme and to see whether according to its proper construction these people who had the option of coming in and of receiving out of this fund 2*l.* 10*s.* per bond are entitled to wait as long as ever they choose before exercising that option. If, according to my view of the construction of this order, they have not got that right under the order, it does not seem to me that the Court would have any right to modify it or alter it at all. Now the compromise is the same both for the people who did assent—people who were present, and being present were bound—as it is for the people who, not being present, were bound by the order of the Court made under the powers of Order XVI. rule 9A. [His Lordship real the material parts of the rule, and continued:] Now these absent people have been bound by the order made under that rule and by the compromise which is sanctioned by that order. The question is what that compromise means. Now, first, I will speak of what the meaning of the compromise is to those people who, being present, have not elected to come in. Have they got an unlimited time to make up their minds? If, at the end of six years, notice were given to them that it was proposed that if they did not come in in a further time of twelve months to apply to the Court to take this money out, is the agreement such that the person in question would be entitled to come to the Court and say, "No; under the terms of this compromise there is no time limited whatsoever. I have got the right to say, 'I have not made up my mind yet; there is no expression of any fixed time within which I am to come in, and there is nothing said about my coming in within a reasonable time, and I insist upon my rights'"? I cannot conceive that as against such a person reasonable time would not be given, and that the Court would not say under this contract—as indeed of necessity under every contract where time is not expressed—that the law implies a reasonable time. If my memory does not deceive me—I have not the authority before me—the expression "of necessity," I think, is Lord Coleridge's expression. It is of necessity that you read in "a reasonable time," and it seems to me that if you have got people who were absent, but who are now here in the country and ascertained, the same thing could be said as against them. They must come in under this compromise within a reasonable time. It seems to me that if you take the people who are absent and unascertained, in this case also they must come in within a reasonable time. The only thing, to my mind, which casts any doubt upon the propriety of reading into this agreement, if it be an agreement, the implied provision as to reasonable time, is, first, that it may be said that this is not a mere agreement; this is an order of the Court; and that the rule does not apply to an order. I have very great doubt about it, because the other members of the Court do not agree with my view, but I think when the Court sanctions a compromise we ought to read into the compromise the term of a reasonable time.

Then the other thing which is said against reading the term of reasonable time into this compromise is that there is another condition expressed in terms—namely, "When and so soon as the holders thereof shall be duly ascertained"; and then it is said, however much one may read the term of reasonable time into an ordinary contract, the reasonable time cannot here begin to run as against people who have not been ascertained and that in each individual case the obligation and the right do not arise until the individual has been ascertained. I do not feel constrained to exclude what I call the necessary term of reasonable time by these words, because it seems to me that the words which follow, "within fourteen days after presentation," get over the difficulty, because they import that presentation must be made within a reasonable time. If I am asked what is a reasonable time for an unascertained person, my answer is that it is not to the interests of the community

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that these bondholders or anybody else should sleep upon their rights and do nothing for an indefinite time, but that people must act reasonably in these matters; and that if people for a long time do not choose to come forward and take advantage of an order which has been advertised throughout the length and breadth of the civilised world, the law will presume that those notices reached them, and make the time run from the reasonable presumption of the date when it must be taken that the notices reached the people. But I wish to say nothing further as to what those terms should be, because the majority of the Court think that there is no power to make the order.

STIRLING, L.J.—I regret to find myself in difference with Lord Justice Vaughan Williams, but I do not think that in this case we have any right to make an order against persons who are unascertained to be the holders of outstanding bonds. It is quite true that in certain cases the Legislature has deprived persons, who do not assert their rights, of those rights by Statutes of Limitation and otherwise, but here no Statute of Limitation applies. The scheme which we have to consider is one which was made with the sanction of the Court, and I apprehend that the Court in sanctioning such a scheme would be very careful in all cases to see that it did not, in dealing with the rights of absent parties, deprive any absent person of his property in a case in which the Legislature had not decreed that he should lose it. It is by no means true in this country that persons who sleep on their rights are in all cases deprived of their property. A very strong example of that is to be found in the tender regard which the Legislature has always paid to the rights of holders of Government stock who do not come forward to claim their dividends. That is familiar to all who practise in the Chancery Division, and I think it is rather to an example such as that than to the case of the Statutes of Limitation that, in forming and sanctioning such a scheme as this, regard ought to be had.

That is as regards the general policy of the Court in dealing with such schemes. But now let us construe the agreement before us. I find that over 150,000*l.* is set apart for a particular purpose for distribution in respect of 61,000 obligations issued by the company when and as soon as the holders thereof shall be duly ascertained, being at a certain rate per obligation, within fourteen days after presentation of the same for payment. That seems to me to imply that that fund should be set apart and distributed amongst the holders of those obligations, and that each holder has a right, first of all, to be ascertained; and secondly, to have an opportunity of presenting his obligation. I am not differing with the Lord Justice in this, that when once you have ascertained a holder it is not in the power of the Court to make him exercise his option. It may be that a holder when ascertained may be in this position. The company may serve him with notice, and ask, in default of his making a choice within a limited time, that the fund shall be paid out to the company. That, I think, might be justified on the footing that when a person has abstained from electing in a particular way which he has a right to, he shall be held to have adhered to the rights which he has under his bond, and to have chosen to stand upon his bond rather than to take the benefit which is given by the scheme. But I cannot think it is right that that should be applied until the holder has been ascertained, and has had an opportunity of ascertaining his rights for payment. It seems to me, on the true construction of this clause, that we have no right to take away from any holder who has not been ascertained the fund which is provided for him. On that ground I agree with Lord Justice Rigby, and think that no order ought to be made.

Motion dismissed.

Solicitors—Francis & Johnson, for railway company; Huxham & Rawlinson, for respondents.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

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[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
Feb. 25, 26, 28.

ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL.

Local Government — Local Authority Created by Statute — Powers — County Fund — Purchase of Tramways — Running Omnibuses — Ultra Vires — Locus Standi of Attorney-General — Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *ss.* 2, 68, *and* 79 *— Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 43 — *London County Tramways Act*, 1896 (59 & 60 *Vict. c. li.*), *ss.* 2 *and* 10 — *London Tramways Co.* (*Lim.*) *Act*, 1896 (59 & 60 *Vict. c. clxxxix.*), *s.* 31 — *London County Council* (*Vauxhall Bridge Tramways*) *Act*, 1896 (59 & 60 *Vict. c. ccxi.*), *s.* 21.

A county council constituted under the Local Government Act, 1888, *is not in the position of a municipal corporation created by Royal charter, but is the creation of statute, and can only exercise such powers as are conferred upon it by statute. Any power, therefore, the assumption of which cannot be justified by the statutes under which the council acts, must be taken not to exist.*

The London County Council, which was constituted under the Local Government Act, 1888, *had power under section* 43 *of the Tramways Act*, 1870, *to purchase compulsorily, and under section* 31 *of the London Tramways Co.* (*Lim.*) *Act*, 1896, *to purchase by agreement, the undertakings of certain tramways, including any works and property connected therewith. Under section* 2 *of the London County Tramways Act*, 1896, *the Council had power to work the tramways, and provide carriages, horses, cars, and fixed and movable plant for that purpose. Under section* 21 *of the London County Council* (*Vauxhall Bridge Tramways*) *Act*, 1896, *the Council were to cause accounts to be kept of their receipts and expenditure "in connection with tramways," and set off one against the other; and so far as the tramway revenue was insufficient to cover the expenses the deficiency was to be paid as payments for general or special county purposes under the Local Government Act*, 1888, *and any surplus was to be carried to the county fund. The Council purchased by agreement the whole undertaking of a tramway company. The company at that time were running omnibuses as feeders to their tramways on certain routes. The Council took over the omnibuses with the tramways, and continued to run them, and extended the route of one line. Passengers used the omnibuses who were not going to or coming from the tramways, and a profit was earned from running them:*—Held, *that the omnibus business was a separate and distinct business from the tramway business; and that the London County Council had no power, either express or implied, under the Local Government Act*, 1888, *or the London County Tramways Act*, 1896, *or the London Tramways Co.* (*Lim.*) *Act*, 1896, *to carry it on; and that the fact that it might be beneficial to them or to the public made no difference.*

Held, *also, that section* 21 *of the Vauxhall Bridge Tramways Act*, 1896, *only applied to receipts and payments in connection with tramways, and would not relieve the Council from making payments in respect of the omnibus business in the first instance out of the county fund under section* 68 *of the Act of* 1888.

Held, *also, that the question was properly raised in an action by the Attorney-General at the relation of certain persons who were ratepayers within the county, and by the relators as plaintiffs.*

Appeal from decision of Cozens-Hardy, J.

Action by the Attorney-General at the relation of a large number of London omnibus proprietors, and by the relators suing as ratepayers, asking for declarations that it was beyond the powers of the London County Council to run omnibuses for hire between certain points in London in connection with their tramways, or to carry on the business of omnibus proprietors and run omnibuses for hire at all within the county of London, and apply the county fund for the purpose of maintaining and working omnibuses; and injunctions to restrain them from so doing.

The London County Council had under section 43 of the Tramways Act, 1870, and under various local Acts, the power

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to acquire by purchase, compulsorily or by agreement, certain tramways.

In 1895 they gave notice to the London Tramways Co. to purchase compulsorily part of their undertaking; and in August, 1898, they gave notice to purchase further parts of their undertaking.

In December, 1898, the Council entered into an agreement with the company to purchase "all the remainder of such undertakings." The company had a terminus at the south end of Westminster Bridge, another at the south end of Waterloo Bridge, and another at the south end of Blackfriars Bridge. At the time of the purchase of their tramways by the Council they were running omnibuses as feeders to their tramways in three directions—First, from the Westminster Bridge terminus over the bridge to a point in Trafalgar Square, near Charing Cross, and back; secondly, from the Waterloo Bridge terminus over the bridge to a point near Somerset House and back; and thirdly, from the Blackfriars Bridge terminus over the bridge to a point in Farringdon Street, and back. The power to run omnibuses had been conferred upon the company by an alteration of its memorandum of association to that effect under the Companies (Memorandum of Association) Act, 1890.

When the Council took over the tramways they took over the omnibuses also, and continued to run those over Blackfriars Bridge as before, but instead of running one set of omnibuses over Westminster Bridge and back and another set over Waterloo Bridge and back, they ran one set of omnibuses from the Westminster Bridge terminus over Westminster Bridge, past Charing Cross along the Strand, and then over Waterloo Bridge to the Waterloo Bridge terminus, the omnibuses returning by the same route to the Westminster Bridge terminus. A halfpenny fare was charged for each omnibus journey or part of a journey. There was evidence that passengers used these omnibuses who were not going to or coming from the tramways. It was alleged that a considerable profit was made from the omnibuses.

The question was whether it was *ultra vires* of the Council to run these omnibuses.

The London County Council was constituted by the Local Government Act, 1888. Section 2, sub-section 1 of that Act provided: "The council of a county and the members thereof shall be constituted and elected and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough divided into wards, subject nevertheless to the provisions of this Act." Then followed certain provisions as to the qualification of aldermen and councillors, and the number and election of councillors. Section 68, sub-section 1, provided: "All receipts of the county council, whether for general or special county purposes, shall be carried to the county fund, and all payments for general or special county purposes shall be made in the first instance out of that fund."

Section 79, sub-section 1: "The council of each county shall be a body corporate by the name of the county council with the addition of the name of the administrative county, and shall have perpetual succession and a common seal and power to acquire and hold land for the purposes of their constitution without licence in mortmain."

The London County Tramways Act, 1896, was passed (*inter alia*) to confer powers on the Council for the working of the tramways authorised by the local Acts mentioned in the schedule thereto, when such tramways had been acquired by the Council. The Acts relating to the London Tramways Co. were amongst those specified in the schedule. Section 2 of the Act was as follows: "It shall be lawful for the Council to exercise with respect to any tramways authorised by the Local Acts mentioned in the schedule to this Act which have been or shall be purchased or acquired by them under their statutory powers the same powers of working such tramways respectively as were possessed by the company or companies respectively owning such tramways and the Council may provide place and run carriages thereon and provide such horses cars fixed and moveable plant harness and apparatus as may be requisite or convenient for enabling the Council to exercise such powers and they may employ such persons as may be requisite

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or convenient for working the tramways for the time being worked by them."

Section 10 was as follows: "All costs and expenses of the Council in the execution of this Act (except so far as they may be otherwise provided for by this or any other Act) shall be defrayed as payments for general county purposes within the meaning of the Local Government Act 1888 and the costs charges and expenses preliminary to and of and incidental to the preparing applying for obtaining and passing of this Act shall be paid by the Council in like manner."

The London Tramways Company (Lim.) Act, 1896 (59 & 60 Vict. c. clxxxix.), after referring to the compulsory powers of purchase conferred on local authorities by section 43 of the Tramways Act, 1870, as regards tramways in their district, and to the facts that different portions of the company's tramways were liable to be purchased at different times, and that the time at which the Council, as the local authority, might purchase some of the tramways had already arrived, provided (section 31) that the company and the Council might from time to time enter into and carry into effect agreements with respect to the purchase by the Council of all or any tramways for the time being belonging to the company, including any works and property connected therewith, and the powers, rights, authorities, obligations, and privileges of the company in relation thereto at such date or dates (whether in anticipation or postponement of the dates at which the same would become purchasable by the Council under the Act of 1870 and certain other Acts and Provisional Orders therein mentioned), and on such terms and conditions as might be agreed between the company and the Council.

The London County Council (Vauxhall Bridge Tramways) Act, 1896 (59 & 60 Vict. c. ccxi.), which was passed to enable the Council to make tramways over Vauxhall Bridge in connection with the London Tramways Co.'s tramways terminating at the south-eastern end of Vauxhall Bridge Road, provided by section 21: "The Council shall cause accounts to be kept of their receipts and expenditure in connection with tramways to which all receipts arising from tramways shall be carried and out of which all payments in respect of tramways shall be made and if and so far as the tramway revenue shall be insufficient to cover the expenses of maintenance and management and of providing for the requisite payments to the consolidated loans fund in respect of money raised or expended for the purposes of tramways the deficiency shall be from time to time defrayed as payments for general or special county purposes as they may decide within the meaning of the Local Government Act 1888 and any balance of tramway revenue over expenditure shall at such times as the Council direct be carried to the general or special county account of the county fund.".

Cozens-Hardy, J., said that anything reasonably proper and convenient for the working of the tramways was within the powers of the Council, but anything not within that definition was outside their powers. In his opinion the Council were carrying on a separate and distinct business as omnibus proprietors. That was outside their powers, and the declarations asked for must be made. There would be no injunction pending an appeal.

The County Council appealed.

Haldane, K.C., *Vernon Smith, K.C.*, and *T. T. Methold*, for the appellants.—The County Council do not claim to run omnibuses generally, but only as part of the undertaking which they took over in 1898, or as ancillary to it. The whole undertaking was bought, including the omnibuses, but that was by agreement, not under the compulsory powers conferred on local authorities by section 43 of the Tramways Act, 1870. The goodwill, as such, was not purchased, but it was of practically no value, as the Council, if acting under their compulsory powers, would not have been bound to pay for the goodwill — *London Street Tramways* v. *London County Council* [1894].[1] If the undertaking had been purchased piecemeal, as it might have been, the goodwill of the remainder would have been worthless.

The Council have under their statutory

(1) 63 L. J. Q.B. 769; [1894] A.C. 489.

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powers the power to purchase the whole undertaking, and to run and work the omnibuses. In section 2 of the London County Tramways Act, 1896, both "cars" and "carriages" are mentioned. That would include omnibuses. Whatever is fairly incidental to the things which the Legislature has authorised by an Act of Parliament ought not to be regarded as *ultra vires*, unless expressly prohibited—*Ashbury Railway Carriage and Iron Co.* v. *Riche* [1875],[2] *Att.-Gen.* v. *Great Eastern Railway* [1880],[3] and *Galloway* v. *London Corporation* [1866].[4]

Even if there is no statutory power to run these omnibuses, the Council is not in the position of a commercial undertaking whose powers must be contained exactly within their statutes, and anything not within them must be taken to be prohibited. It is, under sections 1 and 2 of the Local Government Act, 1888, in a position analogous to that of the council of a municipal corporation Under section 10 of the Municipal Corporations Act, 1882, the council of a borough can exercise the powers vested in the corporation, and it can do many things which, though not within the Acts, are within the general powers of a common-law corporation. Certain powers are by the Act of 1888, notably by sections 3 to 19, transferred to county councils, but it is not provided that those are to be their exclusive powers. Municipal corporations are regulated by the Municipal Corporations Acts, but they are created by Royal charter, and the Acts have not interfered with the prerogative in that respect—*Grant on Corporations*, p. 16, and *Rutter* v. *Chapman* [1841].[5] A common-law corporation can do all such acts as regards its property, and bind itself by contracts, just as an ordinary person can, except so far as any particular acts are expressly forbidden—*Wenlock* (*Baroness*) v. *River Dee Co.* [1883][6] and *Sutton's Hospital Case* [1612].[7] That applies in the case of corporations subject to the Municipal Corporations Acts, 1837 and 1882, and is of importance in considering whether an act is *ultra vires* of the corporation—*Att.-Gen.* v. *Newcastle-upon-Tyne Corporation* [1889, 1892].[8] That case shews that a corporation can enter into contracts which involve payment of money in a manner not authorised for the application of its rates, so long as the rates are not used for such a purpose. That is to say, the contract will not be *ultra vires* or void.

Assuming that the running of these omnibuses is not within the statutory powers of the Council, still, so long as the rates are not used for the purpose, the Council can run them in the same way as a private individual could. Tramways, of course, are different. They can only be run under Parliamentary powers, but any one can run an omnibus with the leave of the police. It is not shewn that the Council are using the rates for this purpose; and if they are not, there is no injury to the public, and the Attorney-General has no *locus standi* to interfere.

The tramways account can be kept separate from the other accounts, and the county fund need not be used at all. Section 68 of the Local Government Act, 1888, has in this respect been modified by section 21 of the London County Council (Vauxhall Bridge) Act, 1896.

Macnaghten, *K.C.*, and *Blaiklock* (*Asquith*, *K.C.*, with them), for the respondents.—No case has been made out for reversing the decision of the Court below. The Council are not in the position of an old municipal corporation, but are the creation of statute, and are prohibited from doing what they are not authorised to do—*Reg.* v. *Reed* [1880].[9] It was constituted under the Local Government Act, 1888, and its composition is defined in sections 1 and 2. Its powers are defined by section 3 and following sections, and by sections 88 and 89 the Act is adapted to the metropolis; but nowhere in the Act is there any power which enables the Council to run omnibuses, or employ drivers or other persons such as are em-

(2) 44 L. J. Ex. 185; L. R. 7 H.L. 653.
(3) 48 L. J. Ch. 428; 49 ib. 545; 11 Ch. D. 449; 5 App. Cas. 473.
(4) 35 L. J. Ch. 477; L. R. 1 H.L. 34.
(5) 10 L. J. Ex. 495; 8 M. & W. 1.
(6) 36 Ch. D. 675*n*, 685*n*.
(7) 10 Co. Rep. 1*a*, 30*b*.
(8) 58 L. J. Q.B. 558; 62 ib. 72; 23 Q.B. D. 492; [1892] A.C. 568.
(9) 49 L. J. Q.B. 600, 603; 5 Q.B. D. 483, 488.

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ployed in the business of an omnibus proprietor. They are in a position analogous to the River Dee Co. in *Wenlock (Baroness)* v. *River Dee Co.* [1888].[10]

Under section 68 of the Act of 1888 the money coming from the omnibuses must go into the county fund, and the cost of running them must come out of the fund, so that the rates would be used for the purpose. Section 21 of the London County Council (Vauxhall Bridge) Act, 1896, does not apply unless the omnibuses form part of the tramway undertaking, or can be said to be necessarily connected with them, and that cannot be said in this case. The word "car," in section 2 of the London County Council Tramways Act, 1896, would *prima facie* mean a tram car, and "carriage" would mean a tram carriage.

The Attorney-General has a *locus standi* to interfere, and it is a proper case for him to do so. The relators are ratepayers, and are interested in seeing that the Council do not exceed their powers. The Council have no right to carry on trade at all, and if they may run omnibuses in the way that they are doing there would be no reason why they should not run them all over London, or carry on some other trades. The fact that it may be advantageous to the Council to do what they are doing is not to the point—*Colman* v. *Eastern Counties Railway* [1846][11] and *Att.-Gen.* v. *Great Northern Railway* [1860].[12] *Att.-Gen.* v. *Newcastle-upon-Tyne Corporation*[8] is not quite the same case.

Haldane, K.C., replied.

RIGBY, L.J.—The first question, or at any rate one that it will be convenient for us first to deal with, is the question as to the legal situation of the London County Council. They are constituted by statute. They are, in fact, incorporated by section 79 of the Local Government Act, 1888. So far, the Council is a statutory body, and not a common-law corporate body at all. It was argued that under section 2 of the Act of 1888 the council of a county and the members thereof are to be in the like position in all respects as the council of a borough divided into wards, and that under section 10 of the Municipal Corporations Act, 1882, the council of a municipal corporation can perform the duties of a corporation. It was also said that municipal corporations are really creations not of an Act of Parliament, but of Royal charter in each individual case, and, although their proceedings are regulated by Act of Parliament, that does not prevent them from being, in effect, corporations by Royal charter, or what may be called corporations at common law, and that such corporations are not within the doctrine laid down in *Ashbury Railway Carriage and Iron Co.* v. *Riche*,[2] and subsequently in several cases, including *Wenlock (Baroness)* v. *River Dee Co.*[10]—namely, that there must be found within the four corners of the Act of Parliament something to justify the assumption of the power which they claim to exercise, and, if there be nothing in the Act to justify the assumption of such power, then the power does not exist. It was said—and no doubt it is to a considerable extent true—that that doctrine does not apply to a corporation not created by Act of Parliament, because it existed by the grant of a Royal charter, and that, inasmuch as a municipal corporation is not within that doctrine, the council of a municipal corporation is able to do in the name, and on behalf of, the corporation, many acts which are not included in any statute, but which are within the general powers of a common-law corporation. Granted that that is the case, how does section 2 of the Act of 1888 make a county council capable of exercising the same powers? The provision is not that they shall have the same powers and authorities that the council of a municipal corporation has, but that the County Council "shall be constituted and elected and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough." It is clearly those last words, if any, that could be construed as giving powers outside any statute. But it is to be subject to the provisions of the Act. It is therefore subject to section 79, and to the creation of the County Council as a statutory

(10) 57 L. J. Ch. 946; 38 Ch. D. 534.
(11) 16 L. J. Ch. 73, 79; 10 Beav. 1, 15.
(12) 29 L. J. Ch. 794; 1 Dr. & S. 154.

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corporation thereunder. That puts the County Council in a different position from the council of a borough, and is, I think, quite sufficient to dispose of the suggestion that the Council can exercise common law powers of corporations created by Royal charter, although the council of a borough may do so. I hold, therefore, that section 2 of the Act of 1888 has no such effect as that attributed to it, and does not enable the London County Council to exercise any other powers than are contained in and conferred upon them by statute.

The next question is whether the London County Council have by any statute whatsoever the power to run omnibuses. Section 2 of the London County Tramways Act, 1896, clearly enables the London County Council to work the tramways which were transferred to them under statutory powers. It was argued that by virtue of this section the London County Council acquired the right of running, at all events, the same tramways that were run by their predecessors. Those predecessors were at the time of the transfer in effect possessed of two separate and distinct lines, though as one undertaking no doubt, one being the tramway line and the other the "'bus line," and they had the power to use both. It would have been easy to say in section 2 of this Act that the London County Council should have the right to take their whole undertaking, including the omnibus line as well as the tram line. When I say "easy," I mean easy as a mere matter of drafting. That could have been made quite plain; but whether as a matter of Parliamentary policy it would have been easy or even possible I do not know. If the intention of Parliament was that the County Council should carry on the whole of the undertaking in both branches, the tramway branch and the omnibus branch, it would have been easy to say so. Nothing of the sort was said, and it is a very notorious circumstance that there is nothing which clearly refers to the transfer of the whole undertaking and the power to run both tramways and omnibuses. It was said that the power to provide horses, cars, fixed and movable plant, harness, and apparatus, as may be requisite or convenient for enabling the work of the tramways to be carried on, is sufficient for the purpose. I am of opinion that those words do not give the power. The suggestion was made that "cars" meant omnibuses, and not tram cars. I think that a little investigation leads to the conclusion that "cars" was used in the Tramways Acts in reference to tram cars and with the meaning of tram cars. When it is used with regard to omnibuses it seems to be coupled with the word "road." There is a large omnibus concern which is called the London Road Car Co., and "road car" would seem to be used as distinct from "tram car." Therefore I find no power under these general words to take and use the "'bus line." Then there is something further. The London County Council in what they have done—I am by no means prepared to say that it is not very reasonable and very beneficial to the public, if only within their powers under the statutes—have extended what I may call the subsidiary lines beyond where their predecessors ever carried them. They are therefore not doing the same thing that the London Tramways Co. did, but something different. One difficulty that the London County Council had to deal with was that by section 68 of the Act of 1888 provision was made for payment of all receipts connected with any of their businesses into a fund entitled the "county fund," and for paying out everything that they had to expend from that same fund, so that unless they are authorised as trustees and administrators of that fund to spend the money on the running of omnibuses they have no title to do what they have been doing. Their counsel sought to get over that difficulty by reference to section 21 of the London County Council (Vauxhall Bridge Tramways) Act, 1896, which is in general alien to the questions now before us, although section 21 seems to be admitted to be quite general. There is no necessity under that section for payments into and out of the General County Fund under section 68 of the Act of 1888, but the section is all governed by the words "in connection with tramways"; and if it is

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not made out that this running of a line of omnibuses is, within the meaning of the statute, part of the tramway scheme, then section 21 of this Act does not help in any way.

With reference to section 31 of the London Tramways Co. Act, 1896, there are no "works" about the 'bus line to be bought, as the omnibuses run over the ordinary street, and the works and property dealt with in that section clearly could not have entitled the Council to any works in connection with the omnibus line; and if it entitled them to purchase omnibus property at all it would only be the omnibuses, and would not give them any power of running the omnibuses.

It was said that although the London County Council may not be expressly authorised to run the omnibuses, yet that it is an undertaking so intimately connected with the powers that are expressly given to the Council of running the tramways, that under the doctrine mainly depending on the judgment of Lord Justice James in *Att.-Gen.* v. *Great Eastern Railway* [3] it may be treated as tacitly understood as being something belonging to, and so connected with, the other powers which are expressly given as to be really within the statute. It is not to be denied that there are certain things which a statutory corporation may do which are not absolutely mentioned in their Act, but they must be things of a very different degree of importance from what is sought to be done in this case, that is the running of omnibuses as a separate undertaking; and I cannot read in the observations of Lord Justice James anything to authorise the notion that a separate undertaking might be entered upon, merely because it was thought to be convenient for the purposes of the main undertaking. I find no authority for that at all. Indeed, in the case of *Colman* v. *Eastern Counties Railway* [11] it might well have been argued that to run steamboats from Harwich to the Continent was most advantageous for the railway, and therefore ought to be taken as impliedly granted to them for the purposes of their undertaking; but Lord Hatherley would not have it at all. He said it was outside the power given to the railway company by the Act of Parliament, and, however advantageous it might be, there was no authority to do it. This line of omnibuses run by the London County Council may be—and I am willing to assume that it is—very advantageous for themselves and for the public; but if they have no power and no authority by their statutes to run the omnibuses, all that avails nothing. They must shew authority to run the omnibuses before they can be allowed to do it.

Then it was said that there was not sufficient public benefit shewn to arise from this action, brought in the name of the Attorney-General, to justify it. For my part, I must say that if there be any case in which a public body is going beyond its powers, I do not see any reason why the Attorney-General should not interfere. He, of course, has to consider whether in his discretion it is worth while to interfere before he allows his name to be used; but any attempt to tie him down by rules, which I do not know to exist anywhere, or to tie him down for the first time by rules, should not, I think, be allowed. But in this case it really is not necessary to go into that question, for the relators are also plaintiffs. They are also ratepayers in the county of London, and I think, therefore, that there is no doubt whatever that the action is properly constituted, and the case made against the London County Council properly raised. I do not at all accede to the suggestion which was made by counsel for the respondents that the relators must necessarily be ratepayers, and that there cannot, at any rate as a rule, be an information without the relators being plaintiffs, because that is not a rule and never was. Consider, for example, all the cases of charities, where individuals interested in a charity, who may not be plaintiffs, appear as relators to an information by the Attorney-General. However, as a matter of fact, these relators are also plaintiffs, and we are therefore absolved from any minute enquiry as to the degree of public benefit that may be concerned in the information so as to justify the Attorney-General in bringing the action.

I think that upon all the grounds that have been stated it must be held that the

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London County Council have no power to run these omnibuses, and the result therefore will be that the appeal fails, and must be dismissed.

VAUGHAN WILLIAMS, L.J.—I entirely agree with all that has been said by the Lord Justice, but I feel that I ought to say a word or two, because the case is a case of importance; but I do so with some hesitation, partly because he has so fully and forcibly expressed the law upon the subject; and secondly, because, if I tried to express my view in a few words, I do not know that I could do so in better words than those which have been already used by Mr. Justice Cozens-Hardy in the Court below. There is one short passage in his judgment which seems to me to express the whole case. "It seems to me," says Mr. Justice Cozens-Hardy, "that the London County Council are really carrying on a separate and distinct business of omnibus proprietors. They do not, and they cannot, lawfully convey in omnibuses only passengers from or to their tramways. By the Act of 1843 for regulating Metropolitan Stage Carriages in or near London, the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), they are bound to take any passenger who desires to ride, and is willing to pay the ½*d.* fare, provided there is a vacant seat. The running of omnibuses through the streets of London is certainly not expressly authorised by the Act of 1896, and, in my opinion, it is not impliedly authorised."

I will, however, say a word or two about the points which have been made here on behalf of the London County Council. These points seem to me to be as follows: First of all, it is said that the London County Council, by reason of the powers granted to them by the London County Tramways Act, 1896, and the London Tramways Co. Act, 1896, of acquiring the tramways and the property of the tramway company, and running the tram cars, had, in the events which happened, the power by express words, or reasonable implication therefrom, of running these omnibuses. Secondly, it is said that the London County Council is, by virtue of the Local Government Act, 1888, in the position of a municipal corporation created by charter, and has the same power of action, and of contracting, that a private individual would have; and that even although the running of these omnibuses should be outside the statutory power of the London County Council, expressed or implied, yet they can run them, unless the London County Council, for the purpose of doing so, have to come upon the rates or some other fund which was appropriated to statutory purposes.

As to the first point, I think that the express statutory powers do not extend to the running of these omnibuses. The express powers relied on are those contained in section 2 of the London County Tramways Act, 1896; and the other power relied on is that contained in section 31 of the London Tramways Co. Act of 1896. Lord Justice Rigby has already pointed out that the express words which are contained in those two sections do not cover the running of these omnibuses. Of course, when I say this, I am taking the same view of the facts which Mr. Justice Cozens-Hardy does. These omnibus lines are not run, and could not be run, even if it were necessary so to do, solely as ancillary to the tramway business. The omnibuses necessarily must carry passengers who wish to be carried along their route, which is a not inconsiderable distance, although such passengers may have no intention of going to the tramways and may not be coming from them. Then it is said that the power to run these omnibuses, although not within the express words, is yet expressly or impliedly given by the terms of one or other or both of the Acts to which I have referred. In *Att.-Gen.* v. *Great Eastern Railway* [3] Lord Blackburn and Lord Watson both not only say that, where you have a body exercising statutory powers of this sort, you are not limited to the express powers, but may treat the powers as extending to matters which are expressly or by implication included in the express powers; but they also go on to point out that if you cannot bring the matter within the expressed or implied powers, then the Legislature must be held to have prohibited it. I

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mention that because it is a convenient moment to do so; and those observations of Lord Blackburn and Lord Watson seem to me to have a considerable bearing upon the order, which it was right, in my judgment, that the Court should have made in this particular case. I ought to add, however, that when one is dealing with this question of whether the power of running these omnibuses is fairly to be implied from the expressed power to run the tramways, because, as it was said, it is found very convenient for the tramway business to have such omnibuses, one has to take into consideration not only that these omnibuses, going the distance and the route which they do, must necessarily take passengers who have nothing to do with the tramways at all, but also that the powers of the tramway companies are very strictly defined by the Tramways Act, 1870—an Act which deals, amongst other things, with the power to make by-laws dealing with the fixing of the fares and tolls, and with various offences which may be committed upon the tram lines; and it seems to me that it would be a very strong thing to say that you must include amongst the powers implied from the grant to the London County Council of the power to run this tramway powers which are not in any respect governed by these elaborate provisions of the Act of 1870, but, on the contrary, are governed by a statute which in many respects is entirely different in its provisions—that is to say, the London Hackney Carriages Act, 1843. That is all I propose to say as to the first point.

As to the second point, the argument is based upon section 2 of the Local Government Act, 1888. I read that section as if it had said, the council of a county created by this statute shall be constituted, elected, and so on, and be in like position in all respects as the council of a borough, subject nevertheless to the provisions of this Act. It seems to me impossible to say that it follows from that section that the London County Council is to be treated as if it was not created by a statute at all, but had been created by a common-law charter, because municipal corporations under the Act of 1882 were common-law corporations so created. It seems to me that so to read section 2 would give no effect to the words "subject nevertheless to the provisions of this Act." Further than that, it seems to me that this is a mere machinery section. I call attention to the sort of provisions which are contained in clauses (*a*) and (*e*) of sub-section 2 of the section, as shewing that the matters provided for in sections 10 to 16 of the Municipal Corporations Act, 1882, are matters of machinery and detail just of the same character as those which are provided for in section 2 of the Local Government Act, 1888, and I read section 2 as a mere machinery section dealing with the constitution, election, and conduct of proceedings, and not as a section making a radical alteration in the origin and incorporation of a county council, changing it, in effect, from a corporation incorporated by a statute for the particular purposes mentioned in the statute to a corporation created by charter outside the statute altogether. If it had been intended to make any such provision, one would have expected to find it, not in this machinery section at all, but in section 79 of the Act of 1888.

It was suggested that the London County Council could not be restrained from running these omnibuses, because they can run and maintain them without coming on the rates. It seems to me that there is absolutely nothing in that point. It admittedly depends on section 21 of the Vauxhall Bridge Act, and it is plain that that section has no application at all, unless the London County Council are able to satisfy the Court that that which they are doing in running these omnibuses is something which they are doing in connection with the tramway under the statutory powers which they have to run the tramway.

Lastly, it was said that the Court ought not to grant an injunction in this case because it is one in which the Attorney-General should not have allowed his name to have been used at all, it being really an application by some omnibus proprietors who do not like the competition of the London County Council for the purpose of preventing, if they can, that competition. Supposing that there is anything in the argument at all, in this

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particular case, at all events, the relators are ratepayers, and as such would have a right to ask the Attorney-General to allow his name to be used to test the question of whether the running of these omnibuses can be justified.

STIRLING, L.J.—I am of the same opinion. The first point argued before us was as to the construction of section 2 of the London County Tramways Act, 1896, and that seems to have been the point that was mainly argued before the learned Judge in the Court below. As regards that I do not propose to say anything, because I entirely agree with the conclusions of fact and of law at which the learned Judge arrived, and for the same reasons; but out of respect to the arguments which have been addressed to us I should like to say a few words with reference to the second point, which, as far as I gather, has been brought out for the first time before ourselves—namely, that the London County Council has got all the powers of a common-law corporation.

Unquestionably the London County Council is a creation of statute, for it was created by the Local Government Act, 1888. That does not end the question, because it may be that the statute has conferred upon the London County Council all the powers of a common-law corporation. The incorporation is effected by section 79 of the Act. The first observation that one would make is that that section, at any rate, does not confer on this statutory corporation the powers of a common-law corporation. There is another observation that I may make, which is this: There is a group of clauses, beginning with section 3, which are headed "Powers of County Council," and we do not find any such express powers conferred there. It is not anywhere there expressly enacted that the powers of the county councils are to be those of the common-law corporations. What is relied upon are the words of sub-section 1 of section 2 of the Act—the first two sections being grouped together under the head of "Constitution of County Council"—and we were referred to section 10 of the Municipal Corporations Act, 1882, to find the position of a council of a borough. The first observation that occurs to me upon that is this: That the council of the county is not to be in a like position in all respects as the council of a borough, but only of a particular class of borough—namely, "the council of a borough divided into wards." I apprehend that that qualification points to something which is peculiar to the position of the council of a borough divided into wards, and which distinguishes it from a council of a borough which is not divided into wards; and if the sections which follow section 10 of the Municipal Corporations Act, 1882, are looked at, it is found that there are peculiarities which distinguish a council of a borough divided into wards from the councils of those which are not. In the second place, there is this remarkable difference—the council of a borough is not a municipal corporation. The municipal corporation is, generally speaking at any rate, a common-law corporation created by charter, and the way in which the Legislature has thought fit to confer powers upon the municipal corporation of a borough is by saying that the council of the borough shall exercise all powers vested in the corporation. Therefore the council of a borough is to exercise all the powers of the municipal corporation. If the words in section 2 of the Act of 1888, "in the like position in all respects," were intended to refer to powers, it seems to me that we should arrive at an extraordinary conclusion, because there is no separate corporation here whose powers the County Council are to exercise. The County Council, by section 79, is itself the corporation, and it seems to me that this would be a very elaborate way of saying anything at all about the power, because we should be still driven back to section 79 or to section 3 and the following sections, which do confer powers on the county councils. I come to the same conclusion, therefore, as my learned brothers, that sub-section 1 of section 2 does not relate to the powers of county councils at all, but is simply dealing with matters which relate to their constitution—or, in other words, as Lord Justice Vaughan Williams described it, it is a machinery section. That being so, the London County Council is left simply in the

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position of a statutory corporation, and anything which is beyond the powers conferred upon it by statute must be taken according to the decisions to be in terms prohibited.

That brings me to the last point which has been argued before us—namely, that there is not sufficient ground for the Attorney-General interfering and bringing the action in this case to prevent the abuse of powers. That argument is based upon the opinion expressed by Lord Justice James in *Att.-Gen.* v. *Great Eastern Railway*,[3] which, at the time, was dissented from by Lord Justice Baggallay. It does not seem to me necessary on this occasion to say anything, or decide anything, as to the point upon which those two learned Judges differed, because Lord Justice James himself in that case says this: "Where a company entrusted with large powers is deliberately violating an express enactment, or disregarding an express prohibition of the Legislature, it is really committing a misdemeanour, and ought to be at once stopped." It seems to me that here the London County Council are violating an express enactment upon the facts which have been found by the learned Judge in the Court below, and with which finding we agree, because under section 68 of the Local Government Act, 1888, all receipts of the County Council, whether for general or special county purposes, are to be carried to the county fund, and all payments are to be made in the first instance out of that fund. That is a section which was introduced for important purposes. The London County Council (Vauxhall Bridge Tramway) Act, 1896, creates an exception from that general rule, but it only authorises the exception in the case of receipts and expenditure in connection with tramways; and the moment that we arrive at the conclusion that the London County Council are really carrying on an independent business of omnibus proprietors, the exception created by section 21 of that Act no longer applies. Therefore, in respect of that the London County Council must obey the injunction which is contained in section 68 of the Act of 1888. It seems to me, therefore, that the case is brought within the very rule laid down by Lord Justice James himself, and that the declaration in this case must be properly made, and the injunction granted. The appeal must therefore be dismissed.

Appeal dismissed.

[The operation of the injunction was suspended for a month, or pending an appeal to the House of Lords in case an appeal were presented.]

Solicitors—W. A. Blaxland, for appellants; Hicks, Davis & Hunt, for respondents.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

KEKEWICH, J. 1901. Feb. 20, 21. } OLIVER *v.* BANK OF ENGLAND.

Principal and Agent—Power of Attorney—Implied Warranty of Authority—Forged Signature—Transfer of Consols—Bank of England—Liability of Stockbrokers—Indemnity.

Where one of two trustees of stock, standing in their joint names in the books of the Bank of England, has sold it under a power of attorney, to which the signature of his co-trustee was forged, and the bank has allowed a member of the firm of stockbrokers who applied jointly for and obtained the power to transfer the stock to other persons, the stockbroker who alone acted under the power and signed the transfer will be held liable to indemnify the bank for the loss they sustained by having to replace the stock, upon the ground that he has impliedly warranted his authority to the bank.

The other partners in the firm of stockbrokers are not proper defendants to an action for indemnity by the bank.

In December, 1897, the plaintiff Edgar Oliver, and his brother Frederick William Oliver, who was a solicitor, were jointly entitled, as trustees for other persons, to a sum of 2,633*l.* 12*s.* 6*d.* 2¾ per cent. Consols, and a sum of 147*l.* 5*s.* 4*d.* bank stock, standing in their names in the

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books of the Bank of England. On December 16, 1897, an application was made to the bank by Messrs. Starkey, Leveson & Cooke, a firm of stockbrokers, for a form of power of attorney from F. W. Oliver and E. Oliver to William John Starkey and Edward John Leveson, for the sale of the Consols.

In this application the address of Edgar Oliver was given as No. 110 Cromwell Road, S.W., which was in reality the address of F. W. Oliver, while the address of F. W. Oliver was given as 61 Carey Street, W.C., where he carried on business as a solicitor. In the bank books the address of Edgar Oliver was entered as at Drayton, Ridgway, Wimbledon, but he had ceased to reside there. The notices relating to the application for the power of attorney were sent to both addresses of Edgar Oliver; the one sent to Wimbledon was returned through the Dead Letter Office, the other went to his brother's house, and never came to his knowledge. A form was supplied by the bank, and by a power of attorney dated December 20, 1897, executed by F. W. Oliver, and purporting to be executed by Edgar Oliver, they purported to appoint W. J. Starkey and E. J. Leveson their attorneys and attorney, jointly and severally, in their names, and on their behalf, and in the name and on behalf of the survivor, to sell and transfer the Consols, and do whatever was necessary for that purpose. On December 23, 1897, W. J. Starkey signed the demand to act by this letter of attorney, and on the same day the bank allowed W. J. Starkey, as attorney for the two Olivers, to transfer the Consols in their books to other persons.

On March 4, 1898, there was a similar application for a power of attorney for the sale of the bank stock. This also was executed by F. W. Oliver, and purported to be executed by Edgar Oliver. On March 8 the bank allowed W. J. Starkey to transfer the bank stock to other persons. In this instance also W. J. Starkey demanded to act alone under the power of attorney, and signed the bank books as attorney for the transferors.

As a fact, Edgar Oliver was wholly unaware of the powers of attorney, and his signature to them was a forgery. On July 7, 1899, Frederick William Oliver died, and a few days afterwards Edgar Oliver, who had now become solely entitled to the trust funds, discovered that the Consols and bank stock had been transferred. He then brought this action against the Bank of England, claiming a declaration that the transfers were void and invalid against him by reason of his name having been forged to the powers of attorney, and that the bank was bound to replace the sums of stock, together with back dividends. On November 7, 1900, the bank served Messrs. Starkey, Leveson & Cooke with a third-party notice, claiming to be indemnified by the firm by reason of the representations made and warranty given in the forms of application for the powers of attorney; and by W. J. Starkey and E. J. Leveson, in the said powers of attorney, that they had the authority of the two Olivers to make the applications and act under the powers of attorney; and by W. J. Starkey acting on the powers of attorney and transferring the stocks. Evidence was given by the plaintiff that the signatures "Edgar Oliver" to the powers of attorney were not his, and that he received no part of the proceeds of the Consols or bank stock.

Warrington, *K.C.*, and *Pattisson*, for the plaintiff, asked for an order in the terms of that made in *Barton* v. *North Staffordshire Railway*, referred to in *Seton on Judgments*, p. 1,918.

Greene, *K.C.*, *Latham*, *K.C.*, and *Howard Wright*, for the bank.

KEKEWICH, J., gave judgment for the plaintiff, making the declarations asked for by the claim.

The question then arose upon the third-party proceedings as to the liability of Messrs. Starkey, Leveson & Cooke, or each of them, to indemnify the bank against the loss which it had just been ordered to make good.

Evidence was adduced as to the practice of the bank in testing the signatures to powers of attorney. There were two clerks in the Power of Attorney Office, whose special duty it was to examine such signatures and compare them with

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others in the possession of the bank, and Edgar Oliver's signatures had been passed as genuine. Evidence of stockbrokers was also produced to shew that they were accustomed to rely upon their solicitor clients who obtained the signatures to powers of attorney, and the stockbrokers had ordinarily no means of testing the genuineness of such signatures, and trusted to the examination by the bank authorities.

Greene, K.C., *Latham, K.C.*, and *Howard Wright*, for the bank.—There has been a breach of the warranty of authority made to the bank by the third parties. The application for the powers of attorney by the whole firm, and the representations in the powers of attorney by the two members of the firm named in them, coupled with the transfer of the stock by W. J. Starkey, separately and together constitute a representation or warranty of authority by the firm and each member of it, which entitles the bank to an indemnity. The law is clear that if a person purports to act as an agent to make a contract, but has not in fact any authority to make it, he is liable in damages to the person with whom the contract is made, if it turns out that he has no authority—*Collen* v. *Wright* [1857] [1] and *Firbank* v. *Humphreys* [1886].[2] *Smout* v. *Ilbery* [1842] [3] is an older case pointing the other way, but it has been recently observed upon.

[KEKEWICH, J.—There is no case made out here except against Mr. Starkey.]

Swinfen Eady, K.C., *P. O. Lawrence, K.C.*, and *Stewart-Smith*, for the third-party defendants.—The defendant W. J. Starkey is not liable to the bank. The law as laid down in *Collen* v. *Wright* [1] and *Firbank* v. *Humphreys* [2] is not disputed. The question is whether an agent who honestly believes that he is authorised to act for a principal, but without in fact having that authority, is necessarily liable where there has been no wrong or omission of right on his part. This is a case where a person believes that he has authority, and produces a document which he believes gives him that authority, and the other side take steps to ascertain that the signature to the document is genuine. In such a case there is no warranty. The bank did not rely upon Mr. Starkey's alleged warranty or representation, but enquired for themselves, and acted upon their own investigations. That does not conflict with *Collen* v. *Wright* [1] or with *Polhill* v. *Watler* [1832].[4]

[KEKEWICH, J., referred to *Beattie* v. *Ebury* (*Lord*) [1872],[5] which was cited with approval in *Halbot* v. *Lens* [1900].[6]]

The case of *Smout* v. *Ilbery*,[3] which was adversely commented on as to one point in *Halbot* v. *Lens*,[6] may be supported, in part at any rate. There is no reported case where a person, acting under a power of attorney, produced to a person who has an opportunity of testing the signatures for himself, has been held liable for breach of implied warranty. The bank here knew all that Mr. Starkey knew, and had more means of testing the genuineness of the signatures.

No reply was called for.

KEKEWICH, J.—This is a case of considerable importance, affecting a very large class of persons. It affects the whole class of brokers and bankers, and also other large bodies who are concerned in transfers of stocks and shares, such as, for instance, large railway companies. But, to my mind, the whole question is a very simple one of law, and of law only. The facts are really common to both parties. There is no dispute about them. The law which I have to apply is laid down in many cases, but I think I need only refer to one or two. I take the statement from the judgment given by Mr. Justice Willes in *Collen* v. *Wright* [1]: "I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the

(1) 27 L. J. Q.B. 215; 8 E. & B. 647.
(2) 56 L. J. Q.B. 57; 18 Q.B. D. 54.
(3) 12 L. J. Ex. 357; 10 M. & W. 1.
(4) 1 L. J. K.B. 92; 3 B. & Ad. 114.
(5) 41 L. J. Ch. 804; L. R. 7 Ch. 777.
(6) *Ante*, p. 125; [1901] 1 Ch. 344.

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assertion of authority being untrue." That is explained a little further on, thus: "The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist." Now, the same doctrine is enunciated in a case thirty years later—namely, *Firbank* v. *Humphreys*,[2] in the Court of Appeal, where Lord Esher expressed the doctrine thus: "The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred." The present Lord Lindley, then a member of the Court of Appeal, expresses it tersely, if I may venture to say so. He says: "Speaking generally an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another. But to this general rule there is at least one well-established exception, viz., where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes." Then he said that the case before him was within the exception to the rule.

Now, that is the law which, it seems to me, I have to apply, and I have to apply it to the very short facts of this case. I propose to dispose of it entirely on one point which, strictly speaking, is not pleaded, but which seems to me to be far more important than any of the other points which are put forward. In December, 1897, and on March 8, 1898, Mr. Starkey purported to transfer in the bank books bank stock and Consols, which could only be transferred in the bank books, and he signed as the attorney for the transferrors. The transfers, of course, were made out in the ordinary form as transferred by the persons who were the owners of the stock in the bank books. That, to my mind, is a complete representation by him that he transferred as the attorney of the two Olivers—in other words, that he is a person authorised to transfer in their names. One need not pause to consider whether that is a contract within the meaning of *Collen* v. *Wright*,[1] which applies to contract only, though I myself have no doubt that the principle of *Collen* v. *Wright*[1] could not be confined to cases of contract in the strict sense of the word. But the other case, which I cited mainly for that purpose, of *Firbank* v. *Humphreys*,[2] shews that the principle of *Collen* v. *Wright*[1] is applied to transactions which may or may not be contractual, and the transaction in this case comes within the decision. Now, unless there is some answer to that in the arguments which I have heard on behalf of Mr. Starkey, it follows that Mr. Starkey is liable on that principle, by an implied contract, to make good the loss which the bank has sustained by acting on those transfers, and allowing the stock to pass into the name of the other holders, and which loss it has been ordered to make good in the present action.

The first objection is that Mr. Starkey behaved honestly, in the belief that he had the authority of those principals in whose name he purported to act. That he did honestly believe it, nobody could possibly doubt, and he is acquitted of anything approaching an improper intent. According to the ordinary course of business precautions are often neglected which might with advantage and with a view to perfect safety be taken, but he says he honestly believed it. The defendants' counsel cited the cases of *Smout* v. *Ilbery*[3] and *Polhill* v. *Watler*[4] as authorities to shew that honest belief excuses him. I doubt whether either of those cases goes that length, but there is certainly an expression in the judgment in *Smout* v. *Ilbery*[3] which tends strongly in that direction, to say the least. *Polhill* v. *Watler*[4] I think may possibly be explained by the peculiar character of the pleading. I doubt whether the judg-

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ment means more than that the defendant would not be liable on the pleading in that case. But there are modern cases which have dealt with the principle, and which have made no such exception; and it is to be observed that Lord Lindley, in the passage which I have before quoted, says that generally an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another, and then he makes the exception which I have also read. It follows as a matter of course that the exception covers the whole of the rule, and that the person who honestly makes the representation, but so as to come within the exception that Lord Lindley lays down, is liable for that misrepresentation. But if that were not so I should have no difficulty in saying that these later cases, apart from any direct statement by any of the Judges, go further and expound the law more fully than it was expounded in *Smout* v. *Ilbery*[3] and *Polhill* v. *Watler*,[4] and that the authority of those later cases must be upheld as against the others.

Then the other objection is that the bank knew as much as Mr. Starkey knew himself, or, at any rate, that it had the means of knowing. To a great extent that was true. It is possible, of course, that Mr. Starkey might have taken means to verify the signature of his principal; but the bank might have had the means also. The answer to that is that the bank is not bound to do anything of the kind. How far the bank authorities are bound to verify the signature to the execution of a power of attorney I do not pause to consider, but they certainly are not bound as between themselves and the person who demands to act under the power of attorney to see that the power of attorney has been properly executed. In discharge of their public duties they would probably think, as they always have thought, that it is better not to take the risk without all precautions that are possible, but they may throw the risk on the agent who comes, and leave it to him to justify his position if, unfortunately, it is necessary to do so. Then it is said that all this was known to these stockbrokers, and it is the practice of stockbrokers to rely on the bank, who, as they know, take these precautions. A great deal that the bank does in that way, as explained by the witnesses, is obviously a work of supererogation, and they are not bound to do it; and they are certainly not bound to tell the stockbroker, and as a matter of fact they do not do so, because one witness, who was a member of the committee of the Stock Exchange, was very careful to say that he only knew of what was done externally. He does not know, the bank does not tell him, and the bank would not be right in telling him, all that takes place within the walls of the bank itself. That is no excuse.

According to the authorities, Mr. Starkey has honestly misrepresented a fact—he has honestly misstated that he was the duly authorised agent of the two stockholders, for the purpose of transferring those stocks. It is unfortunate for him that it turns out to be untrue; but according to the law, as settled by the cases to which I have referred, he is liable for that misrepresentation in point of fact.

The bank, however, has not been content only to sue Mr. Starkey, who executed the transfers, but has endeavoured to make liable his two partners; and although, of course, it does not matter a whit, because Mr. Starkey no doubt acted as one of the firm, and if he is liable no doubt that will set itself right as between himself and his partners—still I have to consider whether any relief can be granted against the others. To my mind the others were improperly made defendants, and I do not think any relief can be granted against them.

Mr. Starkey and his two partners together applied for a power of attorney. They all three made a misrepresentation, and they all three would be liable; but what is the action which we are considering?—I am treating it as if it were an entirely independent action, as perhaps it strictly ought to have been, though we are conveniently disposing of it on what is called a third-party notice. It is an action on an implied warranty; and all the cases lay down, without exception, that the remedy against the person who has purported to act as agent when he had no authority, is on that implied warranty

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which has injured the plaintiff; and in the action you can only recover those damages which have been suffered by reason of the breach of the implied warranty, or implied contract. Even if you could maintain an action technically without alleging and proving the damages incurred, at any rate you would get no relief. It is impossible to suggest that the application alone did the bank any harm, or caused it any injury at all. The application was made for the power, and the power was issued. It might very well have stopped there. [His Lordship then recapitulated the subsequent steps.] There was no warranty there which led to any damages, and no damages could possibly be recovered. But, besides that, we have the transfer ticket, signed in each case by Starkey and one of his partners—the one who was the other attorney in the power. It is quite impossible to sue for damages on that. It appears to me that an action founded on these representations which are the only real cases of misrepresentation which are alleged in the statement of claim, must inevitably fail. The statement of claim does not in terms state that the transfer was executed by this gentleman as attorney, but I think he is liable on that ground. Mr. Starkey must pay to the bank all that the bank is bound to pay to the plaintiff in the original action, including, of course, the costs which it has been ordered to pay, and also the costs of this third-party notice.

Solicitors—Hores, Pattisson & Bathurst, for plaintiff; Freshfields & Williams, for the bank; Morley, Shirreff & Co., for third parties.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

BUCKLEY, J.
1901.
March 1.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
March 20.

COLLISON v. WARREN.

Practice—Interlocutory Relief—Motion for Injunction by Defendant before Counterclaim—Relief Arising from Same Cause of Action—Contract—Mandatory Injunction to Restrain Interference with Occupation of House.

Where an action is brought by a plaintiff relying on a cause of action—for example, a contract—and the defendant wants relief arising from the same cause of action—not necessarily the same relief—he may by motion in the same action, before counterclaim delivered, obtain interlocutory relief until the trial.

Where the plaintiff, the proprietor of an hotel, had executed a deed of assignment of all his property to a trustee for the benefit of his creditors, and had been retained as manager by the trustee under a power in that behalf contained in the deed, and subsequently dismissed, the Court, at the instance of the trustee of the deed, the defendant in the action, granted an injunction to restrain the plaintiff until the trial from interfering with or disturbing the trustee in his occupation of the hotel.

Spurgin *v.* White (2 Giff. 473) *followed.*

Motion.

On August 31, 1899, the plaintiff, who was the proprietor of, and was carrying on business at the Norfolk Mansions Hotel, Wigmore Street, London, executed a deed of assignment for the benefit of his creditors, and thereby assigned to the defendant, as trustee, all his personal property except the leases under which the hotel was held (which had already been charged as a collateral security in favour of another person), upon trust as long as the trustee should think fit to carry on the hotel business, with power to sell (with certain consents), and in the meantime to engage the services of the plaintiff, who, with his wife and family,

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should during such engagement be entitled to reside and board on the premises, as manager of the hotel, at a salary of 100*l.* per annum, payable monthly. The deed contained a covenant by the plaintiff to execute, if called upon, all deeds necessary for vesting the leaseholds in the defendant or a purchaser, and in the meantime to hold them as trustee for such purposes as the defendant and the committee of inspection, who were parties to the deed, should direct.

On February 11, 1901, the defendant wrote to the plaintiff, stating that, owing to his continued habits of intemperance, the committee of inspection had instructed the defendant to summarily dismiss the plaintiff from the management or control of the hotel, and that he was to accept this intimation as final notice of his dismissal, that from that date his services were no longer required, and that he was requested forthwith to leave the premises. With this notice the defendant sent the plaintiff the amount of wages then due, and one month's wages in lieu of notice.

The plaintiff refused to leave the premises, and on February 16 issued the writ in the action against the defendant, claiming a declaration that he was entitled to be engaged as manager pursuant to the deed of August 31, 1899, at a salary of 100*l.* per annum, and that plaintiff, his wife and family, were entitled to reside and board on the hotel premises; and asking that the trusts of the deed might be carried out so far as might be necessary having regard to such declaration; an injunction, and damages for breach of trust.

On February 23, the defendant, before delivering a counterclaim, gave notice of motion in the action for an injunction to restrain the plaintiff, his servants or agents, his wife or any member of his family, until the trial of the action from remaining in or upon the hotel premises; and for an injunction to restrain the plaintiff until the trial of the action from in any way interfering with the conduct or management of the business of the hotel.

The defendant, in his affidavit in support of the motion, alleged that he intended to ask by counterclaim for similar relief to that sought by the notice of motion.

It was alleged, and substantially admitted, that the plaintiff was almost habitually intoxicated.

Astbury, K.C., and *Harold Simmons*, for the motion.

Israel Davis, for the plaintiff.—The motion is misconceived. A defendant cannot before delivering a counterclaim obtain an injunction on motion, except in relation to a matter arising out of or incidental to the relief sought by the plaintiff in the action—*Carter* v. *Fey* [1894].[1] The relief here sought by the defendant is not in relation to a matter arising out of or incidental to the relief sought by the plaintiff, but is a distinct relief. The defendant in effect asks for a mandatory injunction to expel the plaintiff from the premises. There is no precedent for such an order being made in the case of a person dismissed for drunkenness where no damage to the business is proved to have been thereby occasioned.

Astbury, K.C., in reply.—*Spurgin* v. *White* [1860][2] is an authority that the Court will grant a mandatory injunction in a case like the present.

BUCKLEY, J., after stating the facts and holding that the charge of intoxication was proved, continued: The first question is whether the defendant is right in moving in the action. In 1876 Jessel, M.R., held in *Sargant* v. *Read* [1876][3] that a defendant in a partnership action might, before judgment, apply for an injunction and a receiver, notwithstanding that the plaintiff had already served notice of motion for the like purpose. The basis of that decision was that where an action is brought by the plaintiff relying on a cause of action and the defendant wants relief arising from the same cause of action—not necessarily the same relief—he may by motion in the action, before counterclaim delivered, obtain that relief. In *Carter* v. *Fey*,[1] a case in which the defendant ineffectually tried to move in the action, the principle

(1) 63 L. J. Ch. 723; [1894] 2 Ch. 541.
(2) 2 Giff. 473.
(3) 45 L. J. Ch. 206; 1 Ch. D. 600.

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I have stated was held by the Court of Appeal to be the true one. Lord Justice Lindley says: "The defendant's claim is not for any relief arising out of or incidental to the relief sought to be obtained by the plaintiff in his action. In this respect the case differs from *Sargant* v. *Read*,[3] which was an action for dissolution of a partnership and for taking the partnership accounts, and Sir G. Jessel there held that the defendant was entitled to give a cross-notice of motion in the plaintiff's action for the appointment of a receiver. It differs also from *Porter* v. *Lopes* [1877],[4] which was a partition action, and there the defendant was held entitled to move for a receiver for the protection of the property." I understand the Lord Justice in that passage to mean that if the defendant's claim is for anything arising out of or incidental to the relief claimed by the plaintiff he is entitled to move in the action. Lord Justice Lopes says: "The question is this—whether the defendant can move for an injunction against the plaintiff without filing a counterclaim or issuing a writ in a cross-action. In my opinion, he can in some cases, but only in cases where the defendant's claim to relief arises out of the plaintiff's cause of action, or is incidental to it." And Lord Justice Davey says: "In my opinion, it must be relating to or arising out of the relief sought in the action which is before the Court, and that any other injunction cannot properly be granted in the action." I ask myself what in this case is the cause of action on which the plaintiff is suing? It is the contract contained in this deed of arrangement. He affirms that as the result of that contract he is entitled to be employed as manager of the hotel. What is the defendant's cause of action? It is identically the same thing from the opposite point of view. He negatives the plaintiff's claim to be employed, and claims to prevent him from interfering with the management. In that state of things I think he is entitled to move in the plaintiff's action.

It is a novelty to me that an order can be obtained to restrain anybody from remaining in a house, which is of course equivalent to a mandatory order upon him to go out. But I have been referred to a case of *Spurgin* v. *White*,[2] where Vice-Chancellor Stuart granted an injunction to restrain the defendant till further order from acting as agent or manager of the plaintiff society, or from disturbing, hindering, or molesting the plaintiffs or their agents in the possession or enjoyment of the said house, etc., or in carrying on the business and objects of the said society at the said house—that is, from interfering with the plaintiffs' possession of the house; and the order contained words giving the defendant the right to use two rooms, with a right of access to other rooms for the purpose of removing his stock and property. So, as I read that, an injunction was granted to restrain the defendant from interfering with the possession of persons who said that he was there wrongfully. That appears to me to be a precedent for an order which I am prepared to make which will have the effect of restraining the plaintiff from remaining in possession of the premises, which are not vested in him, but in the defendant. I will grant an injunction to restrain him from interfering with or disturbing the defendant in his possession and occupation of the hotel; and secondly, from in any way interfering with the conduct or management of the business; but I shall direct that the first part of the order be not enforced for a fortnight.

The plaintiff appealed, and the appeal was heard on March 20, the operation of the injunction having been suspended till that date.

Israel Davis, for the appellant, urged the same arguments as in the Court below, and cited, in addition, *Todd* v. *Kellage* [1852][5] and *Lawler* v. *Linden* [1876],[6] as to the notice to which the plaintiff was entitled.

Astbury, *K.C.*, and *Harold Simmons*, for the respondent, were not called on.

(4) 7 Ch. D. 358.

(5) 22 L. J. Ex. 1; 8 Ex. 151.
(6) Ir. R. 10 C.L. 188.

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COLLISON *v.* WARREN, App.

RIGBY, L.J.—This is an appeal from an interlocutory order of Mr. Justice Buckley, which amounts to this: That the plaintiff is restrained from interfering with the trustee of a creditor's deed in his occupation of a hotel; and the question really is, How does the plaintiff happen to be on the premises?—in what capacity and on what terms can he claim to be there? The answer is perfectly plain. He was the manager—the removable manager—of the hotel. Under the creditor's deed the trustee had power to engage him as manager, and that is coupled with the provision that during such engagement the plaintiff, together with his wife and family, shall be entitled to remain in certain rooms in the basement of the hotel. That is the foundation of the plaintiff's claim. He is not claiming to be there as freeholder or in any other capacity. That being so, I conceive that there is no ground whatever on which he can support his claim to remain there. He has been dismissed from the post of manager by the trustee, and thereupon his right to remain on the premises comes to an end. Without going further into the arguments which have been addressed to us, in my opinion Mr. Justice Buckley was quite right in granting the injunction, and this appeal must be dismissed with costs.

VAUGHAN WILLIAMS, L.J., and STIRLING, L.J., concurred.

Appeal dismissed.

Solicitors—W. Gipps Kent, for appellant; Lewis Davis, for respondents.

[*Reported by W. Ivimey Cook and A. Cordery, Esqs., Barristers-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
Feb. 19, 20, 21, 22, 25.

COSTA RICA RAILWAY *v.* FORWOOD.

Company — Director — Fiduciary Character—Partner or Shareholder in Concern Contracting with Company—Profit Acquired—Articles of Association.

Articles of association of a company provided that the rules therein contained as to the vacation of the office of a director if he was concerned in the profits of any contract with the company without setting forth in writing the nature of his interest should be subject to the exception that "no director shall vacate his office by reason of his being a member of any . . . company, or partnership which has entered into contracts with, or done any work for, the company; or by reason of his being interested, either in his individual capacity or as a member of any company . . . or partnership, in any adventure or undertaking in which the company may also have an interest," with a provision in respect of voting which prevented his vote being counted in such a case:—Held, *that, having regard to the above article, a director was not liable to account for profits arising out of contracts with another company or partnership in which he was a shareholder or partner to the knowledge of the company.*

Decision of LORD HATHERLEY, L.C., *in* Imperial Mercantile Credit Association *v.* Coleman (40 L. J. Ch. 262; L. R. 6 Ch. 558) *followed.*

Decision of BYRNE, J. (69 L. J. Ch. 408; [1900] 1 Ch. 756), *affirmed.*

Appeal from decision of Byrne, J. (69 L. J. Ch. 408; [1900] 1 Ch. 756).

The plaintiffs, the Costa Rica Railway Co., Lim., claimed a declaration that the defendant, Sir Arthur Forwood, as a director of the plaintiff company from the incorporation thereof until February 29, 1896, was liable to account to the plaintiffs for all profits made by the Atlas Co., the firm of Leech, Harrison & Forwood, the managers of the said company, and the firm of Pim, Forwood & Kellock, the agents of that company in New York, or

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alternatively for all profits received by himself as a shareholder in the Atlas Co., and as a member of the said partnership firms, from or in connection with or by means of a contract referred to as the "banana contract" and an agreement referred to as the "syndicate agreement."

The defendant, Sir A. Forwood, died on September 27, 1898, and an order was made that the proceedings in the action should be carried on against his executors.

The facts were as follows: For several years prior to 1884 Minor Cooper Keith worked, under a lease from the Government of the Republic of Costa Rica, a railway of about seventy-one miles in length from the port of Limon on the Atlantic to Carillo in the interior of the country. By a contract or concession made on April 21, 1884, and other contracts between the Republic of Costa Rica and Minor Cooper Keith, he undertook to construct and equip certain new railways, and to equip, repair, and alter the then existing railways of the republic. In consideration of this the republic conveyed the existing lines and the new lines when constructed, with their equipment and appurtenances, to Keith for the period of ninety-nine years from the completion of the new lines, together with a grant of 800,000 acres of Government lands, on certain conditions, including a provision for the formation of a company to take over the concession on completion of the railways. Keith was also the owner of banana plantations and the largest grower of bananas in Costa Rica. The natural market for the bananas was the United States. The railway from Carillo to Port Limon connected the banana-growing district with the port of Limon, whence the bananas were shipped to New York and New Orleans. The defendant, the late Sir Arthur Forwood, was the principal shareholder in the Atlas Steamship Co., which had steamers running from Port Limon to New York. This company was managed by the firm of Leech, Harrison & Forwood (of which firm Sir Arthur Forwood was a member), who were paid by a percentage on the earnings of the Atlas Co. Messrs. Phipps & Co. were owners of a line of steamers running from Port Limon to New Orleans. In the month of April, 1886, terms were arranged between Keith, the Atlas Co., and Phipps & Co. with regard to the carrying on of the banana trade, and three agreements were entered into, two of which were executed on May 19, 1886, and the third on June 21, 1886.

The plaintiffs, the Costa Rica Railway Co., Lim., were incorporated on April 26, 1886.

By an agreement dated May 19, 1886, which was called the "construction agreement," made between the plaintiff company and Keith, Keith agreed to transfer to the company the concession and premises above mentioned, to construct, complete, and equip the railways and works therein comprised within a maximum period of three years and nine months from the date of the contract, and to pay interest upon the first mortgage debentures of the company until the railways should have been completed and taken over by the company; and in consideration of the premises Keith was to be entitled to the whole of an intended issue of first mortgage debentures and second debentures of the company, and so much of the share capital of the company (1,800,000*l.* in amount) credited as fully paid as was not taken by the subscribers of the memorandum of association of the company or appropriated to the Government of Costa Rica or the holders of the bonds constituting the existing debt thereof under the terms of the concession; and with the view of raising the necessary cash capital for the execution of the works provision was made for the company offering from time to time for public subscription, as and when required by Keith, the whole or any part of the first mortgage debentures and second debentures and share capital of the company constituting the consideration payable to Keith.

By an agreement of the same date, which was called the "banana contract," made between the plaintiff company, Keith, the Atlas Steamship Co., and Messrs. Phipps & Co., it was agreed that the railway company should during the continuance of the agreement, as required by Keith or his agents, take up, convey to their pier at Limon, and stow on board the vessels to be provided by the

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Atlas Co. and Messrs. Phipps all bananas tendered by Keith. The agreement contained elaborate provisions for the supply by the railway company of special trains for the traffic, with precedence over all other trains except passenger and Government trains, together with provisions as to the delivery and storage of the fruit, the supply by the railway company of berths at Limon for the vessels of the Atlas Co. and Messrs. Phipps (these latter being bound in turn to supply a sufficient number of vessels for the traffic), and as to the rates and dues to be charged by the railway company, which the railway company were guaranteed should always reach a minimum of 125,000 dollars a year. It was also provided that the responsibility for payments to the railway company should, as to fruit carried for shipment on the vessels of the Atlas Co., be borne by the company and Keith jointly and severally; as to fruit carried for shipment on the vessels of Phipps & Co., by them and Keith jointly and severally; and as to the difference between the rates payable under the agreement and 125,000 dollars, by the three contracting parties in the proportions mentioned. It was further provided that during the continuance of the agreement (which was to come into operation upon the date when the railway company took possession of the railways, and was to continue for five years from January 1, 1890, or, if the company was not then in possession, for five years from the time when possession was obtained) none of the special facilities thereby provided should be afforded by the railway company to any other person, firm, or corporation, nor should they allow to any such person, firm, or corporation any rebates or discounts such as were thereby allowed, or give any of the advantages or privileges which were thereby granted to Keith, the Atlas Co., and Messrs. Phipps & Co.

On June 21, 1886, by an agreement, called the "syndicate agreement," between Keith, the Atlas Steamship Co., and Messrs. Phipps & Co., it was provided as follows by clause 10: "The bananas shipped under the provisions of these presents shall be sold by the Atlas Co. and Phipps & Co. respectively in or through New York, and in or through New Orleans respectively, for the joint account of the said M. C. Keith and the Atlas Co. as regards sales in or through New York, and of the said M. C. Keith and Phipps & Co. as regards sales in or through New Orleans, and the gross proceeds of such sales shall be dealt with in manner following—namely, there shall be deducted therefrom the price at which the bananas shipped were sold to the party by whose steamer the shipment was made, and all expenses (except the amount paid to the Costa Rica Railway Co. by virtue of the said agreement of the 19th day of May, 1886) in connection with such shipment, including charges for sale (*del credere*), by the party by whose steamer the shipment has been made and for insurance as hereinafter mentioned, and the balance shall be credited as to one half thereof to the party by whose steamer such shipment was made, and as to the other half part thereof to a separate fund to be called the surplus fund. Such fund shall then be dealt with in manner following—namely, there shall be debited thereto the amount paid to the Costa Rica Railway Co. by virtue of the said agreement of the 19th day of May, 1886, and the balance thereof shall be divided or provided between or by the said M. C. Keith and the party by whose steamer the shipment was made in equal shares."

When the construction agreement was entered into, the late defendant Sir A. Forwood and a member of the firm of Phipps & Co. were two of the directors of the plaintiff company, and the late defendant continued as a director until February, 1896. Profits were earned and divided under the syndicate agreement. No disclosure was made in the prospectus of the company that Sir A. Forwood or Phipps was interested in the "construction" or the "banana" contracts, nor was any declaration of his interest made by Sir Arthur Forwood pursuant to article 81 hereinafter stated, but it was well known to the Costa Rica Railway Co. that Sir Arthur Forwood was a large shareholder in the Atlas Steamship Co.

The articles of association of the Costa Rica Railway Co. provided as follows by

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Article 80: "No Director shall vote on any question in which he has a personal interest apart from the Members at large."

Article 81: "The office of a Director shall be vacated: If he accepts or holds any other office or place of profit under the company, except that of Managing Director, Manager, or Agent of the Company: . . . If he is concerned in or participates in the profits of any contract with the Company, or of any work done for the Company, without declaring and setting forth in writing the nature of his interest, such declaration, if his interest then exists, to be made at the meeting of the Board at which such contract is determined on or work ordered, and in any other case at the first meeting of the Board held after the acquisition of his interest:

"But the above rules shall be subject to the following exceptions: That no Director shall vacate his office by reason of his being a Member of any Corporation, Company, or partnership which has entered into contracts with, or done any work for, the Company; or by reason of his being interested, either in his individual capacity or as a Member of any Company, Corporation, or partnership, in any adventure or undertaking in which the Company may also have an interest. Provided nevertheless that in no case shall any Director having such interest as aforesaid vote in respect of such agreement, contract, work, adventure, or undertaking, and if he or they so vote, such vote shall not be counted."

Byrne, J., held that, having regard to the above article, Sir Arthur Forwood's executors were not liable to account for profits arising out of the "banana contract" or "syndicate agreement."

The plaintiff company appealed.

Neville, K.C., and *Younger, K.C.*, for the appellants.—Mr. Justice Byrne decided in the defendants' favour on the view that Sir A. Forwood came within the exception in article 81, and thought the case was governed by the decision of Lord Hatherley in *Imperial Mercantile Credit Association* v. *Coleman* [1871].[1] The basis of Lord Hatherley's decision in that case was that the articles by implication provided that the director should not vacate his seat if he disclosed his interest, and therefore he was entitled to make the profit. The House of Lords reversed the decision on the ground that there had been no sufficient disclosure to entitle the director to the benefit of that construction of the articles. The necessity for full disclosure in such cases is a matter of general principle—see *per* Lord Cairns—and disclosure is obviously contemplated by the provision in article 81 of the present articles, which expressly provides that the director's vote shall not be counted in such a case. The defendant therefore has not brought himself within the exception. The obligation of partners not to benefit themselves at the expense of their copartners is treated in *Lindley on Partnership* (6th ed.), pp. 316–325, citing *Bentley* v. *Craven* [1853],[2] *Lock* v. *Lynam* [1854],[3] and other cases which shew how strict the rule is.

Apart from article 81, the case is clearly within the general principle that a director must account for a secret profit, since the defendant participated in the profits of the banana contract under the syndicate agreement relating to the sale of the bananas, which could not be sold without the banana contract relating to their carriage.

Levett, K.C., Swinfen Eady, K.C. (*Bremner* with them), for the respondent.—The case is not within the general principle at all. If the banana contract is a fair one, the appellants cannot claim to share in the profits after the carriage is ended—*White* v. *City of London Brewery Co.* [1889],[4] *Dean* v. *M'Dowell* [1878],[5] *Aas* v. *Benham* [1891],[6] and *Russell* v. *Austwick* [1826].[7]

The banana contract was a railway contract, and a railway contract only. What happened to the bananas after their carriage over the line is not material. The railway company did not carry on the shipping business.

(1) 40 L. J. Ch. 262; L. R. 6 Ch. 558. Reversed in H.L. [1873], 42 L. J. Ch. 644; L. R. 6 H.L. 189.

(2) 18 Beav. 75.
(3) 4 Ir. Ch. 188.
(4) 58 L. J. Ch. 855, 857; 42 Ch. D. 237, 242.
(5) 47 L. J. Ch. 537; 8 Ch. D. 345.
(6) [1891] 2 Ch. 244, 255.
(7) 1 Sim. 52.

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COSTA RICA RAILWAY *v.* FORWOOD, App.

The real object of article 81 was to enable the company to secure directors with a wide commercial interest. They wished to get the double advantage of business brought in by directors and the judgment of independent directors. This action is seeking to gain something which was deliberately foregone by the articles.

Neville, K.C., in reply.—The claim made is under the law as exemplified in *Parker* v. *M'Kenna* [1874],[8] *Burton* v. *Wookey* [1822],[9] *Albion Steel and Wire Co.* v. *Martin* [1875],[10] and *Bray* v. *Ford* [1895][11] (*per* Lord Herschell), and the cases already cited. Sir A. Forwood put himself in a position in which his duty and interest conflicted. He must therefore be liable unless he can bring himself within the exceptions in article 81. He was bound to disclose his whole interest, and there is no distinction between the disclosure necessary by a trustee, and that required of him under article 81—*Dunne* v. *English* [1874][12] and *Battison* v. *Hobson* [1896].[13] The other directors were not fully aware of his interest—they did not know of the syndicate agreement. That agreement does not come within the saving proviso in the article at all, because the company was not a party to it. Leech, Harrison & Forwood were not parties to any contract with the company.

RIGBY, L.J.—This is an action brought by the Costa Rica Railway Co. against the late Sir Arthur Forwood, and continued, since his death, against his executors. The object of the action is, to obtain an account from the executors of Sir Arthur Forwood in respect of profits made in a company known as the Atlas Steamship Co., Lim., and a firm known as Leech, Harrison & Forwood—profits which were obtained out of a business consisting of the exportation of bananas from Port Limon, which was the limit of the Costa Rica Railway Co.'s railway, to New York and to New Orleans respectively; the ground being that Sir Arthur Forwood, as undoubtedly he was in a fiduciary position towards the company (being from its commencement down to some time in the year 1896 a director), had made profits which he had not disclosed to the company.

Now, I begin by saying that the equitable principle upon which a man in a fiduciary relation, who makes what would be called "secret profits" is bound to give them up to the principal for whom he is acting, is a most salutary one, and a most general one; and I hope that nothing either in this case or in any other case will fall from me that would in any way infringe upon that principle. Many people think it a hard principle. To those who have had experience in such matters, it appears to be necessary, because it is the only way in which you can make sure that people will do their duty under circumstances of unusual difficulty. It does not depend upon fraud, and there is no imputation made in this case of anything like fraudulent conduct on the part of Sir Arthur Forwood; but it does not in the least follow that, with perfect honesty of purpose, he may not have done something which, without his being aware of it, would be contrary to principle, and for which he must be made liable. [His Lordship stated the effect of the contracts.]

We must see what the provisions of the articles were. [His Lordship referred to article 80.] That is a very general clause; it is not so specific as that which follows, but it is not without importance. That appears to me to shew that a director in this company may have interests not in common with the members at large. But if he has them, he must not vote; and I take it that if he does vote, he will not get any benefit from the rule, but will be bound by the general equity which charges a fiduciary agent with the concealed profits that he makes. But the article which is most important is article 81, providing for the contingencies on which the office of director shall be vacated. [His Lordship read the earlier parts of article 81.] That is a perfectly general clause; and there, again, I assume that if a director were concerned or participated, and did not make a sufficient declaration in writing, he would be liable under the equitable

(8) 44 L. J. Ch. 425; L. R. 10 Ch. 96.
(9) 6 Madd. 367.
(10) 45 L. J. Ch. 173; 1 Ch. D. 580.
(11) 65 L. J. Q. B. 213, 217; [1896] A.C. 44, 51.
(12) L. R. 18 Eq. 524.
(13) 65 L. J. Ch. 695; [1896] 2 Ch. 403.

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rule. But that rule is subject to an exception—"That no Director shall vacate his office by reason of his being a member of any Corporation, Company, or partnership which has entered into contracts with, or done any work for, the Company." That is a very wide provision indeed. The subject-matter of the section being the vacation of the office of a director, it is stated that no man shall vacate his office by reason of his being a member of any corporation or company, or a partner in any firm that has entered into contracts with the company.

Now *prima facie*, dealing with the case of the Atlas Co., it would appear that that exception was made for the purpose of excluding altogether any interest whatever which Sir Arthur Forwood could take as a shareholder in the company—I shall have a word afterwards to say about Leech, Harrison & Forwood; but if the Atlas Co. had entered into a contract—namely, the banana contract—and if it was intended to saddle Sir Arthur Forwood with liability by reason of his being a shareholder in the Atlas Co., this clause would have to be got over. True it is the clause does not go on to say, "but such director, as such, may enter into any contracts"; but I think it was admitted by counsel on behalf of the railway company—and in this Court, at any rate, it could not be in question—that if Sir Arthur Forwood is within the exception, he would be permitted to take the profits I think it is plain myself that he is within that exception so far as his interest in the Atlas Co. is concerned, and I think, without relying unduly on the admission of the railway company, we must come to that conclusion even if there were no such admission, because undoubtedly in the case of *Imperial Mercantile Credit Association* v. *Coleman*,[1] which was the case most relied on on both sides in this case, Lord Chancellor Hatherley so held. His decision, if not overruled, would bind us. Being a Court of co-ordinate jurisdiction, we should follow that, and we should be bound by it. So I think counsel for the plaintiffs was not going one jot beyond what he was entitled to do in this Court at any rate, although Lord Cairns, when the case came before the House of Lords, did say that he would accept the ruling of Lord Hatherley on that point without affirming it—meaning that upon a future occasion he would or he might think fit to have it reconsidered. However, so far as I know, and so far as attention was called to it, it must now be taken as binding on this Court. That being so, in the case of the Atlas Co., Sir Arthur Forwood being a shareholder in that company, I hold that, so far as his interest is concerned, the case is concluded. The appellants can have no account of shares of the Atlas Co. held by him. Still less can they have what they seek by the action—an account of all the profits of the Atlas Co. In that respect the case is fundamentally different from the case of *Imperial Mercantile Credit Association* v. *Coleman*.[1] There the article within which Coleman sought to bring himself was couched in these words as far as material—that the director must declare his interest. All that Coleman did was to say he had an interest; and though Lord Chancellor Hatherley was satisfied with that, yet in the House of Lords they were not satisfied. Lord Chelmsford, who delivered the first judgment, equally with Lord Cairns, who delivered judgment afterwards, held that to declare his interest meant to explain and set forth what that interest was; and there had been no such declaration on the part of Coleman. Of course, in one view he had declared his interest to the two officers of the company; but the noble and learned Lords were not satisfied that was so as a matter of fact, and, moreover, they said that if he had declared his interest he must declare it to the directors and not to the officers of the company. Here, instead of the interest taken by a member of the company involving the interests of the company, it is quite plain the interest of the company is intended to cover and safeguard the interest of the shareholders. So far, therefore, as I myself am concerned, I hold that there can be no account of the interest taken by the Atlas Co. or even of the interest taken by Sir Arthur Forwood as a shareholder.

But it is said that the case is different with regard to Leech, Harrison & Forwood, inasmuch as they never entered

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into a contract with the company at all—which appears to be true. Then is the case really different—that is to say, does the case of Leech, Harrison & Forwood involve a member of the firm in the liability to account quite independently of their ever having made a contract with the railway company? I think it does not. All the profits that could be taken by the Atlas Co. appear to me to be covered by what I have read already. Those profits, however large they might be, would not involve Sir Arthur Forwood in a liability to account. Leech, Harrison & Forwood had no other position. They were acting as the agents or the servants of the company, and whatever they made out of the proceeds of the banana speculation would be merely a deduction from what otherwise would have gone to swell the profits of the Atlas Co. And I cannot see that, upon any principles of equity or any mode of supporting the rule, there can be any ground for saying that the Atlas Co. being entitled to make whatever profits they could, large or small, without being involved in liability in respect of them, the interest of Leech, Harrison & Forwood, which was perfectly well known in general to the railway company—for they knew perfectly well that Sir Arthur Forwood was a member of that firm who were the managers of the business of the Atlas Co.—can be relied on for making Sir Arthur Forwood liable. That appears to me not in any way a justifiable conclusion. I consider, therefore, that as regards these profits that are alleged to have been made by Sir Arthur Forwood—and it is not of course denied that he did make profits as a shareholder in the Atlas Co.—he was protected, and intended to be protected, by the clause I have read from the articles of association; and as to profits made as a member of Leech, Harrison & Forwood, it must necessarily follow he was protected because the Atlas Co. were at liberty to make any profits. I should go further than that if necessary. I should say that the Costa Rica Railway Co.'s directors knew as well then as we do now that the company and firm were to make profits. No attempt has been made to shew that Sir Arthur Forwood ever did what was contrary to the articles of association. No attempt has been made to shew he voted about the contracts. He said himself, in contradiction to a statement, that he never had so voted, and I assume, therefore, he never did vote; and I hold that as a shareholder in the Atlas Co. and as a partner also in Leech, Harrison & Forwood, he is not liable within the meaning of the articles. The judgment of the learned Judge below is right and the appeal ought to be dismissed.

VAUGHAN WILLIAMS, L.J.—I also think this appeal ought to be dismissed. I do not know that I should add anything to what has fallen from Lord Justice Rigby, with which I entirely agree, if it had not been—first, that there have been urged before us with great persistency on behalf of the respondent arguments to which I cannot at all assent; and I wish to make it quite clear that, although I think this appeal ought to be dismissed, it is not upon those grounds that were so much urged on us during a portion of the argument for the respondents. Then, secondly, there is, in addition to that, another reason why I wish to add a word or two, and that is, because I think I ought to express shortly what my view is of the effect of the contracts which have been discussed in this case.

Going back to the arguments which have been urged upon us, I do not suppose that it was intended directly to question the stringency of the rule which does not allow directors, trustees, agents, or others standing in a fiduciary relation to enter into engagements conflicting, or which might possibly conflict, with the interest of those whom they are bound to protect. But although no actual question was raised as to that, it seemed to me that really a great deal of the argument suggested things of this sort: "If Sir Arthur Forwood was interested in a way which made it impossible to deny that he might possibly have an interest which might conflict with his duty, yet it would be wrong to hold him accountable here, because it really would not be fair to do so," or "because really the company of which he was a director has lost nothing," or "because the profit which he has earned

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here is really a profit which could not be earned by the company." As I understand it, a whole series of partnership cases was read to us in order to shew that a partner could not be responsible for profits which his firm could not have gained. All I can say is, that it seems to me, without going at length into authorities, that there is no sort of ground for any such contention. There is one case which was not cited during argument, and which there was perhaps no need to cite, because there was ample other authority to the same effect, but which I am going to refer to for one moment for what I may call a text-book reason—that is to say, that you find in the headnote an admirable summary of the law, and when you come to look at the speeches of the noble Lords, you will find that every word of the headnote is justified by their speeches. I am referring to the case of *Aberdeen Railway* v. *Blaikie Brothers* [1854].[14] It is stated so shortly there, that I think it would not be undesirable to read passages from that headnote: "It is a rule of universal application that no Trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which may possibly conflict, with the interests of those whom he is bound by fiduciary duty to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness, or unfairness, of the transaction; for it is enough that the parties interested object. It may be that the terms on which a Trustee has attempted to deal with the trust Estate, are as good as could have been obtained from any other quarter. They may even be better. But so inflexible is the rule that no inquiry into that matter is permitted." As I understand, the rule is a rule to protect directors, trustees, and others against human nature by providing that if they choose to enter into contracts in cases in which they have, or may have, a conflicting interest, the law will denude them of all profits they make thereby, and that notwithstanding the fact that there may not seem to be any reason of fairness why the profits should go into the pockets of their *cestuis que trust*, and although the profits may be such that their *cestuis que trust* could not have earned them at all. I may say, with reference to that last point, that there is a recent and direct decision that the fact that the profits could not have been earned by the *cestui que trust* is wholly immaterial, and that is the case of *Boston Deep-Sea Fishing and Ice Co.* v. *Ansell* [1888].[15]

I should like to preface my observations also by saying this: that counsel for the appellants perfectly satisfied me by the authority of the case of *Dunne* v. *English*,[12] that if the liability of the director, or trustee, or agent to account depends upon disclosure, the disclosure must be a full disclosure, and that it is not sufficient for the person in a fiduciary capacity to say: "I gave you fully sufficient information to put you upon enquiry." And I suppose, moreover, that, generally speaking, it would not be sufficient for the director of a company to shew that, as between himself and his brother directors, the whole matter was above-board. I think that that was established by a case of *Albion Steel and Wire Co.* v. *Martin*.[10]

But, starting with all those propositions, I have come myself most unhesitatingly to the conclusion that Sir Arthur Forwood has not been brought by his transactions with the Costa Rica Railway Co. within the operation of the wholesome doctrines to which I have been referring. [His Lordship examined the facts of the case, and continued:] Now one has not really to question in this case whether apart from the articles there is anything to relieve Sir Arthur Forwood from any liability to account which he might have as director in respect of what I will call, for shortness, secret profits. This matter is dealt with in the 80th and 81st articles, and it is not disputed really in this case, nor in fact in other cases, that if there are articles of this sort and the director can shew that that which he did is authorised by the articles—can shew, in other words, that the company have by their relation with him, as established by the articles, waived their right to have his unbiassed voice in every matter, waived their right to have him abstain from

(14) 1 Macq. H.L. 461.

(15) 39 Ch. D. 339.

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putting himself in a position where he might have conflicting interests—that the director would, according to the decision of Lord Hatherley in *Imperial Mercantile Credit Association* v. *Coleman*,[1] be entitled to rely upon the articles as justifying his action and thus escape the liability to account. I propose, therefore, to ask myself whether, in this case, it has been established that that which was done by Sir Arthur Forwood does come within the authority of these articles. The judgment of Mr. Justice Byrne is that it does come within the articles, and I agree with Mr. Justice Byrne. I may say in passing, before I express what my view of the construction of the article is, that I make nothing of the use of the word "exception" here; I read the latter clauses of article 81 as articles each of which is really subject to the other. There is an affirmative statement that in certain cases the office of a director shall be vacated, and there is also an affirmative statement—which, whether you call it an exception or not, seems to me to make no difference, because it will not narrow in my opinion its ambit—which says that the happening of certain things shall not cause him to vacate his office as director. As I understand it, if he brings himself within the article which is called the exception, the result is that if his conduct is covered by it he will not only not vacate his office, but he cannot be called upon to account for the profits.

Now, that being so, it is said that if he is concerned in or participates in the profits of any contract with the company without declaring and setting forth in writing the nature of his interest, such declaration, if his interest then exists, is to be made at the meeting of the board at which such contract is determined on, and in other cases at the first meeting of the board after the acquisition of his interest. Here, if you take the banana contract as it stands, it seems to come within that clause of article 81. It has been admitted there has been no declaration or setting forth in writing of the nature of Sir Arthur Forwood's interest. But then comes the subsequent clause: "That no Director shall vacate his office by reason of his being a member of any Corporation, Company, or partnership which has entered into contracts with, or done any work for, the Company." I take the view that Mr. Justice Byrne did of the effect of the use of the past tense "has entered" there; and it seems to me really perfectly plain that this banana contract is a contract entered into with the company within the meaning of this clause; and it seems to me also perfectly plain that Sir Arthur Forwood is here really not liable to vacate his office or to account for profits by reason of his being a member of the Atlas Co. The banana contract and the membership of Sir Arthur Forwood in the Atlas Co. seem to be exactly the cases provided for by this clause; and I did not understand that the contrary was very strenuously argued by the appellants here. They seem to admit that, in so far as profits flowed from the contract actually entered into between the company and the shipowners and Mr. Keith, it fell within the clause, and that Sir Arthur Forwood could not have been called on to vacate his office, and therefore was not liable to account. [His Lordship further dealt with the facts, and continued:] Under those circumstances it seems to me that it is absolutely plain that the Costa Rica Railway Co. had every disclosure which was material to them to know with reference to the interest of their director and any conflict of duty that might arise from his interest. They did know in truth and in fact the nature of his interest; they did know what he was doing for Keith; and they did know perfectly well that he—or rather that the Atlas Co., of which he was a shareholder, because it was more remote than that—was to be remunerated for the services they rendered and the obligations which they undertook.

With regard to Leech, Harrison & Forwood, it seems to me that if the tree stands, the branch stands. If once you arrive at the conclusion that Sir Arthur Forwood is not accountable for the profits, how can he be accountable for a deduction from the profits? It is stated that Sir Arthur Forwood, as a member of the firm of Leech, Harrison & Forwood, who were the ships' husbands of the ships of the Atlas Co., was to get a percentage of

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5 per cent. on the gross earnings of the Atlas Co. But if we once came to the conclusion that Sir Arthur Forwood is not, as shareholder, responsible for his interest in the gross earnings of the Atlas Co. (and that is the conclusion we do come to), how can we hold that Sir Arthur Forwood is responsible for his interest in the percentage which had to be deducted from those earnings and paid to the ships' husbands?

STIRLING, L.J.—I wish to state very shortly the reasons which have led me to come to the same conclusions as the Lords Justices.

The plaintiffs launched their case relying on a well-known rule of equity which, I agree, is not to be infringed upon in any way. I will state that rule for the present purpose as being this—that if a person, while holding a fiduciary position and acting in that capacity, makes a profit without fully disclosing his interest to those persons towards whom he stands in such a relation, he must account to them for that profit. That is the rule on which the plaintiffs rely. The main contention of the defendants is this—that, although that is true, still, where the persons to whom there is a fiduciary relation are *sui juris*, and there is no unfair dealing, that rule may be relaxed or even be abrogated; and the main question in this case is, whether such abrogation or relaxation has taken place. The defendants say that that is to be found in articles of association of the company. [His Lordship referred to article 81.] Now Mr. Justice Byrne has held, in accordance with the view expressed by Lord Hatherley, that although this clause only refers to the vacating of the office of director, it also extends to a relief from the rule in equity to which I have referred so far as the exception prevails, and with that I agree.

The question then comes to this—whether there is found here an exception applicable to the present case; and I think it is found in the clause I have read: "No Director shall vacate his office by reason of his being a member of any Corporation, Company, or partnership which has entered into contracts with, or done any work for, the Company." Stopping there, it seems to me that the effect of that clause is to exonerate a director who fulfils the conditions from making any disclosure beyond that of stating that he is a member of a corporation, company, or partnership with which the contracts have been entered into. In the present case the late Sir Arthur Forwood was a director of the plaintiff company, and there is no question that he stood in a fiduciary relation to that company. He did not himself enter into any contract with the company, but he was a member of a company called the Atlas Co., which did enter into a contract with the plaintiff company. It seems to me that, with reference to that, the sole obligation of Sir Arthur Forwood was, as I have stated, to disclose that he was a member of that company; and that duty he fulfilled, it being an admitted fact in the case that the fact of his being a shareholder and a very large shareholder in the Atlas Co. was known to the directors of the plaintiff company. The complaint in the present case is this—that though, of course, the terms of the banana contract were well known to the plaintiff company, yet the syndicate agreement, which is the contract annexed to the banana contract, was not disclosed to the directors; but it appears on the face of the banana contract that there were relations, that there must have been relations, between Mr. Keith, the Atlas Co., and Messrs. Phipps & Co., who, along with the plaintiff company, were parties to the banana contract. The nature of the interest is not by this clause required to be disclosed, and the arrangements which were therefore made for the remuneration of the Atlas Co., in respect of certain services which, as appears by the banana contract, they were to render, Sir Arthur Forwood was under no obligation to disclose. I think on that short ground, as regards the membership of Sir Arthur Forwood in the Atlas Co., he was not under any liability to make any disclosure of the syndicate agreement, and therefore must be exonerated from the relief that is sought against his estate in the present action.

But that was not the sole interest of Sir Arthur Forwood in these matters. He was also a partner in the firm of

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COSTA RICA RAILWAY *v.* FORWOOD, App.

Leech, Harrison & Forwood, and that firm acted as ships' husbands to the ships of the Atlas Co. For their services in that capacity they were remunerated, as is stated in the pleadings, by a commission of 5 per cent. on the gross earnings of the ships. Now the question with reference to that seems to me to be this: Was Sir Arthur Forwood, by reason of his membership in that firm, placed in a position in which his duty and his interest conflicted? The answer I give to that question is No. If his firm had been remunerated by a lump sum, it would seem to me to be scarcely capable of argument. The services to be remunerated were those which took place in carrying, or which were given in the carrying, of bananas from Port Limon to New York; and in fact they were entirely beyond the scope of the contract by which the bananas were conveyed from the interior of Costa Rica to the port. I say, therefore, that if the remuneration had been provided for by a lump sum, it does not seem to me that the case would have been arguable The only reason that gives me any cause of doubt is this—that it is varying and dependent on the earnings of the ships; but it depends on gross earnings, not on profits, and, in my judgment, the fact that it is determined by a sum which includes profits is not sufficient to make the duty of Sir Arthur Forwood as a partner in that firm conflict with his duty as a director of the plaintiff company.

Appeal dismissed.

Solicitors—Norton, Rose, Norton & Co., for appellants; Ashurst, Morris, Crisp & Co., for respondents.

[*Reported by A. J. Spencer, Esq., Barrister-at-Law.*

BYRNE, J.
1901.
Feb. 18, 20.

LEVER *v.* KOFFLER.

Contract—Alternative Written Offer to Let Property or Sell Part—Acceptance of Offer to Let—Statute of Frauds (29 *Car.* 2. *c.* 3), *s.* 4—*Tenancy from Year to Year—Specific Performance*

Where, after negotiations for the letting of a certain property, a letter signed by the agent of the owner and containing an alternative offer to let the property on conditions named therein, or to sell part at the price therein stated, is sent to the intending lessee, and in reply thereto he accepts the offer of the property, there is evidence of a concluded contract for letting sufficient to satisfy the Statute of Frauds.

Dictum of LORD CAIRNS, L.C., *in* Hussey *v.* Payne (48 L. J. Ch. 846, 849; 4 App. Cas. 311, 317), *followed.*

Specific performance of an agreement for a much shorter tenancy than a tenancy from year to year will be granted in a proper case.

Clayton *v.* Illingworth (10 Hare, 451) *distinguished.*

De Brassac *v.* Martyn (11 W. R. 1020) *approved.*

This was an action for specific performance of an agreement between the plaintiff, Mr. Ellis Lever, and the defendant, Mr. Samuel Koffler, whereby the defendant agreed to let to the plaintiff certain premises situate at Colwyn Bay, North Wales, known as Min-y-don, and containing eight acres or thereabouts, upon the terms mentioned in a letter or memorandum dated April 12, 1900, addressed to the plaintiff and signed by the defendant's authorised agent, and there was a claim, in addition or alternatively to specific performance, for damages.

In April, 1900, the plaintiff, who had let his own house on a tenancy with about two years to run, and who had his furniture warehoused, was desirous of renting a house at Colwyn Bay. The defendant, who was the owner of the premises in question, being a house and grounds known as Min-y-don, had employed Mr. J. M. Porter, a local surveyor, to let or sell it. The plaintiff and Porter got into

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communication, and Porter forwarded the plaintiff particulars of the property. On April 11 the plaintiff telegraphed to Porter from Liverpool, "Disposed to rent Min-y-don on terms provided landlord will renovate."

On April 12 Porter wrote to the plaintiff the following letter:

"*Re* Min-y-don.

"I interviewed the owner this morning and after a lengthy discussion got him to agree to the following proposal which is firm, and will be open for your consideration up to Thursday next at 12 noon. He will let you the place upon an annual tenancy only at the rent of one hundred and fifty pounds (150*l.*) and will allow you 20*l.* towards decorating, &c. Should the owner require possession and serve you with notice to quit at the end of the second year he will allow you the sum of fifty pounds (50*l.*) as compensation for disturbance.

"Do. Do. Third year Do. the sum of Thirty pounds (30*l.*).

"Do. Do. Fourth year Do the sum of Twenty five pounds (25*l.*).

"Do. Do. Fifth year Do. the sum of Twenty pounds (20*l.*).

"Immediate possession would be given.

"Tenancy to commence at Midsummer 1900.

"He will sell you the residence, outbuildings, gardens and grounds, the whole covering an area of four acres only with entrance to Beach Road and right of way over new road from Abergele Road, reserving to himself the right to define boundaries of the land included in the four acres; at the price of Five thousand pounds (5,000*l.*). Mortgage of 4,000*l.* at 4½ per cent. can be left on. This proposal also is open for your consideration up to Thursday next at noon. The owner will not grant any option of purchase in the tenancy agreement."

The plaintiff called at Porter's office on Thursday, April 19, at 11.30 A.M., and agreed to accept the defendant's terms, and on Porter's suggestion he wrote the following letter, which he then gave to Porter:

"Colwyn Bay, April 19, 1900.

"J. M. Porter, Esq.

"Referring to your offer of Min-y-don of the twelfth April, I hereby accept same on the conditions named therein.

"ELLIS LEVER."

The defendant subsequently repudiated the tenancy agreement, and this action was commenced on July 25.

E. P. Hewitt, for the plaintiff.—Specific performance ought to be decreed. There was a concluded contract for the tenancy. In addition to the acceptance in writing there was a verbal acceptance. Where the contract is made out from correspondence the Court will look at all the letters. Fairly construed, the agreement is not for a tenancy that could be determined at the end of the first year. The Court will seize hold of slight indications of intention in order to construe agreements of this kind as creating a tenancy for two years at least—*Doe d. Clarke* v. *Smarridge* [1845][1] and *Doe d. Chadburn* v. *Green* [1839].[2] Here the sliding scale of compensation for disturbance in the memorandum itself furnishes such an indication of intention.

But even if the tenancy in this case is one that could be determined at the end of the year the plaintiff is entitled to specific performance — *De Braesac* v. *Martyn* [1863].[3]

In *Clayton* v. *Illingworth* [1853][4] the Court refused to compel specific performance of an agreement for a tenancy from year to year on the ground that there was an existing agreement that could be enforced at law.

[He also referred to *Fry on Specific Performance* (3rd ed.), pp. 30, 31, and *Leake on Contracts* (3rd ed.), p. 965.]

Rowden, K.C., and *Gatey*, for the defendant.—The Statute of Frauds is a good defence to this action. A memorandum in writing which contains two alternative offers, one only of which is to be accepted, does not satisfy section 4, inasmuch as the memorandum alone does not shew what was the ultimate agreement; and it is necessary to read the acceptance if written, or to have evidence

(1) 14 L. J. Q.B. 327; 7 Q.B. 957.
(2) 8 L. J. Q.B. 100; 9 Ad. & E. 658.
(3) 11 W. R. 1020.
(4) 10 Hare, 451.

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of the acceptance if oral, in order to ascertain its terms. The material terms of the bargain must be evidenced by the memorandum itself, and a mere equivocal acceptance will not suffice. The offer must be of such a nature that it can be accepted by a simple acceptance.

The memorandum here which was signed by the defendant's agent does not contain the terms of a completed agreement, and does not comply with the statute—*Mundy* v. *Asprey* [1880].[5] It is ambiguous and requires evidence to complete it. Consequently the only evidence as against the defendant is the memorandum, which does not prove what the contract was, and the acceptance which supplements it, but which is not signed by the defendant, and is therefore not admissible.

If, however, there is an agreement for a tenancy, it is only for a tenancy from year to year, and specific performance will not be granted of such an agreement. We rely on *Clayton* v. *Illingworth*[4] on this point.

E. P. Hewitt replied.

Cur. adv. vult.

Feb. 20.—BYRNE, J., after stating the facts, continued: It is clear both on the verbal and the written acceptance that the plaintiff accepted the offer to let. The defendant repudiated this acceptance.

The points raised by way of defence are —First, that there is no agreement in writing or memorandum or note of the terms signed by the defendant or his agent sufficient to satisfy the Statute of Frauds. It is put in two ways: It is said that an alternative offer being made the reply does not define which alternative is accepted. I think it does: there is an offer to let Min-y-don—that is, the house and the whole eight acres—or to sell part of it. The acceptance is of the offer of Min-y-don—that is, the whole of it. There was but one offer of Min-y-don, and that offer has been accepted. Secondly, it is said that, inasmuch as the letter containing the offer contains two offers, the memorandum signed by defendant does not contain the terms, and it was argued that even if a man offers in writing to sell Nos. 1 and 2 in a particular street or either house at a separate named price, and there is an acceptance of the offer so far as regards No. 1, the contract is not sufficiently evidenced in writing. No authority was cited for this, and it was said that none could be produced. I reserved judgment until this morning out of respect for the forcibly urged argument of counsel on the point.

The question being one about a contract by letters I referred to *Hussey* v. *Payne* [1879],[6] which is the leading case on the subject. I find that in that case, after negotiations had been going on for the purchase, by Mr. Hussey, of an estate belonging to Mrs. Horne Payne, that lady wrote a letter: "I cannot accept your offer of 35,000*l.* for my freehold land at North End. . . . I am now willing to divide the difference between your offer and my price, and I am prepared to accept 37,500*l.* for the entire freehold property, or 34,000*l.* for the property without the Mornington House and 1½ acre of ground." This letter was addressed to Mr. Hussey's agent, who sent the following reply: "I beg to acknowledge the receipt of your letter of the 4th inst., stating that you are willing to accept the sum of 37,500*l.* for the whole of your freehold land at North End (including the Mornington House estate), and I hereby, on behalf of Mr. Thomas Hussey, of 96 Kensington High Street, accept your terms as above, and agree to pay you the said sum of 37,500*l.* for your land as aforesaid, extending from Hammersmith Road to the Hammersmith Railway, subject to the title being approved by our solicitors." Earl Cairns, L.C., said: "The first two letters in this case are dated the 4th and the 6th of October." Then he read them, and continued: "Now I put aside these last words, 'subject to the title being approved,' for separate observation, and, putting them aside, I should say that if these two letters were the only information which your Lordships had upon the subject—if the matter had ended here as it began, with these letters—I should

(5) 49 L. J. Ch. 216; 13 Ch. D. 855.

(6) 48 L. J. Ch. 816, 849; 4 App. Cas. 311 317.

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have been disposed to say that there was undoubtedly evidence of a concluded contract sufficient to satisfy the Statute of Frauds. There is property named, there is a price to be paid, and there is the name of the vendor and of the purchaser. And, of course, stopping there again, the words which I have read would imply that the purchase-money was to be paid in the usual way, namely, as soon as the title to the land could be produced by the vendor and a conveyance offered." This is a *dictum*, but one containing a clear expression of opinion and one which I am content to follow. It agrees entirely with the view I had previously formed.

The next defence was that specific performance will not be decreed of an agreement for a tenancy from year to year. I do not think that the present is such an agreement, as I consider it expresses an agreement not determinable before the end of the second year. This point is from lapse of time now immaterial, except as bearing upon the supposed rule. In support of the contention *Clayton* v. *Illingworth* [4] was cited. But in that case it was decided that there was a sufficient agreement in law. A memorandum was signed, and that memorandum referred to an agreement as entered into by the late W. Broadbill. There appears to have been a provision in the Broadbill agreement that the tenant would pay for a formal instrument, and an action for specific performance was brought, as I read the case, for the purpose only of getting the formal document executed in pursuance of the agreement which had been entered into. Vice-Chancellor Page-Wood observed in the course of the argument that the agreement expressed no term during which the tenancy was to continue; and enquired whether there was any authority to shew that this Court would interfere to enforce the specific performance of an agreement for letting from year to year. Then there is the argument of counsel, and the Vice-Chancellor said "that he was not aware it was usual to have a lease under seal in the case of a yearly tenancy; and the reference to an agreement, to be paid for by the tenant, might be explained by the fact, that the present agreement was made with the agent of the lessor, and not with the lessor himself. Equity interposed to compel specific performance in cases where the legal remedy was inadequate; but in this case he did not see why the remedy at law would not be sufficient. An action might be brought upon the agreement, and the full terms of the agreement could be shewn by proving the former agreement with Broadbill, to which it referred, thereby importing that agreement into the agreement before the Court. In the absence of any authority for the interference of this Court in such a case, he must dismiss the claim." In other words, as I read it, the Vice-Chancellor, in the exercise of his discretion, held that it was an idle action to bring, inasmuch as there was an agreement enforceable at law, and it would only have put the tenant to the expense of having the second formal document, which would be no more effectual. In *De Brassac* v. *Martyn* [3] I think it is clearly recognised by the Court that the right to specific performance may exist even in the case of a much shorter tenancy in a proper case. In that case there was an agreement to take a house from February to September, 1862. The action, which was commenced before the period had elapsed, did not come on for hearing until after the period had elapsed. The learned Judge, after dealing with other parts of the case, finally declared "that the plaintiff was entitled, at the time of filing the bill, to specific performance of the agreement of December 9, 1861; but the term having elapsed during which the agreement was to be enforced, the Court will not now decree specific performance. Inasmuch as the plaintiff made no attempt to have the cause advanced, the Court makes no reference as to damages, but orders defendant to return the 100*l.* [deposit]." In that case, in the ordinary course of the Court, an application might have been made to advance the cause. It appears to me that, although specific performance is a discretionary remedy, it will be granted even in the case of a very short term in a proper case.

I think this is a proper case for granting the relief asked. There will be judgment for specific performance and an

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enquiry as to damages in addition, with costs.

Solicitors—Belfrage & Co., agents for Chamberlain & Johnson, Llandudno, for plaintiff; Hamlin, Grammer & Hamlin, agents for Gamlin & Williams, Rhyl, for defendant.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

BUCKLEY, J. 1901. March 5.

MORRISON, *In re*; MORRISON *v.* MORRISON.

Executor — Administration — Partnership Property—Sale for Shares in Company to be Formed—Sanction of Court—Jurisdiction.

The Court has no jurisdiction to sanction the sale of a testator's business for shares or debentures in a company to be formed to take it over.

Crawshay, *In re*; Dennis *v.* Crawshay (60 L. T. 357), *followed.*

West of England Bank *v.* Murch (52 L. J. Ch. 784; 23 Ch. D. 138) *distinguished.*

Adjourned summons.

Martin Morrison, by his will dated June 6, 1894, devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his trustees upon trust to sell, call in, and convert into money the same or such part thereof as should not consist of money, and out of the proceeds and his ready money to pay his funeral and testamentary expenses, debts, and legacies, and to invest the residue, and to stand possessed of his residuary trust moneys upon trust to pay his wife during her widowhood an annuity of 2,000*l*, and his sister-in-law, Olive Sutton, during her life after her father's death an annuity of 100*l*. so long as she remained unmarried; and after his wife's death or second marriage to hold the trust funds upon trusts for the benefit of his children.

The will contained the following provisions:

"My trustees shall at the request of my wife carry on or permit my wife to carry on so long as she may think proper the farming operations carried on by me at the time of my decease without being answerable for any loss occasioned thereby for a period of 12 calendar months from the 6th of April next after my death and may postpone the sale and conversion of my real and personal estate or any part thereof (except such part of my personal estate as may at the time of my death consist of the stock or shares of any unlimited Company which I direct my trustees to sell as soon as possible after my death) for so long as they shall think fit And as to my share in the Manvers Main Colliery Company Limited and Houghton Main Colliery Company Limited I hereby express my desire without intending hereby to control the discretion of my trustees that they shall continue to hold the same unsold and unconverted and the rents profits and income to accrue from and after my decease of and from such part of my estate as shall for the time being remain unsold and unconverted shall after payment thereout of all incidental expenses and outgoings be paid and applied to the person or persons and in the manner to whom and in which the income of the moneys produced by such sale and conversion would for the time being be payable or applicable under this my will if such sale and conversion had been actually made and my Trustees may let and concur in letting any hereditaments for the time being remaining unsold either from year to year or for any term of years at such rents and subject to such covenants as they shall think fit and accept surrenders of Leases and tenancies and generally may manage the same in such manner as they shall think fit.

"In addition to the securities authorised by the Trustee Act 1893 or any statutory modification thereof my Trustees may continue to hold my present investments so long as they think fit and may lay out the trust funds in the purchase of freehold and copyhold estates in England and Wales."

The will contained no reference to the ironmasters' business in which the testator was a partner at the time of his death.

The testator died on February 1, 1900.

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MORRISON, IN RE.

The testator left him surviving his widow and six infant children.

The testator at his death was the owner of a one-fourth share in the property and business of ironmasters, which he carried on in partnership with four other persons under the style of the Renishaw Iron Co. The testator was the managing partner of the business. The book value of the testator's capital in the business on December 31, 1899, was 13,374*l.* 2*s.* 8*d.*

Shortly before the death of the testator arrangements had been made between the partners and himself for the sale of the partnership assets, property, and business to a company to be incorporated under the Companies Acts, 1862 to 1898, and an agreement of sale had been prepared, but had not been actually executed by the testator.

By an agreement dated July 18, 1900, and made between the surviving partners of the testator, the executors of his will, and a trustee for an intended company, the partners and the executors agreed to sell the partnership assets, property, and business to the intended company for 40,000 fully paid shares of 1*l.* each and 20,000*l.* 5 per cent. mortgage debenture stock, being the whole amount of the issue of such stock. The agreement was substantially the same as that prepared for the testator's signature, with the necessary modifications caused by his death. The testator's share of the proceeds of sale was 10,000 fully paid shares of 1*l.* each and 5,000*l.* debenture stock. The total nominal capital of the company was 75,000*l.* in 1*l.* shares. The agreement was conditional upon the sanction of the Court being obtained to it within six months of its date.

By an agreement dated January 14, 1901, the period of six months was extended to nine months, and the date on which the property was to be taken over was altered from December 31, 1899, to June 30, 1900.

This was an originating summons taken out by the executors of the will, asking—first, that the agreement of July 18, 1900, might be approved as a proper agreement to be entered into by the applicants as executors and trustees of the will; and secondly, that they as such executors and trustees might be authorised to hold the shares and debenture stock of such company coming to them under the agreement for so long as they should think fit, as if the same had formed part of the testator's estate.

Ingpen, K.C., and *J. Fischer Williams*, for the summons.—It is admitted that there is no reported case in which the Court has sanctioned a sale of a testator's business in consideration of shares and debentures in a company to be formed to take over the business. But there have been numerous cases in chambers in which such a course has been sanctioned—see *Low* v. *Seddon*, Stirling, J., August 4, 1890; *Sir Titus Salt, Bart., deceased, In re; Salt* v. *Wright*, Jessel, M.R., July 27, 1881; and *Boyce* v. *Bullard*, Stirling, J., March 25, 1895 (all cited in *Palmer's Company Precedents* (6th ed.), Part I., pp. 496 and 497); *Holroyd, In re*, July 26, 1887 (unreported); and *Bland, In re*, North, J., December 19 and 21, 1891 (unreported).

[BUCKLEY, J. — Assuming the expediency of the proposed arrangement, what jurisdiction have I to make the order?]

We put it on the ground of a compromise of strict rights—to get rid of a liability and to sell something which is unsaleable.

[BUCKLEY, J., referred to *West of England Bank* v. *Murch* [1883].[1]]

The advantage to be derived from the sanction of the Court to the arrangement would be that there would be a company which would relieve the business from its liabilities. If there were a forced sale of the business it might not realise sufficient to discharge the liabilities. *Crawshay, In re; Dennis* v. *Crawshay* [1888],[2] is distinguishable on the ground that there was there no express direction to wind up or continue the business. In any case it is submitted that, having regard to the numerous cases in which orders have been made, it ought not to be followed.

H. Charlton Hawkins, for the widow and six infant children.—It is very much

(1) 52 L. J. Ch. 784; 23 Ch. D. 138.
(2) 60 L. T. 357.

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for the benefit of the infants that the proposed arrangement should be carried out. Under the will the trustees have a discretionary power to postpone the sale of the testator's property, which involves a power to carry on the business during the period of postponement—*Crowther, In re; Midgley* v. *Crowther* [1895].[3] By selling to a company for shares the trustees will in effect be carrying on the business in a new and improved form.

BUCKLEY, J., stated the facts, and continued: In my opinion I have not jurisdiction to approve the agreement. In substance it amounts to one of two things—either it is a sale and an investment of the proceeds in unauthorised securities, or it is an exchange of property of the testator for other property which the trustees are not authorised to hold. Thus stated, it would seem plain that there is no power in the trustees to do it; and therefore no power in the Court in the general administration of the estate to do that which, if done by the trustees, would be a breach of trust. It is said that many such orders have been made in chambers. I recollect very well the most prominent instance, that of Sir Titus Salt in 1881. It was a most exceptional case. There were a great number of legacies of very large amount, and the magnitude and nature of the property was such that it was impossible to realise the assets for cash. I well remember what Sir George Jessel said in making the order in chambers, but I will not repeat it. There have been other unreported cases in which similar orders have been made, but they have all, I think, been what I may call benevolent orders made to help the parties. There are two reported cases. The first is *West of England Bank* v. *Murch*,[1] in which Mr. Justice Fry found his way to make such an order in these circumstances: The testator was a partner in a firm which was largely indebted to a bank and other creditors, and the arrangement was one by which his executrix and the surviving partner concurred in a sale of real estate forming part of the partnership property to a limited company for cash and fully paid shares and debentures, which were handed over to the bank in satisfaction of their debt. The bank were to pay all the other creditors of the firm, to hand back to the executrix, the widow, a sum of cash and some of the debentures, and to provide certain benefits for the surviving partner. Upon a subsequent sale made by the company, the purchaser raised the question whether the executrix had power to sell the property for a consideration not entirely paid in money. Mr. Justice Fry decided the case entirely upon section 30 of Lord Cranworth's Act, as being a compromise with the creditors of the firm. He says this: "Under Lord Cranworth's Act she (*i.e.* the executrix) had power to compromise, and by the arrangement into which she then entered, she did compromise any questions between herself and Mr. T. W. Booker (the surviving partner). I regard the transactions as in substance a compromise by the executrix with the bank and with her deceased husband s co-partner." The other case is a decision of Mr. Justice North—*Crawshay, In re; Dennis* v. *Crawshay*[2]—in which *West of England Bank* v. *Murch*[1] was cited and relied upon. That was a case in which the testator gave an annuity to his wife and legacies to trustees for the benefit of his seven daughters and their husbands and children, and he bequeathed one moiety of his share of the businesses carried on by him in partnership with his two eldest sons to trustees upon trust for his youngest son, and he devised and bequeathed the residue of his real and personal estate to his two eldest sons in equal moieties, and he authorised his trustees to postpone the realisation of his estate and to carry on and manage any trades or businesses in which he might be engaged at his death for so long as they should think fit. He settled his daughters' shares, and authorised his trustees to sell any part of his residuary trust estate. The facts were that the debts and legacies exhausted the testator's estate other than his business; and a proposal was made for the formation of a limited company to which the business should be sold for a price to be paid in shares and debentures of the company, and that these should be allocated in

(3) 64 L. J. Ch. 537; [1895] 2 Ch. 56.

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satisfaction of their legacies among the persons interested in the property.

A petition was presented for the sanction of the Court to this scheme, and Mr. Justice North said: "Two questions arise upon the application: first, as to whether the Court has jurisdiction to do what it is asked to do; secondly, if so, whether what is asked for is likely to be beneficial for the parties interested. I am told there is strong evidence on the second point; but I think I have no jurisdiction to sanction the scheme, and the question whether it would be beneficial or not does not really arise." He then states the provisions of the will and the scheme for a sale to a company and the division of the shares among the members of the family, and continues: "I cannot look upon that as a sale to a going company, because what is proposed is something more than that. It may be true that the interests to be given to the legatees may be capable of being offered for sale; but it is clear that what is done by the scheme is really to substitute for legacies and other interests in the testator's estate, interests in the company proposed to be formed. What the testator provides for is a sale of one-half of his moiety of the business, and he did not contemplate it being retained in specie. Mr. Everitt says the powers given to the trustees by the will are very large. I think they are large, but not large enough to authorise the scheme now proposed. I should not be administering the trusts created by the testator if I consented to this scheme. I should be altering his trusts and substituting something quite outside the will. On the assumption that the scheme would be beneficial to the estate, I cannot decide that I have jurisdiction to authorise it." I feel myself exactly in the position of Mr. Justice North. I have not heard the evidence, but I assume the arrangement to be expedient and beneficial. I have not, however, found and counsel has not found any authority to shew that I have jurisdiction to make the order, and upon the authority of the decision of Mr. Justice North I have none. As to the cases cited from Mr. Palmer's book, it does not appear what were the trusts under which the property was held. In my opinion there does not reside in the Court any power to allow trustees to take, on the ground that it is beneficial, an investment which the testator has not authorised—I must therefore refuse the application. Having regard to the state of the authorities, I think the application was not an unreasonable one, and the costs of all parties will come out of the estate.

Application refused.

Solicitors—Tarry, Sherlock & King, agents for Trotter, Bruce & Trotter, Bishop Auckland, for all parties.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

FARWELL, J. 1901. March 20.

SELOUS, *In re*; THOMSON *v.* SELOUS.

Merger — Equitable Owners — Acquisition of Legal Estate — Commensurate Interests.

The rule that where an owner of an equitable interest acquires a commensurate legal estate the equitable interest will merge in the legal estate, applies where two persons become entitled to commensurate legal and equitable interests.

The difference in value between a tenancy in common and a joint tenancy is so small and of so unsubstantial a character that it will not by itself prevent an equitable interest in common merging in a commensurate legal estate in joint tenancy.

Henry Courtenay Selous, the father of the testatrix in the cause, by his will dated July 23, 1875, made a residuary devise and bequest to trustees in trust for his wife for life with remainder in trust for his three children, J. P. Selous, E. E. Selous, and A. M. Warren, or any of those three who should be living at the time of the death of his wife, in equal shares and proportions. By a codicil dated September 9, 1890, the said H. C. Selous revoked the bequests made to A. M. Warren, and directed that her share of such bequests should be paid over

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to his two daughters, J. P. Selous and E. E. Selous, share and share alike, or to the survivor of them. The trustees of the will were also executors.

The testator survived his wife, and died on September 20, 1890. His will and codicil were duly proved by G. W. Medley, the surviving executor and trustee, on November 7, 1893.

By an indenture dated June 24, 1895, G. W. Medley, at the request and by the direction of the defendant J. P. Selous, and E. E. Selous, assigned to them a leasehold messuage which formed part of H. C. Selous' residuary estate, "To hold the same unto the said J. P. Selous and E. E. Selous as joint tenants" for the residue of the term. The assignment contained a covenant by "the said J. P. Selous and E. E. Selous" with G. W. Medley that "they the said J. P. Selous and E. E. Selous" would pay the future rent and observe and perform the covenants, and indemnify G. W. Medley and his testator's estate against all claims and demands on account of the same. Neither lady executed the assignment.

E. E. Selous died on September 15, 1900, and the plaintiffs were her executors. They took out an originating summons, asking (amongst other things) whether the estate of the testatrix was entitled to a half or any other part of the leasehold messuage, or whether J. P. Selous was entitled to the entirety thereof.

Jason Smith, for the plaintiffs.—The equitable interest of the testatrix is not merged in the legal estate. In *Key and Elphinstone's Precedents in Conveyancing* (6th ed.), p. 405, the proper form of conveyance in the case of a partnership is said to be to the partners as joint tenants in trust for themselves "as part of the co-partnership estate." There is no case in which a merger of the equitable in the legal estate has been held to take place where more than one person is entitled.

T. T. Method, for the defendant J. P. Selous.—If the two ladies had executed the assignment, they would have been bound by the terms of the document —*Lee* v. *Lee* [1876].[1] That proceeds on the expression of assent which was here given by the acceptance of the conveyance. They were probably consulted as to the form. Upon the main question the plaintiffs' claim fails—*Selby* v. *Alston* [1797][2] and *Douglas, In re; Wood* v. *Douglas* [1884].[3] There can be no principle requiring a different construction because two persons are interested.

Bovill and *Rayner Goddard*, for parties not interested in the question, took no part in the argument.

FARWELL, J., after stating the facts to the effect above stated, continued: It has been argued for the plaintiffs that notwithstanding the form of the deed—the conveyance being to the two ladies as joint tenants, and the covenant of indemnity being by them jointly—they still intended to hold as tenants in common. In my opinion that is not the true view. I think the principle of *Selby* v. *Alston*[2] applies. It is well established that a person cannot be a trustee for himself in the case where both interests are commensurate, and I am unable to see why the same principle should not apply where two persons are so interested. The only difficulty that I felt was that a tenancy in common has sometimes been said to be of a more beneficial character than a joint tenancy, and it might therefore be contended that there ought to be a presumption that a merger was not intended to take place. But the difference in the benefit to be derived from a tenancy in common and from a joint tenancy is so small, and of so unsubstantial a character, that I do not think that it affords any ground from which any such presumption should be drawn. I think that these two ladies did not intend to be trustees for themselves, and I declare the survivor to be alone entitled.

Solicitors—Taylor, Son & Humbert, for all parties.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

(1) 46 L. J. Ch. 81; 4 Ch. D. 175.

(2) 3 Ves. 339.

(3) 54 L. J. Ch. 421; 28 Ch. D. 327.

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KEKEWICH, J.
1901.
Feb. 21. March 4, 12.
POLLARD *v.* GARE.

Easement — Light — Implied Grant — Derogation — Lease — Building Land — Injunction — Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.

In the absence of special facts the doctrine that a grantor cannot derogate from his own grant must be applied without limit or restriction to a claim for access of light by the lessee of a house from the owner of building land, as against a subsequent grantee of adjoining land from the same owner.

Where such a lease contains no express grant of lights, the general words of section 6 *of the Conveyancing Act*, 1881, *will be read into it.*

Broomfield *v.* Williams (66 L. J. Ch. 305; [1897] 1 Ch. 602) *applied and followed.*

Action.

The plaintiff was the legal personal representative of Sophia Hartas, who died in 1896. On August 24, 1883, Ellen Maria Walls and Ada Emma Walls entered into an agreement with Sophia Hartas that, so soon as she had erected a house of the character therein mentioned upon the vacant piece of land which was the subject of the agreement, they would grant her a lease of the piece of land, as delineated on a plan to the agreement. The house was erected and called Rosedale. On September 29, 1884, E. M. Walls and A. E. Walls granted a lease of this house, and the site thereof, to Mrs. Hartas, for a term of ninety-nine years from September 29, 1883, at the yearly rent of 10*l.* 10*s.* The lease contained no express grant of any right to light over the adjoining lands, nor was there any express reservation of any rights to the grantors.

Both the agreement and the lease had plans attached which shewed that the adjoining land was set out in plots and a building-line marked, indicating that the land was to be applied for building purposes; but there was no definite building scheme proved to be existing at the time, to shew where the houses were to be built.

On May 13, 1887, an adjoining piece of land, to the north of the premises demised to Mrs. Hartas, was conveyed by E. M. Walls and A. E. Walls to the defendant, Mary Ann Gare, in fee-simple.

In September, 1900, the defendant erected a screen or hoarding within about six feet three inches of the kitchen window of Rosedale, so as to obstruct the light thereto, and the defendant claimed her right to do so to prevent the plaintiff acquiring any right by prescription.

The action was originally framed to restrain the defendant from allowing this hoarding to remain in such a manner as to darken the access of light to the kitchen window of Rosedale. The defendant agreed to remove it, but claimed a right to build a house according to a specified plan, so as to darken the window to the same extent as the hoarding did. The plaintiff, by leave, amended his pleadings by alleging that the defendant threatened and intended to build so as to interfere with the access of light. A plan of the proposed house, which was similar in size to the plaintiff's, was submitted by the defendant, and there was evidence that it darkened the plaintiff's windows. The action now came on for trial.

Renshaw, K.C., and *Marcy*, for the plaintiff.—The present is a case where the well-settled principle of law that a person cannot derogate from his own grant must be applied. Here there were conveyances of two plots from an original common owner. It might have been different if there had been a definite building scheme by which all were bound. The erection of the hoarding was clearly wrong—*Wilson* v. *Queen's Club* [1891].[1] Ever since the decision in *Swansborough* v. *Coventry* [1832][2] the mere fact that some of a grantor's land has been retained with the view of being used for building purposes will not give him a right to obstruct the access of light which has been impliedly granted to another. The principle is clearly recognised in

(1) 60 L. J. Ch. 698; [1891] 3 Ch. 522.
(2) 9 Bing. 305.

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POLLARD v. GARE.

Myers v. *Catterson* [1889] [3] and in *Broomfield* v. *Williams* [1897].[4] The defendant may seek to bring himself within *Birmingham, Dudley, and District Banking Co.* v. *Ross* [1887],[5] but in that case there was a distinct building scheme of which the plaintiffs were aware, and they had stipulated that there should be an intervening passage of a defined width adjoining the new building complained of.

P. O. Lawrence, K.C., and *A. L. Morris*, for the defendant.—At the date when the agreement was entered into, which is the crucial date, there was no house in existence. This estate was a building estate intended to be developed according to a plan, and Mrs. Hartas was aware of this, and the plan shewed the plots. The plaintiff, therefore, is not entitled to claim any greater easement of light than can be implied from this knowledge which was possessed by his testatrix at the time. Otherwise the defendant might be precluded from building at all on land specially sold for that purpose. The case comes within the principles laid down in *Birmingham, Dudley, and District Banking Co.* v. *Ross*.[5] The case of *Beddington* v. *Atlee* [1887] [6] shews what is the time for ascertaining the rights. The plaintiff's right here is not unlimited, but must be modified so as to permit the defendant to build in a reasonable way as proposed. At the time of the agreement and lease Mrs. Hartas must have contemplated that adjoining owners would build in the same way that she did.

Renshaw, K.C., in reply.—The case is within *Broomfield* v. *Williams* [4] It is the lease and not the agreement which defines the rights of the plaintiff. The plaintiff's claim to light can also be based upon section 6, sub-section 2 of the Conveyancing Act, 1881, which enacts that a conveyance of land with a house on it includes the "lights" enjoyed with the house at the time of the conveyance. There being no definite building scheme here, the defendant can build anywhere on her land, and the injunction will occasion no hardship.

(3) 59 L. J. Ch. 315; 43 Ch. D. 470.
(4) 66 L. J. Ch. 305; [1897] 1 Ch. 602.
(5) 57 L. J. Ch. 601; 38 Ch. D. 295.
(6) 56 L. J. Ch. 655; 35 Ch. D. 317.

KEKEWICH, J.—By the agreement of August 24, 1883, Mrs. Sophia Hartas, whose legal personal representative is the plaintiff, contracted with the two ladies who were the common owners of the land, the subject of that agreement, as well as of the land afterwards acquired by the defendant, that she would, within a specified time, build on the land which was the subject of that agreement a house of a specified character; and, on completion of such house, and in consideration thereof, the two ladies contracted to grant her a lease of the land with the house thereon, upon certain terms. The house was erected, and the lease was accordingly granted on September 29, 1884. There was some argument on the question whether the plaintiff's rights, as against the grantors, over the adjoining land, depended on the agreement or on the lease executed in pursuance thereof. To my mind this question is of no material importance. From the date of the agreement Mrs. Hartas was entitled to a lease according to the terms thereof, subject only to the fulfilment of her contract to erect a house. It was, of course, competent to the parties to waive or alter any of the terms on either side of the contract, but in fact, nothing of this kind was done, and it must be taken that the grantors were satisfied that Mrs. Hartas had performed her part of the contract, while, on the other hand, she accepted the lease which was actually granted as a performance by the grantors of their part. For the present purpose, however, I will accept, without more, the contention of the defendant that the rights must be treated as fixed at the date when the agreement of August 24, 1883, was entered into. That date accepted, it is strictly true that the two ladies agreed to grant and Mrs. Hartas agreed to take a lease, not of a house, but of a vacant piece of land; but on that piece of land Mrs. Hartas had bound herself to build, as a condition precedent to the actual lease, a house of a specified character.

The doctrine that a grantor cannot derogate from his own grant must be applied not only to the vacant piece of land, but to the land with the house on

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it according to the contract, which must be taken for this purpose to have been fulfilled. The only question is whether the doctrine is, as regards the access of light, to be applied absolutely—that is, without limit or restriction—or whether any or what limit or restriction must be imposed. Many cases were referred to in argument, but I will only refer to one —namely, that of *Broomfield* v. *Williams*.[4] A study of that case reveals some differences of opinion which on some other occasion may require notice, but which are immaterial here. The plaintiff in that case admitted or conceded, and it may be necessarily, that he could insist upon the application of the doctrine in question only subject to certain restrictions embodied in the order of the Court of Appeal; but these restrictions were postulated by special facts of which we have no trace here. Even apart from these special facts, this case is far weaker in material for restriction than *Broomfield* v. *Williams*,[4] which is an authority for holding that such material as there is does not justify any qualification of the doctrine that, as regards access of light, with which alone we are concerned, a grantor must not derogate from his own grant. It was urged on the defendant's behalf that there was here, to the knowledge of Mrs. Hartas, at the date of her agreement, a building scheme affecting the land the subject of the agreement, and the adjoining land. What the building scheme was nobody pretended to say, and it is clear that there was no building scheme, so far as that phrase is generally used and understood. The estate was marked out on the plan, if not on the ground, in building lots, and there was also a building line marked on the plan so as to extend through all the lots; but these are just the facts which, in *Broomfield* v. *Williams*,[4] were held insufficient to restrict the application of the doctrine. The right to build remains, but there is nothing from which it can be inferred that the grantors were to be at liberty to build in any particular place, or to build houses similar to that of Mrs. Hartas, so as to interfere with the access of light to the latter. If that be so, there is no room for considering what is reasonable, or rather what would have been reasonable if the parties had weighed it; and there can be no question of hardship, the defendant necessarily succeeding to the obligations as well as to the rights of her grantors.

Thus far the case has been treated as entirely depending on the application of the doctrine above quoted. But it may also be treated as depending on section 6 of the Conveyancing Act, 1881. I am not concerned to determine whether the provisions of that section can or cannot be imported into the agreement of August 24, 1883, so as to render it applicable to the house not then in existence, but thereby contracted to be built. I am by no means sure that it cannot. But we have the conveyance, that is the lease of September 29, 1884, dated after the erection of the house; and it is inconceivable to me that, whatever effect the agreement might have had in fixing the rights of the parties, the words of the statute ought not to be read into that conveyance. It seems to me impossible to say that you shall not import into the conveyance words which the statute has enacted shall be imported into it. There is clearly no intention to the contrary; and if authority were required for that, *Broomfield* v. *Williams*[4] here again comes to our assistance. The defendant fails from this point of view also.

The plaintiff is entitled to an injunction restraining the defendant from building on her land so as to interfere with the access of light to his house called Rosedale, as hitherto enjoyed.

Injunction granted.

Solicitors—Sydney R. Pollard, for plaintiff; Burton, Yeates & Hart, agents for Horne Engall & Freeman, Staines, for defendant.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

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BUCKLEY, J.
1901.
Feb. 28.
March 1, 2.

GARDINER, *In re*; GARDINER *v.* SMITH.

Will—Accumulation—Keeping on Foot Policy as Security against Depreciation in Value of Leaseholds—Accumulations Act, 1800 (39 & 40 *Geo.* 3. *c.* 98).

A direction in a will to apply a portion of the rents of the testator's leaseholds in keeping on foot a policy of insurance to secure the replacement at the expiration of the term for which the lease was held of the capital which would be lost by not selling the leaseholds is not an accumulation within the meaning of the Accumulations Act, 1800, *and is therefore valid notwithstanding that at the testator's death the unexpired residue of the term may exceed twenty-one years.*

Adjourned summons.

William Gardiner, by his will dated October 27, 1893, devised and bequeathed his real and personal estate to trustees upon trust as to certain leasehold houses in Liverpool Road, Islington (the leases of which the testator stated had then only about thirty-three years to run), to stand possessed of and to collect and receive the rents and profits thereof, and after paying thereout the rents reserved by the leases under which he held the same and all other necessary outgoings, if any, and the expense of keeping the same insured against loss or damage by fire, and in good repair, and otherwise performing the covenants of the leases and the interest on the mortgages of and the annuity charged upon the same, to set apart yearly during the residue of the term upon which he held the same out of the net rents and profits thereof the clear yearly sum of 50*l.*, which sum he directed his trustees to pay and apply in or towards the effecting and keeping on foot a policy or policies in some good insurance office in London, to secure the replacement at the termination of the term of capital that would be lost through not selling the said leaseholds And as to the rest of such net rents and profits thereof, the testator declared that the same should be paid and applied and fall into and become part of his residuary trust estate; and he further declared that when and as soon as the policy should fall in and the moneys payable thereunder be received, the same should fall into and become part of his residuary trust estate. And as to the remainder of his real and personal estate, the testator declared that his trustees should sell, call in, collect, and convert the same with power to postpone, and should, after making the payments and setting aside the sums therein directed, stand possessed of the residue and remainder of his real and personal estate, thereinafter called his residuary trust estate, upon trust as to one equal third part thereof for his son W. M. Gardiner for his own use and benefit, and as to the remaining two third parts thereof to hold the net rents and annual profits thereof upon trust to divide the same into two equal parts, and to pay one of such parts to each of his daughters Rose E. C. Smith and Helena S. Collier, for their natural lives; and the testator declared that from and after the respective deaths of Rose E. C. Smith and Helena S. Collier the trustees should hold their respective shares upon trusts for the benefit of their respective children.

The testator died on June 26, 1897.

The Islington leaseholds mentioned in the will were held for a term which would expire in 1927, and were valued in November, 1897, for the purpose of the Inland Revenue Account, at 2,879*l.* 16*s.*

In pursuance of the direction contained in the will for securing the capital value of the Islington leaseholds upon the term for which they were held expiring, the executors had effected a policy of assurance dated January 4, 1898, with the Sun Assurance Office, and had paid the three annual premiums of 50*l.* on the policy.

This was an originating summons taken out by W. M. Gardiner and W. H. Fryer, the present trustees of the will, for the determination by the Court of the question (*inter alia*) whether the direction contained in the will of the testator out of the rents and profits of the Islington leaseholds to apply the sum of 50*l.* in

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GARDINER, IN RE.

keeping on foot a policy to secure the replacement, at the termination of the leases, of the capital which would be lost through not selling the leaseholds, was void to any, and what, extent under the Accumulations Act, 1800 (commonly called the Thellusson Act), or the rule against perpetuities, or otherwise.

It was admitted that the direction was not void under the rule against perpetuities.

Martelli, for the summons.—The direction in the will to pay the premiums out of the rents is not an accumulation within the Thellusson Act—*Bassil* v. *Lister* [1851].[1]

[He was stopped.]

R. H. Hodge, for the defendants Rose E. C. Smith and Helena S. Collier, the tenants for life of two-thirds of the residuary estate.—The direction is an accumulation within the Thellusson Act. The preamble to that Act is directed against the postponement of the beneficial enjoyment of all estates, real and personal. Section 1 draws no distinction between wasting and other property; it prohibits the accumulation of the rents of any class of property. An accumulation for the purpose of replacing wasting property is not within any of the exceptions of section 2 of the Act.

[BUCKLEY, J.—An accumulation for repairs is not within the Act.]

That is no doubt so—*Vine* v. *Raleigh* [1891][2] and *Mason, In re; Mason* v. *Mason* [1891][3]; but those cases only decide that the Act does not interfere with the ordinary trusts for management of property in settlements and wills.

[BUCKLEY, J.—How can you be said to be accumulating anything if you are simply providing a fund to make good wasting property?]

Bassil v. *Lister*[1] is adversely criticised in *Jarman on Wills* (5th ed.), p. 286.

C. S. Crossman, for the defendants entitled in remainder, was not called upon to argue.

(1) 20 L. J. Ch. 641; 9 Hare, 177.
(2) 60 L. J. Ch. 675; [1891] 2 Ch. 13.
(3) 61 L. J. Ch. 25; [1891] 3 Ch. 467.

BUCKLEY, J., stated the facts, and continued: The question is whether the direction in the will to apply a yearly sum out of the rents for a period which exceeds twenty-one years from the death of the testator is void to any and what extent under the Thellusson Act. In my judgment it is not. The language of the Act is as follows: "Whereas it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed should be made subject to the restrictions hereinafter contained." It is then enacted that "no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise soever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated" for more than a certain time. What the testator has here directed is not in my judgment an accumulation within the Act. All that he has done is to direct that the property shall not be diminished. At the end of the term the leaseholds will be gone, and his scheme is that the money shall be there to replace them. Therefore on principle I do not think that this is an accumulation. On the authorities I come to the same conclusion. There is a decision of *Bassil* v. *Lister*,[1] where the policy was not to be effected by the trustees, but had been effected by the testator himself. Vice-Chancellor Turner says: "The dry question I propose to determine is, whether a direction given by a will, to pay out of the income of the testator's property the premiums upon a policy of insurance, effected by the testator upon the life of another person, is valid, for the whole of the life insured," and he answers the question by holding that it is. Further on he says: "It was said that it was an accumulation as to the estate, because the estate receives back a certain sum upon the death of the party whose life was insured; but what the estate receives back is not the accumulation of the income, but a sum payable by the office by

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contract with the testator; and is this an accumulation within the meaning of the statute? The history of the statute goes far to shew that it is not; and I think the language of the enactment confirms that view." He had previously stated what was the origin of the Thellusson Act. That was a more difficult case than the present, because there the premiums paid after the death of the testator did produce a sum on the dropping of the life, and that sum might be regarded as an accumulation. The Vice-Chancellor decided that it was not an accumulation; and if that was not an accumulation *à fortiori* this is not, for you do not here pay premiums so as to get an accumulation: but simply put them together in a heap, so as to have the same and not an increased property at the end of the term. In my opinion *Bassil* v. *Lister*[1] goes much further than I am asked to go in this case. Then there are the decisions of *Vine* v. *Raleigh*[2] and *Mason, In re; Mason* v. *Mason*,[3] to the effect that a trust to apply rents in repairing and reinstating buildings is not within the Thellusson Act. Repairing is keeping the property in as good a state of repair as it formerly was.

In *Vine* v. *Raleigh*[2] Lord Justice Lindley says: "All improvements in substance, which can in any fair sense be regarded as coming under the words, 'maintaining in good habitable repair houses and tenements,' appear to be outside the Thellusson Act altogether." Why? I understand him to mean because they simply keep up the property and do not add to it. An improvement which adds to the property is inside the Act, but an improvement which only keeps up the property is outside the Act.

The decision in *Mason, In re; Mason* v. *Mason*,[3] was to the same effect. Mr. Justice Stirling there held that a trust for accumulation was valid, so far as it was a *bona fide* provision for the performance of the trusts for rebuilding, repairing, and reinstating the buildings. Applying the principles of these cases to the present case, it appears to me that any so-called accumulation which simply keeps up the property to its present value is valid and is not within the Thellusson Act.

Solicitors—Gardiner & Son, for trustees; W. Joynson-Hicks, for other parties.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

COZENS-HARDY, J. 1901. Feb. 20. } TEEDE AND BISHOP, LIM., *In re.*

Company — Winding-up — Creditor's Petition—Voluntary Liquidation—Special Resolution—Invalidity—Resolution not in Accordance with Notice—Reconstruction—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 51, 129, *and* 161.

Notice was given of an extraordinary meeting of shareholders in a company for the purpose of considering, and, if thought fit, passing resolutions for a voluntary winding-up, with the appointment of a liquidator at a fixed remuneration, for the purpose of reconstruction in accordance with the terms of a draft agreement.

At the meeting the only resolution put was for the voluntary winding-up of the company, with the appointment of a liquidator:—Held, *on the petition of a creditor for either a compulsory or supervision order, that a compulsory order must be made, on the ground that the resolution put to the meeting was not in accordance with the resolutions of which notice had been given, and therefore no valid resolutions for a voluntary winding-up had ever been passed.*

Petition by Ellen Stacy Pring, a creditor of the above-named company, for the compulsory winding-up of the company or for the voluntary winding-up to be continued under the supervision of the Court.

The company was incorporated on November 19, 1896, with a capital of 80,000*l.*, divided into 10,000 preference shares of 5*l.* each and 6,000 ordinary shares of 5*l.* each. Capital to the amount

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of 59,370*l.* had been issued and credited as fully paid-up.

The petitioner was a creditor of the company for a sum of 450*l.*, being money lent.

On January 2, 1901, notice of an extraordinary general meeting to be held on January 21, 1901, was given for the purpose of considering and, if thought fit, passing the following resolutions:

"That a reconstruction of the company is desirable, and that the company be therefore wound up voluntarily, and that Mr. Wm. Henry Pannell, of 13 and 14 Basinghall Street, London, E.C., Chartered Accountant, be and he is hereby appointed Liquidator for the purpose of such winding-up, and that the remuneration of the said Liquidator for his services be fixed at the sum of 105*l.*

"2. That the said Liquidator be and he is hereby authorised to consent to the registration of a new company, to be named Teede & Bishop (1901) Limited, with memorandum and articles of association which have already been prepared with the privity and approval of the Directors of this Company.

"3. That the said Liquidator be and he is hereby authorised, pursuant to section 161 of the Companies Act, 1862, to enter into an agreement with such new Company when incorporated in the terms of a draft agreement submitted to this meeting, and expressed to be made between the above-named Company and the said Liquidator of the one part and Teede & Bishop (1901) Ltd., of the other part, and to carry the same into effect with such, if any, modifications as they think expedient, and that the said draft agreement be and the same is hereby approved"

The notice further stated that in the event of the above resolutions being passed by the requisite majority, with or without alteration or addition, another extraordinary general meeting would be held, of which due notice would be given, when the resolutions so passed would be submitted for confirmation.

The notice was accompanied by a circular letter, signed by the chairman of the company, which stated:

"You will receive herewith notice of an extraordinary general meeting of our Company.

"This has been rendered necessary by the position in which the Directors find themselves owing to the action of one of their number—who has since severed his connection with the Company—in entering into abnormally large contracts for currants in September last, which are repudiated by the Board, but in regard to which proceedings are pending, which, if given against the Company, may result in a very serious loss.

"Under these circumstances, it is deemed desirable to delay the payment of the preference interest due on the 1st instant.

"I hope you will be able to attend the meeting, when the position of affairs will be laid before you, the suggestions set out in the accompanying notice submitted, and, it is expected, the result of the pending proceedings announced; but in the event of your being unable to do so, I shall be much obliged by your signing and returning to me (in course of post) the enclosed Proxy; by so doing you will not incur any pecuniary responsibility."

At the meeting held on January 21, 1901, the requisite majority of shareholders present, and those voting by proxy, passed the following resolution: "That the Company be wound up voluntarily, and that Mr. Wm. Hy. Pannell, of 13 & 14 Basinghall St. London, E.C., Chartered Accountant, be and he is hereby appointed Liquidator for the purpose of such winding up." The resolution was subsequently confirmed as a special resolution at an extraordinary general meeting held on February 7, 1901.

The petitioner said that she would be satisfied with a supervision order; but other creditors insisted on a compulsory order, on the ground that no valid resolutions for a voluntary winding-up had been passed, and therefore a supervision order could not be made.

Bramwell Davis, K.C., and *Bateson*, for the petitioner.

[COZENS-HARDY, J.—I require proof that the resolutions for voluntary winding-

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up were properly passed. I am not clear that the notice convening the meeting was valid]

Everitt, K.C., and *Stewart-Smith*, for the company.—Although the resolutions of which notice had been given were not put to the meeting, one resolution—for voluntary winding-up simply—was put and carried by the requisite majority, and was duly confirmed at a subsequent meeting, and it became therefore a valid resolution for voluntary winding-up, binding on all members of the company—*Cleve* v. *Financial Corporation* [1873] [1] and *Stone* v. *City and County Bank* [1877].[2]

Eve, K.C., and *Christopher James*, for creditors supporting the petition and asking for a compulsory order.—There is no valid resolution for voluntary winding-up in existence. The resolution which was put to the meeting and carried was entirely different from those of which notice had been given, and is therefore invalid —*Bridport Old Brewery Co., In re* [1867].[3]

A. H. Carrington, for shareholders supporting the petition and asking for a compulsory order.

COZENS-HARDY, J.—This is a point of some difficulty; but in my judgment there never was a valid resolution for voluntary winding-up. [His Lordship read the circular and notice of the first meeting, and continued:] The meaning of that is: "You are asked to consent to a scheme under which a new company will be formed to take over the assets and liabilities of the old company, and a voluntary winding-up in the ordinary sense will not take place: this will be only a reconstruction scheme. If you do not like to consent, you will have the usual rights of a dissentient under section 161 of the Act of 1862. The usual expenses of a voluntary winding-up will not be incurred, as there is a fixed amount payable to the liquidator." When the meeting was held these resolutions were not put at all; the only resolution put and passed was for voluntary winding-up and the appointment of a liquidator. That is altogether different in its results and objects from what was proposed in the notice. It was not a winding-up to bring into operation the provisions of section 161; in fact, it was not the resolution of which notice had been given. A shareholder receiving the notice might very well say that he would not trouble to attend an ordinary reconstruction meeting, and at the same time have the strongest objection to an ordinary voluntary winding-up, which is something more than a winding-up for the limited purpose of a reconstruction.

I therefore come to the conclusion that there is no valid winding-up in existence, and must make the usual compulsory order.

(1) 43 L. J. Ch. 54; L. R. 16 Eq. 363.
(2) 47 L. J. C.P. 681; 3 C.P. D. 282.
(3) L. R. 2 Ch. 191.

Solicitors—A. G. Berry, for petitioner; J. Vernon Musgrave, for company; Stibbard, Gibson & Co. and Carter & Bell, for creditors.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

BYRNE, J. 1901. Feb. 12, 14. } MIDLAND RAILWAY *v.* WRIGHT.

Railway—Land Purchased for Undertaking — Tunnel — Superfluous Land—Discontinuance of Possession—Possession of Surface by Stranger—Telegraph-wires Over Tunnel—Title to Surface and Space Above—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4. *c.* 27, *s.* 3)—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57).

A stranger may by exclusive possession for the statutory period acquire a title to the surface of land situate vertically over a tunnel forming part of a railway company's undertaking, even although not superfluous land, together with so much of what is beneath the surface as is necessary to the enjoyment of such surface, subject to the right of the railway company to the tunnel and to so much of the underlying and superincumbent strata as is necessary for its proper enjoyment as a railway tunnel.

He may also acquire a title to the space

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above the surface by the exercise of rights of ownership in such space, such as leasing the right to the railway company to carry their telegraph-wires over the land, where it is not shewn that the occupation of the surface is necessary, although it may be convenient, for the purpose of carrying such wires.

Action by the plaintiffs for an injunction to restrain the defendant, his servants and agents, from removing or attempting to remove from over a certain piece of land or any other part of the surface of a certain tunnel any telegraph lines or wires belonging to the plaintiffs.

In 1847 the Leeds and Bradford Railway Co. purchased a small piece of land, part of a larger close of land known as Wood Close, in the parish of Calverley, in the West Riding of Yorkshire, for the purposes of their undertaking, and shortly afterwards constructed a tunnel, known as the Thackley Tunnel, through and under the piece of land at a depth of about eighty feet below the surface. That company, and the plaintiffs as their successors in title, had since continuously down to the present time used the tunnel as part of their undertaking. In 1851 the undertaking and property of the Leeds and Bradford Railway Co., including the Thackley Tunnel and the piece of land, became vested in the plaintiffs.

In 1859 Henry Jowett, a predecessor in title of the defendant, purchased the whole of Wood Close, and entered into possession of the same without notice of the sale of the piece of land through which the tunnel ran, or of any title in the railway company, and he or his successors in title, of whom the defendant was the latest, had continued in possession ever since. In the same year an electric telegraph company, by the permission of Jowett, erected telegraph-posts on each side of the piece of land purchased by the railway company, and passed telegraph-wires across it. The number of the lines or wires had from time to time been increased, and the position thereof had from time to time been shifted and varied to some slight extent, but at the present time the lines or wires, so far as they were over and above the piece of land purchased by the railway company, were over and above that part thereof which lay perpendicularly over the Thackley Tunnel. From about 1864 down to and including 1868, the electric telegraph company paid to H. Jowett a rent of 2*s.* 6*d.* per annum in acknowledgment of the permission given by him to the company to carry their wires over his land in the vicinity of the tunnel; and from 1868 down to and including 1896 the plaintiffs, who in 1868 became entitled to the telegraph-wires as the successors in title of the telegraph company, paid the rent to Jowett and his successors in title. The plaintiffs alleged that the payments of the rent were made by them under the mistaken belief, which they said was common to them and the persons to whom the payments were made, that the wires were not perpendicularly over the Thackley Tunnel; but having, in 1897, discovered the mistake the plaintiffs refused to make any further payments. The defendant therefore claimed to be entitled, should he think fit so to do, to remove the telegraph lines and wires, and this action was then commenced.

The defendant by his counterclaim alleged that the plaintiffs threatened and intended to fence off the piece of land over the tunnel from the rest of Wood Close, and he claimed an injunction to restrain the plaintiffs, their servants and agents, from entering or trespassing upon the piece of land, or erecting or maintaining any fences thereon, or from permitting to remain over or above the piece of land any telegraph lines or wires or other things belonging to the plaintiffs, and for an order to remove the same.

At the trial the plaintiffs disclaimed any intention of fencing off the piece of land in question. It appeared from the evidence of the defendant that he and his predecessors in title had, either by themselves or by their tenants, been in continuous and exclusive possession of Wood Close, including the surface of the piece of land over Thackley Tunnel, for more than thirty years, and had used the same as grazing land, and that the plaintiffs had never exercised any acts of ownership over such surface.

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It was admitted by the plaintiffs' engineer that the occupation of the surface of the piece of land was not necessary, although it was convenient, for the purpose of the telegraph-wires.

Levett, K.C., and *Sargant*, for the plaintiffs.—The plaintiff company have not been dispossessed, nor has there been a discontinuance of possession within section 3 of the Real Property Limitation Act, 1833. The making of the tunnel was an entering into possession of the whole of the land which passed under the conveyance to the plaintiffs, and the mere running over the line by their trains was a continuance in possession. A mine-owner is in a different position. He is the owner of a particular stratum, like the owner of a set of chambers. It is immaterial whether the tunnel is made on the cut-and-cover principle, or by means of an arch. The acts of user committed on the land are in no way inconsistent with the user of the land by the plaintiffs as part of their undertaking, and do not amount to a dispossession—*Leigh* v. *Jack* [1879].[1]

The surface over the tunnel was not superfluous land, and no title to it could be acquired—*Metropolitan District Railway and Cosh, In re* [1880] [2]

In *Bobbett* v. *South-Eastern Railway* [1882],[3] although Denman, J., was of opinion that a possessory title could be acquired against a railway company in the case of land that was not superfluous land, he held that the inference of fact was strong against any exclusive possession in the plaintiff.

Norton v. *London and North-Western Railway* [1879] [4] dealt with superfluous land. Both of these cases, however, deal with land that was separated from the land actually occupied by the company by a vertical and not by a horizontal boundary.

The remarks in *Rosenberg* v. *Cook* [1881] [5] are merely *dicta* in a case between vendor and purchaser where the conditions of sale were very special, and where there had been an actual discontinuance of possession of the surface by reason of the previous sale and conveyance by the company.

In *Mulliner* v. *Midland Railway* [1879] [6] it was held that the alienation of a right of way under an arch was *ultra vires*.

No case has decided that land over a tunnel can by virtue of the Statute of Limitations be treated as severed from the tunnel so as to give a right in some surface stratum of the land. By allowing the defendant to have the benefit of the grazing over the tunnel the plaintiffs have not lost possession. They only claim what is vertically above the tunnel.

But assuming that the defendant has acquired some right in the surface of the land, he has merely acquired the surface and so much of the subjacent soil and the air-space above as has been within the area of user by him for the purposes of grazing operations. The statute only applies where the owner has been out of possession, and some other person has been in actual possession—*Smith* v. *Lloyd* [1854].[7]

Here the statute does not give the minerals below the tunnel to the defendant, because, although there has been no possession by the plaintiffs, the defendant has not been in possession of such minerals.

The ouster by the defendant does not extend to the whole interest of the plaintiffs in the superincumbent air. When once the land is cut up into strata, a person occupying one stratum does not get a title extending beyond the stratum of which he is in possession so as to oust the possession of the true owner of the strata above and below that particular stratum.

[BYRNE, J.—The maxim *Cujus est solum ejus est usque ad cœlum* does not mean that a person gets a property in the air.]

He has a property in the space both above the land and below the surface. A trespasser on a vein of coal only gets so much of the space as he actually enjoys.

In the analogous case of the ownership of a street by a local body it has been held that a "street" included everything that

(1) 49 L. J. Ex. 220; 5 Ex. D. 264.
(2) 49 L. J. Ch. 277; 13 Ch. D. 607.
(3) 51 L. J. Q.B. 161; 9 Q.B. D. 424.
(4) 13 Ch. D. 268.
(5) 51 L. J. Q.B. 170; 8 Q.B. D. 162.
(6) 48 L. J. Ch. 258; 11 Ch. D. 611.
(7) 23 L. J. Ex. 194; 9 Ex. 562.

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was necessary for the reasonable use of the street—*Low Moor Co.* v. *Stanley Coal Co.* [1876],[8] *Wandsworth District Board of Works* v. *United Telephone Co.* [1884],[9] and *Tunbridge Wells Corporation* v. *Baird* [1896].[10]

The general question is not affected by the payments made by the plaintiffs in respect of the wires. Such payments were made under a mistake, which was common to both parties, that the wires, the position of which was varied from time to time, were not over the tunnel. Under these circumstances there was no giving up possession of the vertical space over the tunnel so as to confer ownership on the defendant, but at most it amounted to an easement or a licence.

[They also referred to *Shelford's Real Property Statutes* (9th ed.), p. 119.]

Norton, K.C., and *E. Clayton*, for the defendant.—The land above the tunnel could, having regard to the depth of the tunnel below the surface, have been sold by the railway company as superfluous land. There is no universal rule that land above a tunnel cannot become superfluous land—*Grand Junction Canal Co.* v. *Petty* [1888][11] and *Ware* v. *London, Brighton, and South Coast Railway* [1882].[12] *Mulliner* v. *Midland Railway*,[6] which was discussed in those cases, was the case of a grant of an easement, and so long as there was a possibility of the arches being wanted for use, the land could not be superfluous. No doubt the *dicta* in that case go further than was necessary. It is impossible to sever in title a stratum of air. *Metropolitan District Railway and Cosh, In re*,[2] was also a peculiar case, and different from the present. Cotton, L.J., was of opinion that a horizontal section of land might vest in the adjoining owner as superfluous land.

But even if the land was not superfluous land, a disseisor could obtain a good title under the Statutes of Limitation by possession as against the railway company—*Rosenberg* v. *Cook*,[5] *Bobbett* v. *South-Eastern Railway*,[3] *Norton* v. *London and North-Western Railway*,[4] and *Brighton Corporation* v. *Brighton Guardians* [1880].[13]

[BYRNE, J., referred to *Foster* v *London, Chatham, and Dover Railway* [1894].[14]]

That case turned on the fact that the letting of the arches there was merely a temporary letting.

The defendant here has, according to the evidence, been in possession of the surface and has acquired a title to the same—*Marshall* v. *Taylor* [1895].[15] There a title was held to have been acquired to the surface of land as against the owner of the land, notwithstanding that such owner had cleaned out a drain underneath the land, inasmuch as the user of the drain was not inconsistent with the user of the surface. So here the user of the tunnel was not inconsistent with the user of the surface. In *Leigh* v. *Jack*,[1] which was criticised in *Marshall* v. *Taylor*,[15] there was a street—that is, land purported to be dedicated for a street, so that no person was in possession of it exclusively, and the only act of possession of the person claiming the land was the placing of some goods in the street within the statutory period, while within the same period the owner had repaired the street.

Ownership of the surface of the land gives ownership of everything above and below the surface—*Keyse* v. *Powell* [1853],[16] *Lewis* v. *Branthwaite* [1831],[17] *Seddon* v. *Smith* [1877],[18] *Corbett* v. *Hill* [1870],[19] and *Laybourn* v. *Gridley* [1892][20]—except strata which have been severed before the commencement of the disseisor's possession—*Smith* v. *Lloyd*[7] and *Walker* v. *Jefferys* [1842][21]—and probably strata of which the disseisee remains in actual possession. If the plaintiffs here ever went into possession of the surface they have been dispossessed, and if they have not gone into possession their right to do so has expired.

(8) 34 L. T. 186.
(9) 53 L. J. Q.B. 449; 13 Q.B. D. 904.
(10) 65 L. J. Q.B. 451; [1896] A.C. 434.
(11) 57 L. J. Q.B. 572; 21 Q.B. D. 273.
(12) 31 W. R. 228.
(13) 49 L. J. C.P. 648; 5 C.P. D. 368.
(14) 64 L. J. Q.B. 65; [1895] 1 Q.B. 711.
(15) 64 L. J. Ch. 416, 420, 422; [1895] 1 Ch. 641, 648, 651.
(16) 22 L. J. Q.B. 305; 2 E. & B. 132.
(17) 9 L. J. (o.s.) K.B. 263; 2 B. & Ad. 437.
(18) 36 L. T. 168.
(19) 39 L. J. Ch. 547; L. R. 9 Eq. 671.
(20) 61 L. J. Ch. 352; [1892] 2 Ch. 53
(21) 11 L. J. Ch. 209; 1 Hare, 341.

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Strata of air above the surface cannot be severed in title unless they actually form part of a building, because they could not be made the subject of a feoffment—*Pickering* v. *Rudd* [1815][22] and *Kenyon* v. *Hart* [1865].[23] If such strata can be severed and acquired as distinct from the surface, the plaintiffs have not been in actual possession of the stratum in question; but, on the contrary, the defendant and his predecessors in title have had such possession, for the plaintiffs have by the payment of rent for over twenty years in respect of the wires acknowledged their right.

Levett, K.C., in reply.—As to the contention that the defendant has acquired a title to the land over the tunnel, the cases relied on which contain *dicta* in support of that proposition were all cases in which the surplus land was lateral land. It has never been decided that land vertically above or below a railway line can be acquired by adverse possession. The word "land" includes the surface and much more, and there is nothing in the statute which divides the land into horizontal layers or strata. The test laid down in *Bobbett* v. *South-Eastern Railway*[3] is that there must be exclusive possession, and that cannot exist if one person is using a considerable portion of the land. There must be exclusive possession of some definite cubical space. [*Norton, K.C.*, referred to *Bevan* v. *London Portland Cement Co.* [1892].[24]] In that case there was exclusive possession of a particular cubical space—namely, the tunnel under the highway. *Ware* v. *London, Brighton, and South Coast Railway*[12] only decided that the surplus land was that bounded by a vertical plane and the face of the wall. The division there was vertical and followed *Metropolitan District Railway* and *Cosh, In re*.[2] If the argument on the other side prevails, the defendant acquires a property in the tunnel subject to an easement on the part of the company. In *Seddon* v. *Smith*[18] it was held that possession of the surface of land included the minerals, but there is no case that decides the converse.

Cur. adv. vult.

Feb. 14.—BYRNE, J., after stating the facts, continued: There is no doubt at all that the possession of the defendant and his predecessors has been such an exclusive possession of the surface of the land as in an ordinary case between two individuals would have given him an absolute title to the land and all above and beneath, apart from any question as to the existence of the tunnel below.

Then, turning to the questions arising from the fact of one of the parties to the dispute being a railway company, I may say in the first place that in my opinion the land in question is not superfluous land, and I think that the case of *Metropolitan District Railway and Cosh, In re*,[2] establishes this, notwithstanding a certain doubt which was expressed by Lord Justice Baggallay in that case. I think, further, it is established by the case of *Norton* v. *London and North-Western Railway*[4] (in that case, however, perhaps the opinion of the Court of Appeal on the point was not necessary for the decision of the case), and by the case of *Bobbett* v. *South-Eastern Railway*,[3] and by the observations of Lord Justice Lindley and Lord Justice A. L. Smith, in the case of *Marshall* v. *Taylor*,[15] as to the effect of *Norton* v. *London and North-Western Railway*,[4] that a title may be acquired by possession by a stranger to land of a railway company, even though not superfluous land, and therefore land which the railway company could not sell or dispose of. I may mention incidentally that in cases of charity lands also, where the charity is not competent to dispose of the land, it has been held, and there is no doubt, that a title can be acquired by possession to lands so belonging and not capable of being disposed of—*Magdalen Hospital* v. *Knotts* [1879].[25] It is true that the cases establishing the proposition I have last mentioned, having reference to railway companies, deal with land situate laterally to the company's works, and not to land over a tunnel.

It is said that the possession to give

(22) 4 Campb. 219.
(23) 34 L. J. M.C. 87; 6 B. & S. 249.
(24) 67 L. T. 615.
(25) 48 L. J. Ch. 579; 4 App. Cas. 324.

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title and to dispossess must be an exclusive possession, and it was argued that, although the possession in the present case of the surface has been exclusive, it has not been an exclusive possession of the land, inasmuch as the possession of the tunnel must be looked upon as a partial possession of the whole land, including the surface. I cannot accept this. The possession of the surface *prima facie* gives title to all above and below, subject to the rights of owners beneath and above. It is sufficient for the purposes of the present case to say that I consider that the defendant and his predecessors in title have acquired by possession title to the *solum* and to the surface of the land, with so much of what is beneath as is necessary for the enjoyment of it, subject to the rights of the plaintiffs to the tunnel and to so much of the underlying and superincumbent strata as is necessary for its due and proper enjoyment as and for a railway tunnel.

I do not think it is necessary for me to attempt to draw a division in the strata between the surface of the land and the top of the tunnel, or to define precisely where the property of the surface-owner ends and the property of the railway company begins. A number of illustrations were put and a number of hypothetical cases were presented, some of them involving points of nicety; and it was argued that although a man may acquire by possession a title to a cellar though no part of the house above belongs to him; that although he may acquire a title by possession to a single room in the house; that although he may acquire a title to a cave in a bank or in the ground, supposing it could be detached in some way from the surrounding land,—nevertheless it is necessary that whatever is acquired by means of this exclusive possession must be measurable in some way cubically. I think I am rightly expressing the argument which was addressed to me on this point. If this be true, then I think it would follow that the ordinary rights of the owner of the soil would apply, and that the possession of the soil above would carry everything beneath except that which was the property of another party.

I will not say that a question may not perhaps hereafter arise if a stranger sets up a title by possession to something necessary for the carrying on of the railway undertaking, founded on the notion of acquiring a private right against property which is in a sense dedicated to the public use; but the evidence in the present case is that the occupation of the surface is not necessary for the undertaking, although it is convenient for the purpose of carrying the telegraph-wires.

I think the defendant has shewn title to the surface and to the space above. It appears to me that if there had been any other doubt in the matter it is put an end to in this case, because he has actually exercised such a right of ownership in the space above as to have leased a right to the plaintiffs themselves to carry wires over the land.

I think, therefore, that the action fails, and I refuse to grant an injunction.

Then there is a counterclaim, and that is to restrain the plaintiffs from entering or trespassing on the land. There was a threat to come in upon the surface of the land. I think it would be right to grant an injunction to restrain the plaintiff company from entering or trespassing upon the surface of the land and from erecting or maintaining any fence thereon and from permitting to remain over or above the said piece of land any telegraph lines or wires or other things belonging to the plaintiff company.

Solicitors—Beale & Co., for plaintiff company; Jaques & Co., for defendant.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

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FARWELL, J. 1901. Feb. 9.

WALKER, *In re*; WALKER *v.* DUNCOMBE.

Infant—Maintenance—Settled Land—Tenant in Tail in Possession—Direction to Accumulate Surplus Income—Items of Expenditure—Upkeep of Mansion-House—Subscriptions to Local Charities.

Where a testator settles his property on persons for life with remainders over, and provides for infants being maintained during minority, he does not, when he mentions a sum for maintenance and directs an accumulation of the surplus income, without negative words, necessarily exclude an intention that the estate should be kept up and infants brought up in the way suitable to the position which he has shewn by his will he intended they should ultimately occupy.

The following items of expenditure were authorised by the Court on the application of the above principle: (a) Internal repairs to mansion-house and appurtenances; (b) Maintenance of gardens and pleasure-grounds of mansion-house; (c) Increased sum for maintenance of infant; (d) Tutor, clothing, pocket-money, travelling and incidental expenses of infant; (e) Subscriptions to local charities.

Sir James Walker, Bart., by his will dated September 5, 1882, devised real estates to trustees upon trust that they or other the trustee or trustees for the time being should, as soon as conveniently might be after his death, settle and assure the said real estates to the uses upon and for the trusts, and with and subject to the powers and provisions thereinafter declared and contained—that was to say, to the use of his eldest son James Robert Walker for life without impeachment of waste, with remainder to the use of James Heron Walker (the first son of the said J. R. Walker) for life without impeachment of waste, with remainder to the use of the first and every other son of the said J. H. Walker, severally and successively according to seniority in tail male, with remainders over. The testator (amongst other provisions) directed that the settlement so to be made should contain provisions enabling the trustees or trustee for the time being thereof, during the minority of every person for the time being entitled thereunder, as tenant in tail by purchase to the possession of the said real estates, to manage the same and to receive the rents and profits thereof, and to make any new or additional buildings, fences, plantations, or other improvements thereon, as the same trustees or trustee should think proper and most advantageous for the same estates and the persons interested therein, and to apply for such purposes accordingly any part of the rents and profits of the same hereditaments; and also provisions that the said trustees or trustee for the time being should out of the rents and profits of the same estates raise and levy during the minority of any tenant for life or in tail by purchase in possession as aforesaid, such yearly or other sum for the maintenance, education, or benefit of such minor as his guardian or guardians should in writing direct, not exceeding in the whole until such minor should attain the age of eighteen years the sum of 500*l.* in any one year, and after he should attain the age of eighteen years the sum of 600*l.* in any one year, and should pay the same yearly or other sum or sums of money to such guardian or guardians to be applied to the last-mentioned purposes, either immediately by them, or at their election to be paid to any person or persons to be appointed by them to receive and apply the same to those purposes; and also that the said trustees or trustee for the time being should, during the minority of any tenant for life or in tail by purchase in possession as aforesaid, invest or accumulate the surplus for the benefit of such tenant for life or in tail as aforesaid if he should attain full age, but if he should die under age, then should hold all investments and accumulations of surplus rents during his minority upon the trusts therein directed to be declared concerning the moneys to arise from any sale or exchange of the settled estates under the said settlement which by a subsequent clause were directed to be invested in the purchase of other hereditaments to be settled to the same uses and trusts as in the said settlement

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were directed to be contained. And the testator expressed his desire that the said James Robert Walker should make Sand Hutton his chief residence.

By a codicil to his will the testator bequeathed a sum of 340,000*l.* and the residue of his personal estate (estimated at about 100,000*l.*) to the trustees of his will upon trust to invest the same and the interest thereof upon the same trusts and purposes as in the will declared concerning the moneys to arise under the power of sale and exchange to be contained in the settlement.

The testator died on October 8, 1883.

On August 19, 1884, the settlement directed by the will of the devised real estates was carried into effect by deed of that date.

The testator's son, Sir J. R. Walker, survived his father and died on June 12, 1899. Upon the death of Sir J. R. Walker, his son, Sir J. H. Walker, the tenant for life in remainder mentioned in the will, became entitled in possession. He died on November 25, 1900, leaving his widow, Dame Violet Maud Cecil Walker, and five infant children, of whom the plaintiff (who was born in March 1890) was the eldest.

The plaintiff, suing by a next friend, issued an originating summons praying—first, That the defendant trustees might be authorised to permit Sand Hutton Hall, together with the outbuildings, gardens, and pleasure-grounds, to be used and occupied during the minority of the plaintiff as the residence of the plaintiff and of Dame V. M. C. Walker, the mother, and of the guardians of the person of the plaintiff; secondly, That the defendant trustees might be authorised during the minority of the plaintiff out of the rents, profits, and income of the estate of which the plaintiff under the said will and settlement was tenant in tail in possession, to keep Sand Hutton Hall and the outbuildings thereof, including the greenhouses and all other garden buildings, erections, and walls in repair, so far as regards roofs, main walls, and timber and external repairs, and to pay 4,000*l.* per annum (free of income tax) for the maintenance and education of the plaintiff as from January 1, 1901, to the said Dame V. M. C. Walker, one of the guardians of the person of the plaintiff.

The following facts appeared in evidence: Sand Hutton Hall was the principal mansion-house on the estate, and had been rebuilt by the testator at a cost of 20,000*l.* It had been occupied and maintained by him, and after his death by Sir J. R. Walker, and Sir J. H. Walker in succession, as the family country seat. The cost of maintaining it with the outbuildings, gardens, and pleasure-grounds was 600*l.* a year. The gross income from all sources of the testator's estate was about 24,000*l.* a year, and the net income, after providing for all charges and outgoings, was over 14,000*l.* a year. The minimum annual expenditure required to enable Sand Hutton Hall to be occupied by the applicant as a permanent home with his mother and her children was, according to the scheme prepared by the trustees, 4,000*l.* a year, made up of the following particulars:

	£	s.	d.
Internal repairs to Sand Hutton Hall and outbuildings attached thereto	200	0	0
Maintenance of gardens and pleasure-grounds of Sand Hutton Hall	600	0	0
To be paid to Dame V. M. C. Walker for the maintenance of the plaintiff	2,700	0	0
Tutor, clothing, pocket-money, travelling and incidental expenses of the plaintiff	400	0	0
Subscriptions to local charities	100	0	0
	£4,000	0	0

If the scheme were not sanctioned the infant would have to be maintained in another establishment, and Sand Hutton Hall let if a tenant could be found. Dame V. M. C. Walker had a separate income of her own of about 2,500*l.*, and would receive for the maintenance of the younger children the income of their portions, amounting approximately to another 1,000*l.* a year.

Upon the hearing it appeared that the tenant in tail in remainder was not a party, and it was arranged that he should be added as a party, and his case should be argued by the counsel for the trustees, for whom a separate brief should be produced to the Registrar.

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WALKER, IN RE.

Butcher, *K.C.*, and *T. L. Wilkinson*, for the plaintiff.—The Court has jurisdiction to make the order—*Allan, In re; Havelock* v. *Havelock* [1881],[1] *Collins, In re; Collins* v. *Collins* [1886],[2] and *Alford, In re; Hunt* v. *Parry* [1886].[3] The case which most nearly resembles the present in its facts is *Griggs* v. *Gibson* [1866].[4]

[They also referred to *Barnes* v. *Ross* [1896],[5] *Bennett* v. *Wyndham* [1857],[6] *Greenwell* v. *Greenwell* [1800],[7] *Cavendish* v. *Mercer* [1776],[8] and *Fendall* v. *Nash* [1779].[9]]

[FARWELL, J., referred to *Revel* v. *Watkinson* [1748].[10]]

J. D. Davenport, for the infant tenant in tail in remainder.—The Court cannot disregard the terms of the will. The cases cited have not always been regarded with approval. There should, in any event, be set aside so much only as is necessary to keep up the house, the rest being accumulated.

A reply was not called for.

FARWELL, J., after stating the facts to the effect above stated, continued: It is obvious that the sums appointed for the maintenance of the infant are wholly inadequate to keep up Sand Hutton Hall. The will contains a general power of leasing, which does not exclude the mansion-house, but the testator undoubtedly regarded Sand Hutton as the family mansion-house, and I find a request in his will that his son should reside at Sand Hutton. The question that I have to consider is whether I have any jurisdiction to accede to the present application on the true construction of the will. I decline to accept any suggestion that the Court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. But in construing a will, it is open to the Court to have regard to the paramount intention, as was done by Lord Hardwicke and Mr. Justice Pearson in the cases which have been referred to. *Revel* v. *Watkinson*,[10] in which both tenant for life and remainderman were represented, was a very strong case. There were charges upon the estate, the interest on which more than absorbed the whole of the income of the property. There was no express direction in the will relieving the tenant for life from his legal obligation to keep down the interest on the charges, but Lord Hardwicke, finding in the will a paramount intention that the tenant for life should not starve, directed maintenance to the tenant for life, notwithstanding that the income was not sufficient to keep down the interest on the incumbrances. That was extended by Mr. Justice Pearson in *Collins, In re; Collins* v. *Collins*,[2] to the education and bringing-up of the infant in a way suitable to the position which he was afterwards likely to fill in the world. That appears to me to rest also on the same principle of paramount intention. These cases clearly establish that a testator who settles his property on one for life with remainders over, and provides for infants being maintained during minority, does not, when he mentions a sum for maintenance and directs an accumulation of the surplus income, without negative words necessarily exclude an intention that the estate should be kept up and the infants should be brought up in the way suitable to the position which he has shewn by his will he intended they should ultimately occupy. There are in fact two intentions running side by side in the will before me. One is that the infant is to inherit the full enjoyment at twenty-one of that of which he now is in possession, subject to the management clauses; the other is that he shall have an allowance of 500*l.* a year.

I think I do no violence to the words of this will when I regard the 500*l.* a year in the light of the allowance which a parent in the position of the testator here would make to a son who was under age, either allowing it to him personally or regarding it as the amount which would be necessary to pay his school bills, and

(1) 50 L. J. Ch. 778; 17 Ch. D. 807.
(2) 55 L. J. Ch. 672; 32 Ch. D. 229.
(3) 55 L. J. Ch. 659; 32 Ch. D. 383.
(4) 14 W. R. 538. See further proceedings [1873], reported 21 W. R. 818.
(5) [1896] A.C. 625.
(6) 23 Beav. 521. On app.: 4 De G. F. & J. 259.
(7) 5 Ves. 194.
(8) 5 Ves. 195*n*.
(9) 5 Ves. 197*n*.
(10) 1 Ves. sen. 93.

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WALKER, IN RE.

his clothing, and so on, while the parent himself provided and kept up a home at the family estate, and the family mansion-house at which the boy lived with his father. The direction as to management in this will, to my mind, points to that. The testator certainly did not contemplate that Sand Hutton Hall should be shut up. He certainly did not contemplate that the family mansion should be let, because I think if he had, he would have expressed it in terms; and although the power is wide enough to include the letting of Sand Hutton, in case it became necessary, I think probably the testator had no contemplation of the possibility of letting, nor would it be desirable or convenient that the house should be let as a furnished house unless it were absolutely unavoidable. I therefore hold that, on the true construction of this will, I have authority to accede to the application which is made to me. The best illustration of the exercise of the jurisdiction established by the two cases I have already mentioned is the case of *Griggs* v. *Gibson*.[4] No question is here raised as to the sufficiency of the amount, and it seems to me to be a very fair and proper amount. As regards one item of charities to which my attention was specially called, many times within my own recollection Judges have allowed in cases of large estates a sum to be expended for charities, on the footing that it is within the principle that the son is to be brought up and to live on the property, keeping up the reputation of the family, and that he could not do this if the ordinary subscriptions to charities, which a country gentleman living in the country necessarily pays, should not be paid on behalf of the infant.

Therefore I will make the order as asked.

Solicitors—Long & Gardiner, for all parties.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

FARWELL, J. 1901. March 12, 13. } SPINDLER AND MEAR'S CONTRACT, *In re.*

Vendor and Purchaser—Conditions—Power to Rescind—"Notwithstanding intermediate litigation"—Notice to Rescind Pending Proceedings—Costs.

Conditions of sale which give a vendor power to rescind the contract "if the purchaser shall insist on any requisition or objection which the vendor shall be unable or unwilling to remove or comply with . . . notwithstanding any attempt to remove the same or that there shall have been any intermediate or pending negotiation proceeding or litigation"; and provide that he shall thereupon return to the purchaser his deposit, "but without any interest costs, of investigating the title, or other compensation or payment whatsoever," do not protect the vendor from the payment of costs of litigation; and if the vendor allows a summons, under the Vendor and Purchaser Act, 1874, to be proceeded with until the hearing and then gives notice to rescind he will be ordered to pay the costs.

On May 21, 1900, a house and grounds, the subject of this summons, were put up for sale by auction under conditions one of which was as follows:

"If the purchaser shall insist on any objection or requisition which the vendors shall be unable or unwilling to comply with and shall not withdraw the same after being required so to do, the vendors shall (notwithstanding any attempt to remove the same or that there shall have been any intermediate or pending negotiation proceeding or litigation, and although they may have insisted that all or any of the objections and requisitions are or is untenable) be at liberty, by notice in writing signed by their solicitors, to rescind the contract, and shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title or other compensation or payment whatsoever."

The property was not sold at the auction, but on June 19, 1900, the plaintiff entered into a contract to purchase it subject to the particulars and conditions

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so far as they applied to a sale by private contract.

The abstract was delivered and the plaintiff sent in voluminous requisitions. The vendors delivered answers and on July 20, 1900, the plaintiff delivered replies to the answers. On July 24 the plaintiff took out this summons under the Vendor and Purchaser Act, 1874, asking for a declaration that the plaintiff's objections to the title had not been sufficiently answered, and in particular that the title was defective on certain specified grounds, and for return of his deposit, and costs.

The vendors, who were trustees, were the defendants.

Both parties filed evidence of considerable length. The summons came on for hearing on March 12, and counsel for the defendants then stated that the vendors had on that day required the purchaser to withdraw his requisitions and given him notice to rescind the contract. The question of costs was argued on March 13.

Butcher, *K.C.*, and *Philpotts*, for the purchaser.—The purchaser does not oppose rescission of the contract, but the vendor must pay the costs of the summons up to the date of the notice to rescind. *Duddell* v. *Simpson* [1866][1] is exactly in point. This condition for rescission does not deprive the Court of its jurisdiction over costs. If that can be done at all, it must be done by express words—*Isaacs* v. *Towell* [1898].[2]

Upjohn, *K.C.*, and *E. Beaumont*.—In *Duddell* v. *Simpson*[1] there were two separate contracts as to separate houses, and the purchaser's action succeeded as to one, as appears from the report in the Court below; the question of costs was not argued in the Court of Appeal, and is not mentioned in the judgments. In *Isaacs* v. *Towell*[2] the words "notwithstanding any intermediate litigation" did not occur. Byrne, J., commented upon their absence, and there was a full judicial consideration of the merits of the case. It has been decided that the power to rescind cannot be exercised after judgment—*Arbib and Class's Contract, In re* [1891][3]; but the observations of all the Judges shew that it may be exercised at any time before. In this case we have the word "litigation." The costs of the proceedings are clearly within the word "payment." The Court will not make an order as to costs without going into the merits, and for that it has no materials before it. The Court is asked to make the vendor pay all the costs when, if it went into the merits, it might order the purchaser to pay them.

Butcher, *K.C.*, in reply, referred to *Hamand* v. *Best* [1879].[4]

FARWELL, J.—In this case the purchaser took out a summons under the Vendor and Purchaser Act on July 24 last. The parties went into evidence. The summons came on for hearing yesterday, and counsel then stated that the vendor had that afternoon served the purchaser with a notice to rescind the contract, and they asked for the dismissal of the summons without costs. The question turns upon the wording of one of the conditions of sale. [His Lordship read the condition.] That is practically indistinguishable from the condition in the case of *Duddell* v. *Simpson*.[1] I cannot suppose that the two Lords Justices, in ordering the vendor to pay costs in that case, overlooked the point arising in the construction of the condition. They decided that the vendor must pay the costs up to the time when he gave notice to rescind. I am bound by that decision. And upon the construction of this condition I think that, as the costs of investigating the title are specifically mentioned, the parties probably intended to exclude costs which are only payable under an order of the Court. But, however that may be, I cannot refuse to follow a decision of the Court of Appeal merely because the Lords Justices did not fully state the grounds of their decision.

Counsel for the vendor urged that there is nothing before me upon which I can decide the question of costs upon the

(1) 35 L. J. Ch. 451; 36 L. J. Ch. 70; L. R. 1 Eq. 578; 2 Ch. 102.
(2) 67 L. J. Ch. 508; [1898] 2 Ch. 285.
(3) 60 L. J. Ch. 263; [1891] 1 Ch. 601.
(4) 48 L. J. Ch. 503; 12 Ch. D. 1, *sub nom.* *Best* v. *Hamand*.

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merits. I cannot agree with him. I think it was very unreasonable on the vendor's part to let things go on until the summons was ready for hearing; and very hard upon the purchaser that the vendor should let him go on incurring all the costs and not make up his mind to rescind until the very last moment. These are quite sufficient grounds for making him pay the costs.

Solicitors—H. Mear, for purchaser; Upton & Britton, for vendor.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

COZENS-HARDY, J.
1901.
Feb. 22, 23, 25.
March 6.

LLOYD'S BANK *v.* PEARSON.

Mortgage—Priority—Notice to Trustees—Chose in Action—Proceeds of Land held in Trust for Sale—Mortgagor Trustee—Notice through His Knowledge.

The knowledge of one of several trustees, who is also a beneficiary, of a mortgage, created by himself, of his own share in the proceeds of land held in trust for sale is not, by itself, notice to the trustees. Such a mortgage will be postponed to a subsequent mortgage of which due notice has been given to the trustees.

Browne *v.* Savage (4 Drew. 635) *followed.*

A reversionary interest in the proceeds of land held in trust for sale, but not yet sold, is a chose in action within the principle laid down in Dearle *v.* Hall (3 Russ. 1) *as to gaining priority by notice to trustees.*

This was a foreclosure action brought by Lloyd's Bank against the defendant Pearson and his mortgagees, in which a question arose as to priority of incumbrances.

By a deed dated May 3, 1872, certain freehold property at Eastbourne was vested in three trustees upon trust at the request in writing of Mrs. Pearson during her life, and after her death at the discretion of the trustees to sell and to invest the proceeds, and pay the income to Mrs. Pearson for her life for her separate use, and after her death to stand possessed of the proceeds and the income thereof in trust for all her children at twenty-one or marriage. The rents and profits until sale were directed to be paid and applied as income of the investments; the property had not been sold.

Mrs. Pearson, who was still living at the date of the action, had four children only, of whom the defendant Pearson was one. In addition to his original one-fourth share he became in 1896 entitled, under the will of a sister who died in November of that year, to one-third of her one-fourth share of the funds.

In 1892 the trustees of the deed were Henry Stapley, Stephen Steele, and the defendant Pearson. Stapley died and Flowers was appointed a trustee in his place by deed dated April 1, 1896.

On September 27, 1892, the defendant Pearson mortgaged his reversionary one-fourth to the Capital and Counties Bank for 800*l.* Notice of this mortgage was given to the trustees through Flowers, who acted as their solicitor both before and after his appointment as trustee. The plaintiff bank had paid off and taken a transfer of this mortgage, and it was admitted that they were entitled to rank as first mortgagees in respect thereof.

On November 22, 1892, the defendant Pearson executed a mortgage of his reversionary one-fourth share to the defendant Grinyer for 500*l.* subject to the admitted mortgage for 800*l.*

On June 29, 1893, he charged the same share in favour of the defendant Grinyer with a further sum of 500*l.* Both these deeds were wholly in the handwriting of Pearson, who was a solicitor, and were kept in his own possession for several years.

In August, 1894, the defendant Pearson executed a mortgage in favour of Mackenzie and Hart subject only to the first mortgage of 800*l.* The defendant Pearson at the same time made a statutory declaration that he had never mort-

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gaged, charged, or otherwise incumbered his share except by the first mortgage. This mortgage was paid off before the action.

In May, 1898, the defendant Pearson mortgaged all his interest under the settlement to the plaintiff bank to secure his current account up to 1,800*l*. Notice of this charge was given to Flowers, who was then one of the trustees and acted as their solicitor. The plaintiff bank made enquiries as to prior incumbrances other than the 800*l*. mortgage, and they had no knowledge or notice of either of the charges held by the defendant Grinyer.

The defendant Pearson was made bankrupt and absconded in 1899. This action was then commenced, but neither the defendant Pearson nor his trustee defended it, and as against them the proceedings were in default.

Eve, K.C., and *Curtis Price*, for the plaintiffs.—We rely on two positions—first, that there was an absolute conversion of the settled land into personal estate, and that notice to the trustees was consequently necessary for the defendant to perfect his title; and secondly, that notice to the mortgagor-trustee was not notice to all the trustees. As to the first position, we have here a trust for sale, so that the rule in *Dearle* v. *Hall* [1823][1] applies—*Foster* v. *Cockerell* [1835],[2] *Lee* v. *Howlett* [1856],[3] and *Wyatt, In re; White* v. *Ellis* [1891].[4]

As to the second position, the assumption that what is communicated to one trustee will necessarily be communicated by him to his fellow-trustees, is liable to be rebutted; and it is rebutted *ipso facto* by such a fact as we find here—that is, that the single trustee who has notice is himself the mortgagor—*Browne* v. *Savage* [1859],[5] *Newman* v. *Newman* [1885],[6] *Low* v. *Bouverie* [1891].[7] *Browne* v. *Savage*[5] was preceded by other cases which, though cases in bankruptcy, embody the same principle—*Hennessy, In re* [1842],[8] and *Boulton, Ex parte; Sketchley, in re* [1857].[9] It is true that doubt has been thrown on *Browne* v. *Savage*[5] in *Willes* v. *Greenhill* [1860],[10] but the latter case is not really inconsistent with the principle now laid down.

[COZENS-HARDY, J.—I do not at present see that *Willes* v. *Greenhill*[10] is inconsistent with *Browne* v. *Savage*.[5] The cases were on different lines.]

There are many other authorities in our favour, one of the latest of which is *Arden* v. *Arden* [1885].[11]

Micklem, K.C., and *E. P. Hewitt*, for the defendant Grinyer.—The onus lies on our opponents to shew that the other trustees had no notice.

[COZENS-HARDY, J.—I think, on the evidence, that the other trustees had no notice.]

The onus lies on the plaintiff to prove it affirmatively, and this he has not done—*Ward* v. *Duncombe*[4] and *Stevens, Ex parte* [1834].[12] As to notice to one trustee, who is the mortgagor only, the rule is really the same as in bankruptcy, where notice to an assignor himself is sufficient—*Rogers, Ex parte* [1856],[13] *Smith* v. *Masterman* [1833],[14] and *Lloyd* v. *Banks* [1868].[15]

[COZENS-HARDY, J., referred to *Robson on Bankruptcy* (7th ed.), p. 534; *Saffron Walden Second Benefit Building Society* v. *Rayner* [1880],[16] and *Mutual Life Assurance Society* v. *Langley* [1886].[17]]

As to *Browne* v. *Savage*[5] we agree that it is inconsistent with the principle which we contend for here; but that case stands quite alone, and is not reconcilable with the general current of authority. In

(1) 3 Russ. 1.
(2) 3 Cl. & F. 456.
(3) 2 K. & J. 531.
(4) 61 L. J. Ch. 178; [1892] 1 Ch. 188. In the House of Lords, *sub nom. Ward* v. *Duncombe*, 62 L. J. Ch. 881; [1893] A.C. 369.
(5) 4 Drew. 635.
(6) 54 L. J. Ch. 598; 28 Ch. D. 674.
(7) 60 L. J. Ch. 594; [1891] 3 Ch. 82.
(8) 2 Dr. & W. 555, 563.
(9) 26 L. J. Bk. 45, 49; 1 De G. & J. 163, 178.
(10) 31 L. J. Ch. 1; 29 Beav. 376. On app.: 4 De G. F. & J. 147.
(11) 54 L. J. Ch. 655; 29 Ch. D. 702.
(12) 4 Deac. & C. 117.
(13) 25 L. J. Bk. 41; 8 De G. M. & G. 271.
(14) 3 L. J. Ex. 42; *sub nom. Smith* v. *Smith*, 2 Cr. & M. 231.
(15) 37 L. J. Ch. 881; L. R. 3 Ch. 488.
(16) 49 L. J. Ch. 465; 14 Ch. D. 406.
(17) 32 Ch. D. 460.

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Willes v. *Greenhill*[10] it is distinguished in a manner that is really indistinguishable, for all the cases agree that formal notice is immaterial. The judgment in the latter case of Knight-Bruce, L.J.—prepared, but never delivered—is entirely inconsistent with *Browne* v. *Savage*[5] and proceeds on quite different principle.

[COZENS-HARDY, J., referred to *Shropshire Union Railway and Canal Co.* v. *Reg.* [1875].[18]]

The distinct tendency of the later cases has been to cut down rather than extend the principle of *Dearle* v. *Hall*.[1] *Wasdale, In re; Brittin* v. *Partridge* [1898],[19] and *per* Lord Macnaghten in *Ward* v. *Duncombe*[4]: "For the reasons which I have already given, I do not think that those principles are so clear or so convincing that the rule ought to be extended to a new case."

As to the other point, we can hardly deny that this was a case of conversion.

[They referred also to *Atterbury* v. *Wallis* [1856].[20]

Eve, K.C., in reply, referred to *Rice* v. *Rice* [1854][21] and *Thompson* v. *Speirs* [1845].[22]

Cur. adv. vult.

March 6.—COZENS-HARDY, J. (after stating the facts as above).—The question I have to decide is whether Grinyer's securities, which are prior in time, take precedence of the charge of the plaintiff bank. Now I think it is clear that this is a case to which the rule in *Dearle* v. *Hall*[1] applies, although the land has not yet been sold, and although the securities all purport to deal with land and not with money.

It is contended by the defendant Grinyer, in the first place, that it rests upon the plaintiff to prove that no notice of Grinyer's charges was given to either Stapley or Steele, and that no such proof has been furnished; and in the next place, that even if the Court is satisfied that no notice was given to either of them, the knowledge which the defendant Pearson himself had, he being one of the trustees, is sufficient to protect Grinyer.

On the first point I have felt considerable difficulty. Stapley and Steele are both dead, and Pearson has absconded. But, upon the whole, I have arrived at the conclusion that there is sufficient evidence to justify me in finding that no notice was given to either Stapley or Steele. [His Lordship went through the evidence on this point, and continued:]

Upon the whole, therefore, I think I must deal with this case on the assumption that the defendant Grinyer can only rely upon the knowledge which the defendant Pearson, one of the trustees, had of his own incumbrances. Is that sufficient? Now the very point was decided by Vice-Chancellor Kindersley in 1859 in *Browne* v. *Savage*[5]; but I am asked to hold that that decision is not well founded, and is inconsistent with prior and subsequent cases. It is necessary to read what the Vice-Chancellor said: "In the case where the assignor is himself one of the trustees, he being the only one of the trustees who has any notice or knowledge of the assignment which he has made, if he should afterwards apply to another person to advance him a sum of money on an assignment of his interest, concealing the fact of the prior assignment, such proposed assignee could not, by any caution in making enquiry of all the trustees, discover the fact of the prior assignment; for it is the interest of the trustee, who is the proposed assignor, to conceal the prior assignment; and the other trustees know nothing about it. Such notice, therefore, would not effect the object for which notice to trustees is required; viz., the security of the party taking the assignment against prior assignments concealed from him by his assignor. And therefore I am of opinion that, though Mr. Savage, being one of the trustees, had notice (as of course he had) of the assignment he had made to the plaintiff, Hannah Browne, such notice was not sufficient to give her priority over a subsequent incumbrancer with notice."

I am not convinced that the authority of *Browne* v. *Savage*,[5] so far as it relates to the effect of notice to or knowledge of

(18) 45 L. J. Q.B. 31; L. R. 7 H.L. 496.
(19) 68 L. J. Ch. 117; [1899] 1 Ch. 163.
(20) 25 L. J. Ch. 792; 8 De G. M. & G. 454.
(21) 23 L. J. Ch. 289; 2 Drew. 73.
(22) 14 L. J. Ch. 453; 13 Sim. 469.

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a trustee assignor, has ever been questioned. It was quoted with approval by Sir John Romilly in *Willes* v. *Greenhill*.[10] That case only decided that, where a beneficiary, the wife of a trustee, mortgaged her separate estate by a deed to which the husband trustee was a party, the notice to or knowledge of the husband trustee was sufficient. It will be observed that the trustee was not and could not be the assignor of his wife's separate estate, though he may have been, and probably was, the person who got the benefit of the money advanced. On appeal Lord Westbury expressly stated that he did not intend to overrule or throw doubt upon any former decision, including of course *Browne* v. *Savage*.[5] In the very important case in the House of Lords of *Ward* v. *Duncombe*,[4] *Browne* v. *Savage*[5] is cited by counsel as establishing a recognised exception to the sufficiency of notice to a single trustee; but there is no mention of it in the elaborate judgments of Lord Herschell and Lord Macnaghten; certainly there is nothing in either of those judgments to impugn its authority.

But it has been strongly urged before me that the rule in *Dearle* v. *Hall*[1] rests upon and follows the principles of the Court of Bankruptcy in dealing with order and disposition, and that as it has been decided that the knowledge of one of two assignors, jointly entitled, who was a trustee, was sufficient to take a *chose in action* out of the order and disposition of the assignors—*Rogers, Ex parte*[13]—the same rule ought to apply as between several incumbrancers, and that Vice-Chancellor Kindersley overlooked this. But I think there is a fallacy in this argument. I have the authority of the Court of Appeal that the two cases are not analogous. In *Saffron Walden Second Benefit Building Society* v. *Rayner*[16] Lord Justice James says: "No doubt there are cases in bankruptcy in which it was held that notice to a person acting as solicitor was sufficient to take a *chose in action*, out of the order and disposition of the assignor. Whether I should have decided those cases originally as they were decided, I will not undertake to say, but it seems to me that the question what is sufficient notice to prevent a thing from being alleged to be in the order and disposition of an apparent owner with the consent of the true owner, stands upon a very different footing from the question what is sufficient notice as regards successive incumbrancers." And again in *Mutual Life Assurance Society* v. *Langley*[17] Lord Justice Cotton says: "Order and disposition must be with the consent of the true owner, and it may very well be that sufficient has been done to shew that the true owner does not consent to the fund remaining as it is, although it would not be sufficient to shew that notice had been given to effectually secure or obtain priority."

I have carefully read Lord Macnaghten's judgment in *Ward* v. *Duncombe*,[4] which I accept as a guide. But I do not profess to be able to discover any definite principle upon which the rule in *Dearle* v. *Hall*[1] is founded. Nevertheless it must now be recognised as a positive rule, though it is not one to be extended. But it would be whittling away the rule, and indeed would be making it a mere trap, if it were to be held that the knowledge which an assignor trustee has of his own incumbrance is sufficient to give the assignee priority against a subsequent incumbrancer who gives due notice to all the trustees. This, I take it, was the view of Vice-Chancellor Kindersley in *Browne* v. *Savage*.[5] It commends itself to my judgment. But whether it did so or not I should consider it proper to follow the unchallenged decision of that most learned and accurate Judge, and to leave the parties to apply to the Court of Appeal to overrule it if they consider that it is no longer law.

The result is that I must hold the plaintiffs entitled to priority over the defendant Grinyer. And the usual accounts in a foreclosure action must be taken on that footing.

Solicitors—Venn & Woodcock, agents for T. A. Goodman, Brighton, for plaintiff; Clarke & Calkin, agents for Howlett & Clarke, Brighton, for defendant Grinyer.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

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BUCKLEY, J. 1901. March 6. } SCOTT-CHAD'S SETTLEMENT, *In re*; SCOTT-CHAD *v.* PARES.

Marriage Settlement—Covenant to Settle After-acquired Property—Separate Legacies each below Limited Amount, but together above it — Aggregation — Deduction of Legacy Duty.

By a marriage settlement the wife covenanted that if at any time during the continuance of the marriage she should "at one and the same time and from one and the same source" become entitled to any real or personal property of the value of 500l. and upwards, she would cause the same to be settled. Under two successive codicils to a will of a testatrix the wife became entitled to two legacies, each for the sum of 500l., one payable out of the general estate of the testatrix and the other out of the proceeds of certain lands directed by the testatrix to be sold. The legacies were subject to duty at the rate of 10 per cent., reducing them to 450l. each:— Held, *that the legacies, so far as the beneficial receipt by the legatee was concerned, were reduced to 450l. each, and were therefore separately not bound by the covenant, but that the legatee, having become entitled to them "at one and the same time"—namely, the death of the testatrix; and "from one and the same source"—namely, the testatrix—the legacies must be aggregated, and were together bound by the covenant.*

Adjourned summons.

By a deed of settlement dated April 27, 1886, and made on the marriage of Alice Scott-Chad, then Alice Pares, spinster, with Charles Scott-Chad, who was still living, Alice Pares covenanted to settle after-acquired property. The covenant, so far as is material, was in the following terms: "That if at any time during the continuance of the said intended marriage the said Alice Pares shall at one and the same time, and from one and the same source, become either by gift or will or otherwise howsoever seised or possessed of or entitled to any real or personal property of the value of 500l. or upwards for any estate or interest whatsoever whether in possession reversion remainder or expectancy (except certain property therein specifically mentioned) then and in any and every such case the said Alice Pares and all other necessary parties will at the cost of the trust premises and as soon as circumstances will permit to the satisfaction of the trustees or trustee for the time being of these presents convey assign or assure the said real and personal property to or otherwise cause the same to be vested in the said trustees or trustee for the time being their or his heirs executors or administrators respectively" upon the trusts therein mentioned.

Eliza Back, by her will dated November 5, 1896, appointed the Rev. Norman Pares, George Lancelot Pares, and George Edgar Frere executors and general trustees of her will and any codicil or codicils thereto, and devised, bequeathed, and appointed all real and personal estate over which she had any power of disposition or appointment by will (except as therein mentioned) unto her trustees in fee simple absolutely.

By a codicil to her will bearing even date therewith, the testatrix directed her trustees to pay out of her real and personal estate to each of the children of her sister-in-law, Katherine Pares, who should be living at her death 500l., and as to a sum of 56,000l. she directed her trustees to hold the same upon trust to invest the same and to pay the income thereof to Fanny Back for life and after her death to pay the income to Katherine Pares for life, and after her death upon trust to divide the capital equally between the children of Katherine Pares (of whom Alice Scott-Chad was one) living at the testatrix's death, and the child or issue of any such child as should have died in her lifetime leaving issue at her death in equal shares *per stirpes*.

By a second codicil to her will dated May 12, 1899, the testatrix directed that certain lands in the parish of Horsell, in the county of Surrey, then belonging to her, should be sold, and out of the proceeds of the sale thereof she gave, amongst other legacies, to her niece, Alice Scott-Chad 500l., and the testatrix directed that the legacies to her nieces by this codicil were to be in addition to the legacies given them by the first codicil, and also that every legacy

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thereby given to a woman who should at her death be married should be for her separate use.

The testatrix died on June 17, 1900, and her will and two codicils were duly proved by all the executors on August 3, 1900.

The legacies of 500*l.* given by the first and second codicils to Alice Scott-Chad were each subject to duty at the rate of 10 per cent., which would reduce their amounts to 450*l.* each.

This was a summons taken out by Alice Scott-Chad and another asking (*inter alia*) for the determination by the Court of the question whether the benefits given to the plaintiff Alice Scott-Chad by the codicils were bound by the covenant to settle after-acquired property in her settlement.

It was admitted that her reversionary interest in the 56,000*l.* was bound by the covenant.

Austen-Cartmell, for the summons.—The two legacies are not bound by the covenant. They are of two different amounts, each of which is less than 500*l.*—namely, 450*l.*

[BUCKLEY, J.—As regards the amount of the legacies, I am so far with you.]

They do not arise "from one and the same source." "Source" does not mean the donor, but the place or investment. "From one and the same source" means under the same title. Here one legacy is payable immediately out of the general estate, and the other out of the proceeds of sale of lands directed to be sold; nor are they payable "at one and the same time" as required by the covenant. There may be different titles under the same will—*Middleton's Will, In re* [1868],[1] and *Davies, In re; Harrison* v. *Davis* [1897].[2]

Mark Romer, for the respondents, was not called upon.

BUCKLEY, J., stated the facts, and continued: The legatee in each case has to suffer a deduction of duty at the rate of 10 per cent., so that each of these sums becomes, so far as her beneficial receipt of them is concerned, 450*l.* only, and is therefore not caught by the covenant. The aggregate of these two sums is 900*l.*, and the question is whether they ought to be aggregated and therefore settled. In my opinion they ought. Did the lady become entitled by the will "at one and the same time" to both these legacies? Plainly she did. At what time? When the testatrix died. Did she get them "from one and the same source"? I answer, she did. The source from which she "became by will entitled" was the testatrix. It was argued that she got them from different sources—one sum by a legacy out of the general estate, and the other out of the proceeds of sale of land, and that these are different sources. In my opinion "source" does not bear that meaning. If a testatrix, entitled to a balance at the London and Westminster Bank and to a balance at the Capital and Counties Bank of 400*l.* each, gives both to one legatee, it appears to me that the legatee becomes entitled to both sums from a source which is not the banks, but the testatrix. The bank is not the source; the person who makes the will is the source. In my opinion, therefore, the lady became entitled "at one and the same time and from one and the same source" to both these legacies.

Does it make any difference that one sum is not immediately payable because the land, out of the proceeds of which it is payable, has not yet been sold? I answer, no. The time to be considered is the moment when she became entitled to this legacy. That was when the testatrix died, although she would not actually receive it till later. Was it of the value of 500*l* when she thus became entitled to it? When she became entitled she could have sold the right to receive in the future payment out of the land. The aggregate value of the two legacies is thus more than 500*l.* I hold, therefore, that the property derived under the will is bound by the covenant.

Solicitors—Bower, Cotton & Bower, for all parties.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law*

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(1) 16 W. R. 1107.
(2) 66 L. J. Ch. 512; [1897] 2 Ch. 204.

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FARWELL, J. 1901. March 5. } MAYHEW, *In re*; SPENCER *v.* CUTBUSH.

Will — Appointment — Special Power — Gift of Residue after Payment of Debts, &c.—"Appoint, devise, and bequeath"— Execution of Special Power—Evidence.

A testatrix, who possessed a special power of appointment in favour of nephews and nieces over a fund of personalty, after giving a number of pecuniary legacies, proceeded to "appoint, devise, and bequeath" all the residue of her real and personal estate to trustees, upon trust to convert the same and out of the proceeds thereof to pay her debts and funeral and testamentary expenses, and to pay and divide the residue of the proceeds equally between certain nephews and nieces:—Held, *that evidence was admissible to prove that the testatrix possessed at the time of her death no other power of appointment, having reference to the fact that the word "appoint" was found in her will, and that the above disposition was under the circumstances an exercise of the special power of appointment.*

Dictum in Richardson's Trusts, *In re* (17 L. R. Ir. 436), *questioned.*

Adjourned summons.

Under the will of her father, the late William Mayhew, dated March 27, 1858, the testatrix, Maria Mayhew, was entitled to a special testamentary power of appointment over a certain fund of personal property in favour of her nephews and nieces.

By her will dated June 9, 1898, Maria Mayhew, after giving a number of pecuniary legacies, made (*inter alia*) the following disposition: "I appoint, devise, and bequeath my real estate and the residue of my personal estate to my trustees, upon trust to sell or convert the same into money and to pay and divide the proceeds (after paying my debts, funeral and testamentary expenses) equally between the four children of my deceased sister, Jane Cutbush, namely . . . Frederick Mayhew Cutbush . . . Mabel Jane Cutbush, Horace Mayhew Cutbush, and Bertram Mayhew Cutbush, or such of them as shall be living at my decease."

The will contained no reference to the special power of appointment already mentioned, other than what might be gathered from the language of the disposition set out above.

The testatrix died on September 19, 1900, and her will was proved on November 5, 1900.

An originating summons was issued by one of the trustees of the will of William Mayhew for the determination (*inter alia*) of the question as to whether the special testamentary power of appointment given as aforesaid to Maria Mayhew by the will of her father, William Mayhew, had been duly exercised by the disposition in the will of Maria Mayhew set out above.

It was proved in evidence at the hearing of the adjourned summons, after some dispute as to its admissibility, that Maria Mayhew possessed no other power of appointment, general or special, at the time of her death.

Coote, for the trustee of the will.

Butcher, *K.C.*, and *Gatey*, for the four nephews and nieces.—Any reference to the special power, however slight, is sufficient—*per* Lindley, L J., in *Williams, In re; Foulkes* v. *Williams* [1889].[1] Here we have such a reference in the word "appoint," the natural and obvious meaning of which can have reference only to a power of appointment of some kind, and the testatrix possessed no other power than the one now in question—a fact which we are entitled to prove in evidence. Unless there be reason to believe that "appoint" is used loosely, the Court is bound to give it a technical sense. Otherwise, in the present case, the term is simply otiose. The value attached to the word "appoint" is shewn by *Pidgely* v. *Pidgely* [1844].[2]

The direction to pay debts and funeral and testamentary expenses out of a fund which, *ex hypothesi*, includes the fund subject to the special power, is not in itself sufficient to negative a presumption of an intention to exercise the power otherwise established—*Cowx* v. *Foster*

(1) 58 L. J. Ch. 451, 453; 42 Ch. D. 93, 97.
(2) 1 Coll. C.C. 255.

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[1860],[3] *Teape's Trusts, In re* [1873],[4] and *Swinburne, In re; Swinburne* v. *Pitt* [1884].[5]

The present case is really indistinguishable from *Milner, In re; Milner* v. *Bray* [1899].[6]

[FARWELL, J.—But in that case there was a reference to the power.]

The only authority against us is the Irish case of *Richardson's Trusts, In re* [1886],[7] which is distinguishable; for in that case it was stated, and not denied, that the testatrix had also a general power of appointment over other property to which the words of the will in question might easily have applied.

J. S. Green, for persons claiming in default of appointment.—The onus is on the other side to shew affirmatively that the power has been exercised—*per* Kay, J., in *Mills, In re; Mills* v. *Mills* [1886][8]: "The burden of proof is on those who assert affirmatively that the power was exercised." The will must contain some reference, by recital or otherwise, either to the power purporting to be exercised or to the property subject to it—*Harvey* v. *Stracey* [1852].[9] Neither of those two conditions is satisfied here.

[FARWELL, J.—But it is argued here that the use of the word "appoint" is, in itself, a reference to the power.]

That is to give an undue value to "appoint"—*Cotton, In re; Wood* v. *Cotton* [1888].[10]

[FARWELL, J.—That case was governed by special circumstances, which appear in the judgment of North, J.]

Hayes, In re; Turnbull v. *Hayes* [1900],[11] is a decision in my favour. Extrinsic evidence is not admissible to shew that the testatrix possessed no other power of appointment at the time of her death—*Huddleston, In re; Bruno* v. *Eyston* [1894].[12]

J. A. Hay, for other parties claiming in default of appointment.—This case is similar to *Huddleston, In re; Bruno* v. *Eyston*.[12] There is a great distinction between the bare use of the word "appoint" and cases in which there is a general prefatory reference to "all the powers that" the testator "may have."

FARWELL, J.—This case is very near the line, but, on the whole, I come to the conclusion that the special power has been exercised. [His Lordship read the disposition in the will already set out above.] The testatrix had a limited power of appointment among her sister's children. I start, therefore, with this, that the gift is to the objects of the special power. It is plain on the authorities that the mere fact that a testator directs payment of his debts and funeral and testamentary expenses out of a fund which includes a fund that is subject to a special power, is not enough to exclude the intention of executing the power. Further, it has been proved in evidence that the testatrix in this case had no other power. It has been argued that this evidence is not admissible, but, in my opinion, it is admissible alike on the authorities and on principle, when the Court finds the word "appoint" in a will. When I have a devise of real estate I have to find whether, in fact, a testator had real estate; and, similarly, where a testator "appoints" personal estate, I have to enquire whether he possesses a power to "appoint" personalty.

I find, therefore, that this testatrix had a special power, and no other power, and I find in this will the words "appoint, devise, and bequeath." Now "appoint" is a word of art, and, in my opinion, refers to powers, and to powers only. I do not say that, if there were not other words, "appoint" would not carry all the property. Here, however, we have all three words; and "appoint," in my opinion, in this collocation contains in itself a necessary reference to a power. I read it, therefore, as if it were written, "in exercise of every power, I appoint, devise, and bequeath." I think that this is the true view in a will like this, in which we find all three words used. At first I felt some difficulty whether the reference might not be limited to general

(3) 29 L. J. Ch. 886; 1 J. & H. 30.
(4) 43 L. J. Ch. 87; L. R. 16 Eq. 442.
(5) 54 L. J. Ch. 229; 27 Ch. D. 696.
(6) 68 L. J. Ch. 255; [1899] 1 Ch. 563.
(7) 17 L. R. Ir. 486.
(8) 56 L. J. Ch. 118, 122; 34 Ch. D. 186, 194.
(9) 22 L. J. Ch. 23; 1 Drew. 73, 112.
(10) 58 L. J. Ch. 174; 40 Ch. D. 41.
(11) 69 L. J. Ch. 691; [1900] 2 Ch. 332
(12) 64 L. J. Ch. 157; [1894] 3 Ch. 595

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powers, which the testatrix thought she might possibly have at the time of her death, which would sufficiently answer it. The words "my personal estate" might seem to point to this view. But in *Teape's Trusts, In re*,[4] and in *Swinburne, In re; Swinburne* v. *Pitt*[5]—especially in the latter—the same objection applied, when the words were held a sufficient reference to a special power. Here the words "devise and bequeath" would of themselves, under section 27 of the Wills Act, 1837, execute any general power. I am therefore merely acting on the general rule that effect should be given to all the words used by the testatrix if I hold that the word "appoint" is an exercise of the special power. My chief hesitation has been caused by the expression of opinion by Vice-Chancellor Chatterton—it does not amount to a decision—in the Irish case of *Richardson's Trusts, In re*.[7] In that case the Vice-Chancellor said: "Property which was not that of the testatrix, but over which she had a special power of appointment, cannot, without the aid of a strong context, be held to be described by [the words, 'all *my* real and personal estate and effects of every kind']. No such context exists here except merely the word 'appoint'; and even if the testatrix had no general power of appointment, I think that I should go beyond any decided cases and beyond the principle on which those cases proceed, if I were to hold that this was sufficient." With regard to that, I am bound to say, with all respect for the opinion of the learned Vice-Chancellor, that if that is intended to be a general statement of law and not a remark confined to the case before him, I am unable to agree with him. I think that there is here sufficient to shew that the word "appoint" does apply to, and has reference to, and exercises this special power.

Solicitors—Herbert Edward Griffith; Paterson, Candler & Sykes, agents for A. J. Ellis, Maidstone.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

JOYCE, J. 1901. Feb. 16, 26. } YOUMANS' WILL, *In re*; GREAT CENTRAL RAILWAY, *ex parte*.

Will — Construction — Equitable Fee-simple—Rule in Shelley's Case.

Freehold land was devised to trustees in fee-simple upon trust out of the rents and profits to pay certain annuities, and then to pay the residue of the rents and profits to W. D. for his life, and from and immediately after the respective deceases of the annuitants and W. D. upon trust to convey the land together with any accumulations of rent unto the right heirs of W. D.

The land was acquired compulsorily by a railway company, and the purchase-money paid into Court. The surviving annuitant had previously released the property from her annuity. On a petition by W. D. for payment out to him, —Held, ***first, that the rule in*** Shelley's Case (1 Co. Rep. 93*b*) ***applied to the devise, and that under the will W. D. took an equitable estate in fee-simple in the land subject to the annuities; and secondly, that, in the circumstances, W. D. was absolutely and presently entitled to the fund in Court.***

Petition.

By his will dated August 21, 1877, Richard Youmans, the above-named testator, after certain specific devises, devised and bequeathed all the rest and residue of his freehold, copyhold, and leasehold estates unto his trustees, their heirs, executors, administrators, and assigns, according to the nature thereof respectively, upon trust to let and manage the same and to receive the rents and profits thereof, and thereout, after payment of all outgoings, to pay to each of his first cousins therein named the sum of 60*l.* per annum for their lives, and then to pay the residue of such net rents and profits to William Douglas for his life, and from and immediately after the respective deceases of his said first cousins and William Douglas, upon trust to convey, surrender, and assign the said freehold, copyhold, and leasehold estates together with any accumulations of rents in the hands of the trustees "unto the right heirs of the said William Douglas."

By a codicil to his will the testator

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directed his trustees not to erect any new buildings on any part of his freehold, copyhold, or leasehold estates so devised and bequeathed on trust as aforesaid without the written consent and direction of William Douglas, to whom he had devised and bequeathed the same estates after the deceases of his said first cousins, or in case of the death of William Douglas, then not without such consent and direction in writing of the person or persons who should "then be interested in his said residuary estate."

The testator died on October 25, 1877.

In May, 1895, the respondent company (then the Manchester, Sheffield, and Lincolnshire Railway) agreed with the trustees and W. Douglas to purchase for 1,825*l.* part of the testator's residuary freehold estate for the purposes of their proposed railway. At the date of such agreement [all but two of the annuitants were dead, and by an indenture of September 8, 1899, the two then existing annuities were released, in respect of the lands purchased by the respondent company, to the trustees and W. Douglas by the surviving annuitants, one of whom subsequently died on April 2, 1900.

The respondent company prepared a conveyance from the trustees and W. Douglas, and proposed to pay the purchase-money to W. Douglas as being a vendor beneficially entitled to the fee-simple in the lands; but as the trustees objected to the payment of the purchase-money to W. Douglas without the sanction of the Court, the company paid the money into Court on July 10, 1900.

This was a petition by W. Douglas for payment out to him of the money in Court.

Hughes, K.C., and *F. FitzGerald*, for the petitioner.—Subject to the annuities, an estate of freehold is given to W. Douglas, and an estate of inheritance to his right heirs. The rule in *Shelley's Case* [1581][1] applies, and W. Douglas takes the fee subject to the annuities—*Van Grutten* v. *Foxwell* [1897].[2]

Austen-Cartmell, for the trustees.—The rule in *Shelley's Case*[1] is not applicable—*Evans* v. *Evans* [1892].[3] There is no limitation to the heirs of W. Douglas until after the death of all the annuitants and of W. Douglas himself. The testator contemplated that these annuities should first be provided, and that only the balance of the rents should go to W. Douglas. As each annuitant dies the surplus will not go to W. Douglas, but must be accumulated.

[JOYCE, J.—That is not so. W. Douglas takes the residue of the rents and profits when any annuity falls in.]

If any of the annuitants should survive W. Douglas for a period of twenty-one years, any accumulations after that would go to the testator's heir.

Hughes, K.C., replied.

M. Romer, for the railway company.

Cur. adv. vult.

Feb. 26.—JOYCE, J., stated the facts and read the material trusts of the will, and continued: Under those trusts William Douglas is equitable tenant for life subject to the annuity, and the trust is, after the deaths of William Douglas and the annuitant, to convey the property with any accumulations of rents in the hands of the trustees unto the right heirs of William Douglas. It appears to me, therefore, that by virtue of the rule in *Shelley's Case*,[1] and subject to what the effect of the will may be with respect to the period, if any, between the death of William Douglas and that of the present annuitant if surviving him, William Douglas is owner of the equitable fee-simple in the property. There is no express disposition of the surplus rents as they may accrue during the aforesaid period, if any, between the death of the said William Douglas, in the lifetime of the surviving annuitant, and the death of such annuitant. Nor is there any express direction to accumulate this surplus, but on the death of the surviving annuitant the property with any accumulations of rents in the hands of the trustees is to go to the right heirs of the said William Douglas. Now, whatever may be the true view of the effect of the will with reference to these surplus rents, it is clear

(1) 1 Co. Rep. 93*b*.
(2) 66 L. J. Q.B. 745; [1897] A.C. 658.
(3) 61 L. J. Ch. 456; [1892] 2 Ch. 173.

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that they could not be accumulated for more than twenty-one years from the death of William Douglas; and I am of opinion that according to the true construction of this will any surplus rents accruing after the expiration of the before-mentioned period of twenty-one years from the death of William Douglas during the remainder, if any, of the life of the annuitant are not undisposed of, but would belong to William Douglas's right heirs to whom the accumulations (if any be made) are given.

Further, during the before-mentioned period of twenty-one years, in case the annuitant live so long, the Court would not, in my opinion, direct any accumulation of the surplus rents except in so far as such accumulation might be necessary for the reasonable protection and security of the annuity.

In the result, therefore, I think that, according to the true construction of this will, the right heirs of William Douglas are the devisees of the surplus rents from the date of the death of William Douglas although the annuitant should survive him. In other words, I think that, in effect, upon and from the death of William Douglas, the will gives the property (but subject to the annuity if and so long as subsisting) to the right heirs of William Douglas. If I am right in this, it follows that, by virtue of the rule in *Shelley's Case*,[1] the property, subject to the annuity, if and so long as it may be subsisting, belongs to William Douglas for an equitable estate in fee-simple—or rather would belong to him, if it had not been taken by the railway company. But the property in question—or the fund in Court—has been released from the only subsisting annuity. I hold, therefore, that William Douglas is absolutely and presently entitled to the fund in Court.

Order for payment out accordingly.

Solicitors — Venn & Woodcock, agents for Pellatt & Pellatt, Banbury; Ullithorne, Currey & Co., agents for C. H. Roche, Daventry; Cunliffes & Davenport, agents for Lingards, Manchester.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

JOYCE, J. 1901. March 2. } HARRIS, *In re*; LONDON COUNTY COUNCIL, *ex parte*.

Compulsory Purchase — Termor — Adverse Possession—Reversioner Unknown—Payment Out—Dividends—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 79.

In 1810 *a freehold house was demised, at a peppercorn rent, for two hundred years to secure an annuity of* 100*l.*, *payable until the death of the survivor of nine named persons, upon which event the term was to cease. From* 1829 *to* 1895, *when the ninth life dropped, and from* 1895 *to December*, 1900, *the annuitant or his successors in title, the last of whom was the petitioner, had been in possession of the premises and in receipt of the whole of the net rent, which was never less than* 120*l. per annum, without any claim on the part of the reversioner, who was altogether unknown. In December*, 1900, *the premises were acquired compulsorily under the Lands Clauses Consolidation Act*, 1845, *and the purchase-money paid into Court. On petition for payment out under section* 79 *of that Act*,—Held, *that the petitioner was not at present entitled to immediate payment out to her of the capital money in Court within that section, but that the dividends or income on the investments of the fund might be forthwith paid to her until twelve years from the dropping of the ninth life, or until further order.*

Petition.

By an indenture dated September 1, 1810, and made between Thomas Luxmoore of the first part, Ann Harrison of the second part, and Samuel Harris of the third part, the said T. Luxmoore and Ann Harrison covenanted to pay to the said Samuel Harris, his executors, administrators and assigns, during the lives of the nine persons therein named, and the lives and life of the survivors and survivor of them, an annuity of 100*l.* by equal quarterly payments on the days therein mentioned; and for better securing the regular payment of such annuity, Ann Harrison thereby demised the messuage and premises then known as No. 338 Strand, London, to S. Harris for the term of two

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hundred years at the yearly rent of a peppercorn if demanded, but nevertheless upon the trusts and subject to the power thereinafter expressed and contained of and concerning the same—that was to say, upon trust to permit Ann Harrison, her heirs and assigns, to receive the rents and profits thereof until default should be made in payment of the said annuity, and upon further trust in case any quarterly payment of the annuity or any part thereof should be unpaid for twenty-one days after any of the days thereby appointed for payment thereof, that then and so often S. Harris, his executors, administrators, and assigns, should out of the rents, issues, and profits of the said premises, or by selling, demising, leasing, or mortgaging the same for all or any part of the said term of two hundred years, raise and levy such sum or sums as should be sufficient to pay and satisfy the annuity, or so much thereof as should from time to time be unpaid, and the costs thereby incurred, and should apply such sum or sums in satisfaction thereof accordingly, and should pay to or otherwise permit and suffer Ann Harrison, her heirs and assigns, from time to time to receive and take the residue or overplus of the rents, issues, and profits of the said premises after full payment and satisfaction of the annuity, and all arrears thereof, and costs, to and for her and their own use and benefit. Provided always that after the determination of the annuity by (*inter alia*) the death of the nine persons therein mentioned, and payment of all arrears thereof and all costs, the term of two hundred years, or so much thereof as should be or remain undisposed of under the trusts aforesaid, should cease subject and without prejudice to any sale, mortgage, or other disposition of the said premises under the trusts aforesaid.

Default was made in payment of the annuity, and from 1829 Samuel Harris and his successors in title to the annuity were in continuous receipt of the rents of the said house and premises down to the acquisition of the same by the London County Council as hereinafter mentioned. During the whole of that period the premises had been let at rents varying from 120*l.* to 150*l.* per annum, and the surplus over and above the 100*l.* required for the payment of the annuity had been received and retained by the person for the time being entitled to the annuity, without any claim or demand on the part of any reversioner or any other person.

The last of the nine lives dropped on May 31, 1895, when the premises were in the possession of the petitioner, who was the surviving executor and trustee and tenant for life of the residuary personal estate under the will of Samuel Thomas Harris, the previous successor in title of Samuel Harris.

The petitioner continued in undisputed receipt of the rents and profits of the said premises after the cesser of the term on May 31, 1895.

In 1900 the London County Council acquired the said premises for the purposes of the Strand Improvement at a valuation of 8,400*l.*, which sum was paid into Court on December 7, 1900.

The petitioner thereupon presented this petition, praying (*inter alia*)—that the said sum of 8,400*l.* on deposit in Court, together with any interest, might be paid to her as trustee of the will of Samuel Thomas Harris; or alternatively, that the said sum of 8,400*l.* on deposit in Court might be invested, and that the interest on the said money on deposit and the dividends as they accrued on such investment might until further order be paid to her as such trustee as aforesaid.

It appeared from the evidence on the petition that it was altogether unknown who was entitled to the reversion expectant upon the determination of the term, or whether Ann Harrison left any devisee or heir-at-law.

Younger, *K.C.*, and *Marten*, for the petitioner.—Ever since 1829 the petitioner and her predecessors in title have been in undisputed possession and in receipt of the whole of the net rents of this house, and that state of things has continued since the term came to an end on May 31, 1895. The petitioner is entitled under section 79 of the Lands Clauses Consolidation Act, 1845, to the money paid into Court, for she is a party "in possession of such lands, as being the owner thereof, or in receipt of the rents

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HARRIS, IN RE.

of such lands, as being entitled thereto at the time of such lands being purchased or taken," who is to "be deemed to have been lawfully entitled to such lands, until the contrary be shown to the satisfaction of the Court." There has been no claim on the part of any reversioner for nearly seventy-two years, and we ask for payment out of the principal. *Chamberlain, Ex parte* [1880],[1] is in our favour. The correctness of the decision in that case was doubted by Lindley, L.J., and Bowen, L.J., in *Gedye* v. *Works and Public Buildings Commissioners* [1891],[2] but the case was not overruled.

[JOYCE, J.—I do not think the petitioner is at present entitled to the fund.]

The petitioner is, at any rate, entitled to have the fund invested and the dividends paid to her under the latter part of section 79 of the Act.

F. Thompson, for the London County Council.

JOYCE, J.—I cannot, in the circumstances, order the *corpus* of the fund to be paid out to the petitioner, but I shall make an order directing the investment of the fund in Court and the payment of the dividends on such investments to the petitioner until the expiration of twelve years from the dropping of the last of the nine lives—that is, from May 31, 1895—or until further order. Costs according to the Act.

Solicitors—Warren, Murton & Miller, agents for F. F. Giraud, Faversham, for petitioner; W. A. Blaxland, for London County Council.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

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(1) 49 L. J. Ch. 354; 14 Ch. D. 323.
(2) 60 L. J. Ch. 587; [1891] 2 Ch. 630.

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

FARWELL, J.
1901.
Feb. 22, 26.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
March 20, 21.

BURROWS *v.* MATABELE GOLD REEFS AND ESTATES CO.

Company—Underwriting—Commission—Option to Take Shares—Premium—"Offer to the public"—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 8.

An agreement by a company to remunerate underwriters by an option to call for an allotment of shares is prohibited by section 8, *sub-section* 2 *of the Companies Act*, 1900, *notwithstanding that the issue price fixed by the option exceeds the nominal amount of the shares.*

Per FARWELL, J.—*An offer of additional shares to existing shareholders is not an "offer to the public" within section* 8, *sub-section* 1.

The Matabele Gold Reefs and Estates Co., Lim., was incorporated in March, 1899, with a capital of 500,000*l.* in 1*l.* shares, of which 387,030 had been issued. On February 1, 1901, the company sent out a circular to their shareholders announcing a further issue of 80,000 1*l.* shares to existing shareholders, in the proportion of one share for every five already held, at the price of 2*l.* 10*s.* per share. The circular stated that the issue to an extent of 60,000 shares had been guaranteed, in consideration of an option to June 30, 1901, on 15,000 shares at the issue price of 2*l.* 10*s.* per share. By the underwriters' letter each underwriter, for the consideration thereinafter mentioned, thereby undertook to subscribe or find responsible subscribers to the company's satisfaction for [blank] shares of 1*l.* each at the issue price of 2*l.* 10*s.* each, and to pay the amounts due on application and subsequent calls as made, and, in consideration of his undertaking as before mentioned, he or his nominee was to have the right up to June 30 to subscribe for and to have allotted to him at the issue price of 2*l.* 10*s.* a proportionate number of the

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15,000 shares, part of the un-issued capital of the company.

It was stated that the market price of the company's shares had been 8*l.*, and was considerably over 2*l.* 10*s.*

This action was commenced on February 9 by a shareholder to restrain the company from carrying out the underwriting agreement, and in the alternative from applying any of its shares or capital in the payment of an allowance or commission to any person in consideration of his subscribing for any part of the issue of 80,000 shares.

On February 14 the company sent a circular to the shareholders stating that the guarantors had agreed to raise the price of their option to 3*l.* 15*s.* per share.

Article 4 of the company's articles of association provided that the shares might be allotted or otherwise disposed of to such persons for such considerations and upon such terms and conditions as the board of directors might determine. Article 82 provided for payment by the directors of all expenses attending the incorporation of the company or the issue of its capital, including brokerage or commission for obtaining applications or subscriptions for shares. There was no article fulfilling the requirements of section 8, sub-section 1 of the Companies Act, 1900.

Upjohn, *K.C.*, and *Eustace Smith*, for the plaintiff.—The application is founded on section 8 of the Companies Act, 1900.[1] Sub-section 1 applies only to an issue to the public.

If this is a case of issue to the public, then the conditions of sub-section 1 have not been complied with. Sub-section 3 refers only to brokerage, which it has been decided a company may pay—*Metropolitan Coal Consumers Association* v. *Scrimgeour* [1895].[2] This agreement therefore falls within the prohibition of sub-section 2.

[FARWELL, J.—Is a premium "capital" within the clause?]

That point has never been decided, but we do not rely upon the word "capital," but on the word "shares." Possibly the company might issue their shares at a premium, and then pay a commission out of the premium, but that is not what this company are doing. They are indirectly or, in fact, directly applying their shares in payment of an allowance or commission to the underwriters. It would be illegal if the contract to take the shares was absolute; and the giving an option is worse; for the company and the shareholders are quite in the dark as to how much commission the underwriters will get.

Bramwell Davis, *K.C.*, and *A. R. Kirby*, for the company.—Apart from the Act, this is a perfectly proper arrangement. It is a mere agreement that the company will issue shares at a high premium. It makes no difference that the guarantors may possibly sell them at a higher premium. A company is not and cannot be bound to issue shares at the highest market price when it is above par. Premium is profit—*Lubbock* v. *British Bank of South America*

(1) Companies Act, 1900, s. 8: "(1) Upon any offer of shares to the public for subscription, it shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission and the amount or rate per cent. of the commission paid or agreed to be paid are respectively authorised by the articles of association and disclosed in the prospectus, and the commission paid or agreed to be paid does not exceed the amount or rate so authorised.

"(2) Save as aforesaid no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

"(3) But nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay."

(2) 65 L. J. Q.B. 22; [1895] 2 Q.B. 604.

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[1892].[3] When received it is divisible as profit, and it is a question for the directors what is a reasonable premium at which to issue the shares.

The transaction is not within section 8 of the Act of 1900. The whole object of the Act is the protection of the public. In section 10 a clear distinction is drawn between a prospectus issued to the public and a circular to existing shareholders. Coming to the construction of section 8 with that distinction in mind, it is plain that sub-section 2 does not apply. But if it does this transaction is not applying shares either directly or indirectly. "Apply shares" must mean issuing them either fully paid or at a discount to the guarantors. An indirect application would be where a vendor to the company loads the price and pays the guarantors either in money or shares.

Upjohn, K.C., replied.

Feb. 26.—FARWELL, J. (after stating the facts as above).—For the purposes of the argument and decision of this motion I assume that the agreement has been made *bona fide*.

Sub-section 1 of section 8 of the Companies Act, 1900, is a conditionally enabling clause, and it is admitted that if the present case falls within it the necessary conditions have not been complied with. Sub-section 2 is a general prohibitive clause extending to every application of shares or capital except in the case excepted by sub-section 1. It was argued for the defendant that sub-section 2 applied only to the case of an offer of shares to the public; and that the Act was intended to protect that portion of the public only who had not yet become members of a company, leaving actual members unprotected; and it was said that this is not an offer to the public (a point with which I will deal presently), and therefore is not within the Act at all. I am unable to accede to this contention. The Act applies (section 31) to every company whether formed before or after the commencement of the Act, and I can find no ground for limiting general words of prohibition, in the limited nature of the exception from such general prohibition, nor can I see any reason why existing shareholders should not be protected as well as prospective shareholders.

It was suggested, rather than argued, on behalf of the plaintiff, that the 1st sub-section applies, and that the circular of February 1 was an offer to the public. In my opinion this is not so. I think that the clue to the meaning of the word "public" as used in this Act is to be found in section 10, sub-section 4, which excludes "a circular or notice inviting existing members . . . to subscribe for further shares" from that section. An offer is not the less made to the public because it is sent to shareholders or debenture-holders as well as to other persons, or because it is not advertised in the public newspapers; but if it is sent solely to the shareholders and debenture-holders of the company there is no offer to the public. The distinction is between persons who are members or debenture-holders of a company on the one hand, and those who are not on the other. I therefore hold that this circular is not an offer of shares to the public under sub-section 1.

But the plaintiff rested his main contention on sub-section 2, and argued that an allotment of shares under the underwriting agreement would be an application direct or indirect of shares in payment of "commission, discount or allowance" to persons in consideration of underwriting, and I am of opinion that this contention is sound. Suppose that the directors were indebted to a person in 1,000*l.*, and they allotted to him 400 shares at par, when their market price was 2*l.* 10*s.* premium, in discharge of the debt, they would in my opinion clearly have applied those shares to the payment of that debt; they could in no other way justify their action in issuing shares at par instead of obtaining a proper premium. How then can directors in the present case justify the issue of shares to a favoured individual at less than the market price, except on the ground of a valuable consideration coming from that individual to the company? And what other consideration is there than the underwriting agreement? It was said by the defendant that the company might have agreed to pay a sum equal to the difference between 2*l.* 10*s.*

(3) 61 L. J. Ch. 498; [1892] 2 Ch. 198.

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premium and the market price on June 30; but that is not the present transaction; here the underwriters will get the shares and may retain them or deal with them as they please. The shares will in fact be applied in paying them, and the difference between the market price and the 2*l.* 10*s.* premium will merely afford the reason inducing the underwriters to exercise or refrain from exercising their option to have the shares applied in payment of the consideration for their underwriting agreement. It is said that the section was intended to prevent a vendor from giving part of his shares to underwriters; but assuming this to be so, I see no reason why the words of the Act should not be applied to other transactions which are fairly within the expressed intention of the Act and the mischief intended to be thereby prevented.

It was urged that the premiums would not be capital and that the consideration might be paid out of premiums; but that is not the case before me. The Act distinguishes between capital and shares, and forbids the application of either in payment of underwriting commission. I have to consider only a dealing with shares and not with the money produced by those shares.

I therefore grant an injunction in the terms of section 8, sub-section 2 of the Act, limiting it to shares.

The company appealed.

Swinfen Eady, K.C., *Bramwell Davis, K.C.*, and *A. R. Kirby*, for the appellant. —The present transaction is a perfectly good one under the old law, and is not invalidated by the Companies Act, 1900, s. 8, sub-s. 2. The transaction is not a device for applying the capital of the company in underwriting, since the premium is not capital, but profit; nor is it a device for loading the price of property sold to the company. Prior to the Companies Act, 1900, it had been decided that reasonable brokerage could be paid by the company—*Metropolitan Coal Consumers Association* v. *Scrimgeour*,[2] and the effect of that provision is preserved by sub-section 3 of section 8. Sub-section 1 goes further, and enables something to be done, if certain conditions are fulfilled, which could not be done before. Then sub-section 2 is simply declaratory. It is not intended to alter the old law, or to render invalid what was previously valid. In *Shaw* v. *Holland* [1900][4] it was recognised that shares can be disposed of by way of option. *Lubbock* v. *British Bank of South America*[3] shews that premium on the issue of shares is profit, not capital. The substance of this transaction was a payment made by the company to the underwriters out of profits.

Upjohn, K.C., and *Eustace Smith*, for the respondent.—As regards the old law a company could properly employ agents at a reasonable brokerage for work done—*Metropolitan Coal Consumers Association* v. *Scrimgeour*[2]—but could not pay underwriting commission out of capital—*Faure Electric Accumulator Co*, *In re* [1888][5]; and the observations of Kay, J., in that case seem to apply equally to the case where the payment is made out of profits. The issue was an offer to the public within the Act. Where the shareholders are a numerous body the issue is, in fact, made to the public—see sections 9, 10 (sub-section 4), and 30.

[VAUGHAN WILLIAMS, L.J.—May not the existence of the underwriting agreement make the offer an offer to the public? The underwriters, to whom the shares were conditionally offered, are not shewn to be existing shareholders.]

That point was not suggested in the Court below; but we do not desire to press this further. Treating the case as governed by sub-section 2 alone, we submit that the company is applying its shares within the meaning of the sub-section, notwithstanding that it obtains the par value. Every dealing with its shares by the company is an application, and it makes no difference that the consideration includes the par value. It is no answer to say that it is not a dealing with capital money, for the Act in terms specifies both things—share and capital money. The *dicta* in *Shaw* v. *Holland*[4] shew that such a dealing even before the Act could not be sustained. It is said that in substance the transaction is a

(4) 69 L. J. Ch. 621; [1900] 2 Ch. 305.
(5) 58 L. J. Ch. 48; 40 Ch. D. 141, 153.

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mere promise to pay a sum of money out of profits. The answer is that the underwriters obtain shares, not money. The transaction is a promise by the company, at the request of the underwriters, to deal with the company's shares in a particular way. Further, it depends on the state of the company's capital account whether the premium can be properly treated as profits.

Bramwell Davis, K.C., in reply.—As to the old law, *Faure Electric Accumulator Co., In re*,[5] was overruled by *Metropolitan Coal Consumers Association* v. *Scrimgeour*.[2] There is no direct decision as to the right of directors to apply profits in payment of underwriting commission, but it was expressly decided by Vaughan Williams, J., in *South African Trust and Finance Co., In re; Hirsch & Co., ex parte* [1896],[6] under an article of association similar to article 4 here, that a company could dispose of its shares by giving an option; and his ruling on that point was not disturbed in the Court of Appeal or House of Lords. The premium would retain its character of profit for this purpose, whatever other losses the company had sustained. The transaction, therefore, can only be impeached, if at all, under the Act. We admit that sub-sections 1 and 3 do not apply, but according to the fair reading of it sub-section 2 only prohibits the application of shares at less than their par value.

RIGBY, L.J.—In this case an action has been brought to restrain a limited company from carrying out a scheme which is plainly shewn to us in all its bearings on the documents that have been put in evidence. It appears that the company has been down to the present time a prosperous company, so that there is no doubt whatever that at present, as things exist, the shares are worth a good deal more than the nominal amount, which is 1*l.* per share. Now the plan proposed by the company was out of the unissued capital of about 112,000*l.* to issue 80,000*l.* for the purpose of assisting certain affiliated companies in a way a little unusual perhaps, but not denied, so far as that goes, to be within the powers of the company. Those 80,000 shares were to be offered in the first place to the existing shareholders in the company, but the company was not minded to enter upon a transaction of this magnitude without having security against the possibility of the existing shareholders not taking up all the shares; and accordingly they entered into what is called an underwriting transaction, getting certain persons, who may or may not have been shareholders in the company, to enter into an underwriting agreement which comes in effect to this—that they would take up certain of the shares at the price at which they were offered to the shareholders; and were to have in addition the option of taking at the same price 15,000 other shares—a most valuable option if the shares went on increasing in value, so that 2*l.* 10*s.* a share, the price which would have to be paid, would really mean less than the market value. That option involves, on the other hand, a great limitation upon the rights of the company, and in proportion as it was valuable to the underwriters it would be onerous as regards the company. Under the underwriting engagement the company were, if called upon, in accordance with the conditions imposed, bound to allot to underwriters in the whole 15,000 shares, and the question now is whether on the construction of section 8 of the Companies Act, 1900, that is or is not permissible under the circumstances.

We are relieved from many minor points by the frank admission that, whatever else takes place, the company cannot claim the benefit of sub-section 1 of section 8. Whether this was an offer of shares to the public for subscription or whether it was not, the company could not claim the benefit of sub-section 1 without pointing to an article of association which authorises the payment of commission, and the amount or rate per cent. That must be set forth in the articles of association—that is to say, the power of the directors to give commission is limited to an amount or rate not greater than that prescribed by the articles. There is no such article here fixing the amount or rate; and whether or not this was an offer

(6) 74 L. T. 769; in H.L., *sub nom. Hirsch & Co.* v. *Burns* [1897], 77 L. T. 377.

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to the public for subscription, that clause alone would prevent the company claiming the advantage—for it is an advantage—of sub-section 1. It is also admitted, and must necessarily have been admitted, that sub-section 3 can have no application here; and really the only question left for us is to consider the effect and meaning of the prohibitive sub-section 2. It has been urged that the construction of that sub-section is very difficult. I cannot myself see the difficulty. It appears to me that the section is about as plain as a section can well be made: "save as aforesaid"—that means leaving untouched any effect that can be properly given to sub-section 1; and it is admitted that no effect can be given to it in this case—"no company shall apply any of its shares or capital money"—I pause there to consider the words "shall apply any of its shares." How can it be said that there is any doubt whatever as to the meaning of those words? "Apply" means what it says simply, and nothing else. "Shares" means "shares," and nothing else. "No company shall apply any of its shares"—we have not got to consider the case of capital money here, because the case is one of shares—"either directly or indirectly"—which are words frequently inserted for the purpose of obviating any doubt—"in payment of any commission, discount or allowance to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company." I stop there, because those are the important words. No doubt the company agreed to allot shares in consideration of the underwriters applying conditionally or unconditionally for other shares in the company. They agreed to allot 15,000 shares in consideration of the underwriters subscribing for other shares. A great deal of ingenuity has been spent in saying that that is a difficult section. No doubt it is difficult if we are to wrest it out of its plain meaning. It is very difficult on that footing to find a standing ground, and to say this is what it must mean; but I avoid that difficulty by applying the plain *prima facie* meaning to it, and nothing else. It is said that the Legislature must have meant "shall apply the shares up to the nominal value." I find nothing about the nominal value of the shares. Companies find very often to their loss that their shares are not in any way valued by the nominal amount, and what has been issued in pounds as the nominal amount may only be worth pence. It not so frequently happens that what has been issued at 1*l.* becomes worth a great deal more; but, in any case, the share is worth to the company what it will bring. If it will bring more than 1*l.*, the nominal amount, then that is the value to the company; and if they apply a share which nominally only amounts to 1*l.*, but is really worth, we will say, several pounds, they apply several pounds' worth of their property—and that they are prohibited from doing if the result will be that a commission or profit thereby accrues to the underwriters for subscribing for other shares in the company. That appears to me to be the plain, straightforward, and undoubted meaning of the sub-section—that they are not to get rid of their shares or apply them in allowing such a claim as the present to be put forward by the underwriters, they saying, "In consideration of our paying 2*l.* 10*s.* you will allot to us shares which we, before we exercise the option, shall have satisfied ourselves will be worth more than the 2*l.* 10*s.*"; which really means, "You will enable us to make out of this transaction of subscription for shares a profit or commission." Commission need not be expressed in percentages or in definite amounts. If it be plain that a profit will be realisable, then I think it amounts to "commission, discount or allowance"; it amounts to money's worth which it is contemplated that subscribers for shares will get; and the mode in which it is to be got is by applying the shares. How can the company apply the shares in any way more clearly than by allotting them I do not know; and when it allots them it applies not the nominal value but the shares themselves, and that is what the sub-section prohibits.

I do not think it necessary to enter further into the details of this matter; it being conceded that sub-section 2 is the only one of the three sub-sections which needs to be interpreted, and the

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BURROWS v. MATABELE GOLD REEFS AND ESTATES CO., App.

interpretation of that being simply in obedience to the plain language and meaning of the words, that is all that I, at any rate, think it necessary to say in support of our view. That is the view which has also been taken by the learned Judge in the Court below, and the result will be that the appeal will be dismissed.

VAUGHAN WILLIAMS, L.J.—I agree. I think that if the underwriters in the exercise of their option ask for these shares, and an allotment is made to them by the company, that will be an allotment in consideration of the underwriters subscribing or agreeing to subscribe for shares of the company; and I do not think it is the less so because the allotment may be at a premium. I think that such an allotment is plainly and manifestly an application of the shares within the meaning of the word "apply" in sub-section 2. It was not really argued that if we take the literal meaning of the words there was not an application of the shares within the meaning of this sub-section 2, but it was said that we ought not to read "apply" in its natural sense, and that we ought to read it as if the words had run, "Save as aforesaid no company shall apply the proceeds of the issue of its shares so far as the same are capital or any capital money," and so on. I do not see any reason for modifying the meaning of the word "apply." The reason that is suggested for so doing is that it is said that this sub-section is really directed against the misapplication of capital. I do not at all know that that is so. On the contrary, when I find this distinction drawn between shares and capital money I am rather led to the contrary conclusion. I think it is quite possible that the very object of the Legislature in so wording the sub-section was to prevent the payment of these commissions for placing shares by giving options of this description; but whether that is so or not I have not to decide. I merely have to decide on what seems to me to be the perfectly plain meaning of the words in the sub-section.

STIRLING, L.J.—I am of the same opinion. The matter really lies within a very narrow compass. It was admitted that neither sub-section 1 nor sub-section 3 of section 8 applies to this case. [His Lordship read sub-section 2, and continued:] Now that being so, let me put this question. Can a company having 1*l.* shares issue or allot one of those shares partly in consideration of 2*l.* 10*s.* and partly in consideration of an agreement to subscribe for other shares in the company? I think not. That is an application of the shares partly in consideration of an agreement to subscribe for other shares of the company which is struck at, as it appears to me, by this sub-section. It is quite true that the whole consideration is not the agreement to subscribe, but none the less it appears to me to be within the sub-section; and if there was any doubt upon it it would seem to me to be removed by the words in specified instances, one of which is "whether the shares be so applied by being added to the purchase-money of any property acquired by the company . . . or otherwise." If I am right in that conclusion, then it seems to me that it follows that this agreement is beyond the powers of the company and is prohibited by this sub-section. The underwriting agreement begins with an agreement on the part of the underwriter to subscribe for certain shares in the company, and then continues that in consideration of his undertaking as above mentioned—namely, the agreement to subscribe—he is to have the right at any time to take up and have allotted to him shares at the issue price of 2*l.* 10*s.* That seems to me an agreement on the part of the company to do the very thing to which I have just referred. I think the judgment of Mr. Justice Farwell was perfectly correct and ought to be affirmed.

Appeal dismissed.

Solicitors—Ashurst, Morris, Crisp & Co., for appellant; Morse, Hewitt & Farman, for respondent.

[*Reported by J. R. Brooks and A. Cordery, Esqs., Barristers-at-Law.*

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BUCKLEY, J.
1901.
March 13.

GASELEE, *In re*.

Compulsory Purchase—Purchase-money Paid into Court—Interim Investment—Railway Securities — Brokerage—Costs—Incidence—Rules of Supreme Court, 1883, *Order XXII. rule* 17 (*November*, 1888)—*Lands Clauses Consolidation Act*, 1845 (8 *& 9 Vict. c.* 18), *ss.* 70 *and* 80.

Where an interim investment of purchase-money paid into Court under the Lands Clauses Consolidation Act, 1845, *is made upon railway securities allowed by Order XXII. rule* 17 *for the investment of cash under the control of the Court, the promoters of the undertaking are, by virtue of section* 80 *of the Lands Clauses Act, liable for the costs of the investment, although the terms of the section apply only to the costs of investment "in Government or real securities."*

Brown, *In re* (59 L. J. Ch. 530), *applied.*

Adjourned summons.

On January 2, 1901, an originating summons was issued by Henry Gaselee, who was tenant of life of certain real estate under the will and codicil of Stephen Gaselee, deceased, asking that a sum of 7,081*l.* in Court, representing the purchase-money of land compulsorily taken by the London County Council under their statutory powers, might (till the same should be re-invested in land or otherwise dealt with pursuant to section 69 of the Lands Clauses Consolidation Act, 1845) be invested in two of (*inter alia*) the following securities—namely, Great Eastern Railway 3½ per cent. Preference Stock, Midland and Great Northern Railways (Joint Line) 3 per cent. Rent Charge Stock, and Metropolitan Railway 4 per cent. Preference Stock; and that the County Council might be ordered to pay the costs of the investment.

On January 17 the following order on the summons was drawn up by the Registrar in chambers (omitting immaterial parts): "The applicant by his solicitors undertaking to pay to the Chancery broker the brokerage and other charges on the investment in the schedule hereto directed It is ordered that the funds in Court be dealt with as in the said schedule hereto directed. And it is pursuant to section 80[1] of the Lands Clauses Consolidation Act, 1845, ordered that the County Council of the Administrative County of London do pay to the applicant Henry Gaselee his costs (including therein all reasonable charges and expenses incident thereto) of obtaining this order and of the investment therein

(1) The Lands Clauses Act, 1845, enacts: Section 70: "Such money"—that is, money paid into Court—"may be so applied as aforesaid upon an order of the Court of Chancery . . . . made on the petition of the party who would have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited; and until the money can be so applied it may, upon the like order, be invested by the said Accountant-General in the purchase of Three per Centum Consolidated or Three per Centum Reduced Bank Annuities, or in Government or real securities, and the interest, dividends, and annual proceeds thereof paid to the party who would for the time being have been entitled to the rents and profits of the lands."

Section 80: "In all cases of moneys deposited in the Bank under the provisions of this or the special Act, or an Act incorporated therewith, except where such moneys shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Chancery . . . . to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking; (that is to say,) the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for, and the costs of the investment of such moneys in Government or real securities, and of the re-investment thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such moneys shall be invested, and for the payment out of Court of the principal of such moneys, or of the securities whereon the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants. . . ."

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directed and of all proceedings relating thereto such costs to be taxed by the Taxing Master in case the parties differ." The schedule above referred to provided for the investment to be made "without deducting brokerage and other charges" in two of the three above-mentioned railway securities, and for payment of the interest to the applicant.

On an adjournment of the summons into Court upon the form of the order, the question to be determined was whether, under section 80 of the Lands Clauses Act,[1] the County Council were liable to pay the costs of investment upon any securities other than those expressly authorised for interim investment by section 70 of the Act [1]—namely, Government or real securities.

S. Dickinson, for the applicant.—It is plain, since *Metropolitan and District Railways Act, In re; St. John Baptist College, Oxford, ex parte* [1882],[2] that money paid into Court under the Lands Clauses Act may now be invested in any securities in which cash under the control of the Court may be invested under the new Order XXII. rule 17 [3]; it must therefore be taken that the scope of section 80 of the Lands Clauses Act is extended to include the costs (here including brokerage, stamps, and registration fees) of all such authorised investments, and is no longer confined to investment on Government or real securities. Section 80 is very wide and general, making the costs of adverse litigation the only exception to those which the promoters have to pay. No case is to be found where any limitation has been put on their liability except *St. John Baptist College, Oxford, Ex parte*,[2] and there the only limitation was as to the excess of the money invested over the amount originally paid in. Moreover, the spirit of the Act is to be regarded, and not its letter, as is pointed out by Jessel, M.R., in *Bethlem Hospital, In re* [1875],[4] and the spirit of the Act is clearly in favour of the view contended for. The principle of that case applies. The matter is really covered by *Brown, In re* [1890].[5]

F. Thompson, for the respondents.—*Bethlem Hospital, In re*,[4] lays down no principle, and merely decides that redemption of land tax is, for the purpose of section 80, a "purchase of lands." The Act says that the promoters of the undertaking are to pay the costs of investment on Government or real securities, and the scope of the Act ought not to be enlarged so as to make the County Council liable to pay more costs for investment because the tenant for life wants to get more income by investing on securities not covered by the Act.

BUCKLEY, J.—The question which I have to determine arises thus: Section 80 of the Lands Clauses Consolidation Act, 1845,[1] puts upon the London County Council, the respondents to the summons, the obligation to pay "the costs of the investment of such moneys" (the purchase-moneys of the lands) "in Government or real securities," these being the securities mentioned (together with Three per cent. Consolidated and Three per cent. Reduced Bank Annuities) in section 70,[1] as being authorised for the interim investment of moneys. The applicant desires the investment to be made in one or more of certain railway securities, and it is admitted that the brokerage and other charges for investing in those securities are larger than would be the case if the money were invested in the securities specifically mentioned in the section of the Act to which I have just referred.

It is said that the order as drawn up is wrong in point of form, as containing an undertaking to pay "brokerage and other charges"; but, in my opinion, this is not

(2) 52 L. J. Ch. 268; 22 Ch. D. 93.

(3) By a rule which came into operation on November 26, 1883, and stands in the place of Order XXII. rule 17 of the Rules of the Supreme Court, 1883, "Cash under the control of or subject to the order of the Court may be invested in the following stocks, funds, or securities; namely"—then follows an extensive list, including "Debenture, preference, guaranteed, or rentcharge stocks of the railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stock or shares." . . .

(4) 44 L. J. Ch. 406; L. R. 19 Eq. 457.

(5) 59 L. J. Ch. 530.

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so—the order is quite right. The applicant must undertake to pay the Chancery broker all brokerage and other charges, whatever they are. Then, when the matter comes before the Taxing Master, he would determine what are the costs (including reasonable charges and expenses) which the County Council are to pay; and, if the parties were not satisfied with his allowances, the question could be brought before a Judge to review the taxation. So really the question I am asked to determine is premature, and I might dismiss the summons and leave the matter to wait till the costs have been taxed in the usual way; but, as both parties wish to have the question of principle decided now, I am willing to decide it.

Since the Lands Clauses Act was passed in 1845 cash under the control of the Court may (by later legislation) be invested in various other securities than those which are mentioned in section 70 of the Act.[1] Is the Act, then, to have the effect of throwing increased costs in respect of this greater liberty of investment on the promoters of the undertaking? In my opinion, yes. I am entitled to look and try to find out what is really the meaning of the Act. Under it land is taken, it may be against the owner's will. In a case like the present the purchase-money is to be ultimately applied in the purchase of other lands or in certain other ways specified in the statute, and until it can be so applied an interim investment of it is to be made "in the purchase of Three per centum Consolidated or Three per centum Reduced Bank Annuities, or in Government or real securities." Now, as I have said, a larger class of investments is allowed for cash under the control of the Court. In *Bethlem Hospital, In re*,[4] Sir G. Jessel, M.R., had before him a case in which the question was whether the costs of the application of the purchase-money of lands taken by a railway company in the redemption of land tax were payable by the company, and he decided that they were upon two grounds. First, whether such an application of the moneys was a "re-investment in the purchase of lands" or not, he thought that the spirit of the Act was such that the costs ought to be borne by the company. And secondly, Lord Romilly, in *London, Brighton &c. Railway, In re* [1854],[6] had held that the application of purchase-money in the redemption of land tax was a re-investment in the purchase of lands within the meaning of the 80th section, and in that case, of course, the costs ought to be borne by the company. Sir G. Jessel says, "The Lands Clauses Consolidation Act, 1845, does not in words make the costs with which it is now sought to charge the railway company payable by them." That is exactly how the case stands before me. Then he goes on: "It has been decided that an order may be made for payment of costs, although no express words can be found authorising it. One remarkable instance of this is the case of *Berkeley's (Earl) Will, In re* [1874].[7] That case originally came before me. I . . . referred the matter to the Lords Justices . . . and Lord Justice James, in giving his judgment, says this: 'The sum which the company have paid is now in Court, and ought to be re-invested in land; but this ought to be done according to equitable principles, and the costs, charges and expenses of the agent, properly incurred, ought in the first place to be paid out of the fund.'" Then later, referring to *Trafford, Ex parte* [1837],[8] which came before Lord Abinger, he says, "I understand him" (Lord Abinger) "to draw a distinction between the spirit of an Act, or that which a Judge conceives to be the spirit of an Act, and the intention, which, though not expressed in precise words, may be gathered from considering the terms of the enactment, and which amounts in fact to a species of construction; he thinks that unless he can find the latter he cannot make the order. He then consulted Lord Lyndhurst, and, having done so, he appears to have found that stronger expression which he required, and he made the order." That case is an authority for the proposition that I am entitled to look and see, if I can, what is the intention of the Act of 1845, having regard to the altered circumstances as to investment

(6) 18 Beav. 608.
(7) 44 L. J. Ch. 3; L. R. 10 Ch. 56
(8) 2 Y. & C. 522.

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GASELEE, IN RE.

Of course, since *St. John Baptist College, Oxford, Ex parte*,[2] there is no doubt that the investment which is asked for is one which can be made. I am therefore of opinion that the London County Council are liable to pay the costs of investing in these securities, including the increased brokerage and other charges.

Another case which has been referred to—*Brown, In re*[5]—is of some assistance, though it does not expressly decide the present point. There the Midland Railway had purchased land belonging to a lunatic, and the purchase-money was ordered to be, and was, invested in Three per cent. Consols. On the conversion of the National Debt in 1888 the committee of the lunatic did not consent to the conversion of the Consols into Two and Three-quarter per cent. Consols, and the Government accordingly redeemed the Consols and paid the redemption-money into Court. A petition was then presented in lunacy by the committee asking that the money in Court might be invested in Great Northern Railway Preference Stock, and Lord Justice Lindley and Lord Justice Bowen made an order for investment as prayed, and directed that the Midland Railway should pay the costs of the application and of the investment, except so far as the costs of investment might have been increased by reason of the redemption-money exceeding the amount of the purchase-money originally paid by the company. Before the order was drawn up the petition was, by the direction of the Court, restored for reargument upon, *inter alia*, the question of the liability of the company to pay the costs. The Court held that the order was right. The question of how much of the costs of the application and investment was to be paid by the company was therefore prominently before the Court; and they held that all the costs, except so far as they had been increased by the redemption-money exceeding the purchase-money, must be paid by the company. It does not appear that the question as to the difference of the amount of brokerage between Government and railway securities was argued, but the decision, in my opinion, involved it. That case, therefore, is an authority upon the question which I have to decide, although it does not appear that the precise point was actually brought before the Court.

I therefore hold that the costs of the interim investment of purchase-money in securities which are now allowed in the case of cash under the control of the Court are payable by the promoters.

Solicitors—Janson, Cobb, Pearson & Co., for applicant; W. A. Blaxland, for respondent.

[*Reported by Arthur Lawrence, Esq., Barrister-at-Law.*

JOYCE, J. 1901. Feb. 13, 16.

ROGERSON, *In re*; BIRD *v.* LEE.

Will—Charitable Bequest—Trust to Repair Tomb out of Income of Legacy—Remainder of Income Given for Good Charitable Purpose—Object Partly Illegal—Whole of Income Applicable to Charity.

Where a legacy has been given to trustees upon trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for valid charitable purposes, then, the trust for repair of the tomb being void, the result of the failure of that trust is that the whole of the income of the fund becomes applicable for the charitable purposes.

Fisk *v.* Att.-Gen. (L. R. 4 Eq. 521), Birkett, *In re* (47 L. J. Ch. 846; 9 Ch. D. 576), *and* Vaughan, *In re*; Vaughan *v.* Thomas (33 Ch. D. 187), *followed.*

Adjourned summons.

By his will dated October 26, 1864, John Rogerson, the above-named testator, after making certain devises and bequests not material to this report, bequeathed a sum of 1,000*l.*, to be reserved out of his personal estate, unto his trustees therein named, and directed that the said sum of 1,000*l.* should after the death of his wife (to whom he gave a life interest in the same) "be invested in the purchase of stock of the Government called 3*l.* per

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cent. Consolidated Bank Annuities in the name of the vicar and churchwardens of St. George's Church of Doncaster, in trust that they the said vicar and churchwardens for the time being do and shall out of the proceeds or annual income of such investment in the first place maintain yearly and keep in good repair and condition annually in all respects the two tombs and palisading belonging to me, and also the gravestone belonging to Miss Rogerson and adjoining mine in the cemetery. . . . And, in the next place, to divide and distribute the remainder of such annual income or dividend unto and equally among the poor recipients" of the almshouses therein mentioned. And the testator thereby directed that "the trustees of this my will shall have full power and authority, and I hereby desire them to see that this money is properly applied yearly for the purposes aforesaid."

The testator died on November 14, 1864, and his will was duly proved on December 8, 1864.

The testator's widow died on June 17, 1900.

This was a summons taken out by the executors and trustees of one of the testator's residuary legatees against the executors of another residuary legatee, who was also the last surviving trustee of the testator's will, the Rev. Henry Jemson Tebbutt, the vicar of St. George's, Doncaster, on behalf of himself and the churchwardens for the time being of that church, and other defendants, for the determination of the question whether, the gift to repair the tombs being invalid, the whole fund was applicable for the purposes of the charity, or whether so much of it as would have been required for the maintenance of the tombs fell into the testator's residuary estate.

Hughes, K.C., and *T. H. Watson*, for the plaintiffs.—The proper course is to treat the gift as good in part and void in part, and not to treat it as a valid gift to a charitable object subject to an invalid obligation. The gift for the tomb is void and falls into the residuary estate—*Hoare* v. *Osborne* [1866].[1]

(1) 35 L. J. Ch. 345; L. R. 1 Eq. 585.

[JOYCE, J.—The statement of the law on this point in *Tudor's Charitable Trusts* (3rd ed.), p. 45, is against you, and so is *Fisk* v. *Att.-Gen.* [1867].[2]]

Vaughan, In re; Vaughan v. *Thomas* [1886],[3] is in my favour, for there part of the gift was held void, and went to the residuary legatees; and it was so held also in *Rigley's Trusts, In re* [1866].[4] The principle laid down in these cases is the proper principle, and to be preferred to that which prevailed in *Fisk* v. *Att.-Gen.*,[2] *Hunter* v. *Bullock* [1872],[5] *Dawson* v. *Small* [1874],[6] *Williams, In re* [1877],[7] and *Birkett, In re* [1878].[8]

W. F. Hamilton, K.C., and *Christopher James*, for the first defendants.—We adopt the argument urged on behalf of the plaintiffs. In *Fowler* v. *Fowler* [1864][9] a similar gift was held void *in toto*. The words of the gift in this case are different from those used in *Fisk* v. *Att.-Gen.*,[2] *Birkett, In re*,[8] and *Vaughan, In re*.[3] In those cases there was a gift to the charity of what was not "required" or "necessary" for the illegal object, as was pointed out by Kay, J., in *Taylor, In re* [1888][10]; whereas in this case there are two distinct trusts, the second dependent upon the first, and as the first is void and fails, the second fails also.

J. G. Wood, for the defendants, the vicar and churchwardens. — *Hoare* v. *Osborne*[1] shews that where there is any question of partitioning between valid and invalid objects, and there is any difficulty in assessing the amount of the invalid object, the whole gift fails for uncertainty. The authorities in favour of the contention that the whole of the income goes to the charity are conclusive.

Eastwick, for other defendants.

Cur. adv. vult.

JOYCE, J.—I think that the law on this question is correctly stated on page 45 of

(2) L. R. 4 Eq. 521.
(3) 33 Ch. D. 187.
(4) 36 L. J. Ch. 147.
(5) 41 L. J. Ch. 637; L. R. 14 Eq. 45.
(6) 43 L. J. Ch. 406; L. R. 18 Eq. 114.
(7) 47 L. J. Ch. 92; 5 Ch. D. 735.
(8) 47 L. J. Ch. 846; 9 Ch. D. 576.
(9) 33 L. J. Ch. 674; 33 Beav. 616.
(10) 58 L. T. 538.

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Tudor's Charitable Trusts (3rd ed.) in the passage which says that in all the cases where "a fund has been given to trustees upon trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for valid charitable purposes . . . . it has been held that the result of the failure of the trust for the repair of the tomb is, that the whole of the income becomes applicable for the charitable purpose." Now of course in all these cases the real question is whether on the true construction of the gift the trust for the application of the income for the repair of the tomb is to be a charge on the whole income, and the residue is to be given to the charitable purpose. By "residue" I mean so much of the income as is not required for the repair of the tomb. In this particular gift the word "residue" is not used; the words are "do and shall out of the proceeds or annual income of such investment in the first place maintain yearly and keep in good repair and condition annually in all respects the two tombs . . . . and in the next place to divide and distribute the remainder of such annual income or dividend unto and equally among the poor," &c. That, to my mind, is equivalent to making the provision for the repair of the tomb a charge on the bequest. I think that there is no practical difference between the gift in this case and the gift in *Fisk* v. *Att.-Gen.*[2]; and I think that this case is governed by the decisions in that case, and *Birkett, In re*,[8] and *Vaughan, In re; Vaughan* v. *Thomas*.[3] If there be any contradiction between the cases, I think that there is a great preponderance of authority in favour of *Fisk* v. *Att.-Gen.*[2] and the other cases I have mentioned; and I think that the statement to which I have referred in *Tudor's Charitable Trusts* is right.

Of course if there were provisions for various objects, and it were possible as a matter of construction to arrive at the conclusion that the testator never intended that there should be any surplus at all, that would be a different matter. Where, however, there is a trust for a tomb, as here, then, as Vice-Chancellor Bacon pointed out in *Dawson* v. *Small*[6]—a similar case—"The obligation to keep up the tombstones is merely honorary; but the obligation to give all that is not applied for the purposes first-mentioned in favour of these poor people, is by no means honorary; it is a trust that must be executed." Testators who make bequests of this nature really intend that the legacy shall go to the object of the bequest with a moral obligation to keep up the tomb. I therefore hold that the whole income of this bequest goes to the vicar and churchwardens of St. George's, Doncaster. The fund must be invested in the name of the official trustee, and the income paid to the vicar and churchwardens for the purposes of the charity.

Solicitors—Collyer-Bristow & Co., for plaintiffs; A. F. & R. W. Tweedie, agents for Atkinson & Sons, Doncaster, for first defendants; Speechly, Mumford, Rodgers & Craig, for vicar and churchwardens; Lammin & Lodge, agents for Parkin, Taylor & Parkin, Doncaster, for other defendants.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

COZENS-HARDY, J. 1901. March 21. } PEARCE *v.* BASTABLE'S TRUSTEE.

Bankruptcy—Vendor and Purchaser—Specific Performance against Trustee—Disclaimer of Leaseholds — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.

A trustee in bankruptcy cannot disclaim a bankrupt vendor's contract for the sale of leaseholds without disclaiming the lease. Specific performance of such a contract will be ordered against the trustee notwithstanding an attempted disclaimer.

Holloway *v.* York (25 W. R. 627) *applies only to the case of a bankrupt purchaser.*

On June 19, 1900, the plaintiff entered into an agreement in writing with Francis

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PEARCE v. BASTABLE'S TRUSTEE.

Bastable for the purchase of a leasehold house at Richmond, in Surrey, subject to a mortgage for 300*l.*, at the price of 85*l.* The agreement provided that the vendor should pay the interest on the mortgage up to the day fixed for completion, July 16, 1900, and for payment of 42*l.* 10*s.* as deposit, and this the plaintiff had paid. On August 21, 1900, Francis Bastable was adjudicated bankrupt, and the defendant was appointed his trustee in bankruptcy. The title had been accepted by the plaintiff, and he had sent a draft assignment to the defendant, who had approved the draft, and the plaintiff had had it engrossed and sent it in for execution. The defendant had allowed the interest on the mortgage to fall into arrear, and the mortgagees had taken possession. Some dispute had arisen as to the apportionment of outgoings and the right of the plaintiff to be put into possession.

On December 22, 1900, the defendant by writing under his hand disclaimed the contract. He did not disclaim the lease of the house.

The plaintiff brought this action for specific performance.

Lord Coleridge, K.C., and *W. M. Spence*, for the plaintiff.—The disclaimer of the trustee in bankruptcy is void. *Kerkham, In re* [1886],[1] shews that a trustee in bankruptcy cannot disclaim a contract to sell leaseholds and retain the leaseholds. The case of *Pooley, In re; Rabbidge, ex parte* [1878],[2] shews that the trustee of a bankrupt vendor is bound to perform his contract for sale.

Eve, K.C., and *E. Clayton*, for the defendant.—Specific performance can never be obtained against a trustee in bankruptcy—*Holloway* v. *York* [1877],[3] *Fry on Specific Performance* (3rd ed.), p. 439. The plaintiff's only remedy is to prove for damages in the bankruptcy.

COZENS-HARDY, J.—This is a plain case. There was a contract entered into between the plaintiff and Bastable, which is in no way impeached, for the sale to the plaintiff of the equity of redemption in certain leasehold property. On the contract the plaintiff paid a deposit and the title was accepted by him. Then Bastable became bankrupt, and a delay ensued, possibly caused by the bankruptcy proceedings. The draft assignment was then sent in by the purchaser and approved, and the engrossment was sent in. There was no dispute about the form of the assignment. It was an assignment of the leasehold property subject to the mortgage. Then the trustee in the vendor's bankruptcy had, to use plain language, the impudence to say that he disclaimed the contract, but would not disclaim the lease—which would have enabled the purchaser to apply for a vesting order—that he would keep the deposit paid by the purchaser, and leave him to take such steps in the bankruptcy as he might think fit. The trustee clearly cannot be allowed to disclaim the contract without disclaiming the lease. If authority is needed for such a proposition, it is to be found in the decision of Mr. Justice Cave in *Kerkham, In re*.[1] There a man had, before bankruptcy, contracted to sell leasehold property to another, who had sold his right under the contract to a third person. The trustee in bankruptcy of the original vendor purported to disclaim the contract without disclaiming the lease, but the Court held that he could not separate the contract from its subject-matter and keep the property, and that the disclaimer was bad. That is precisely this case. The disclaimer which the trustee has purported to make is a nullity. What is the position of a trustee in bankruptcy in such a case? It has been contended on his behalf that the fact of the bankruptcy made all the difference to the liability to specific performance. *Holloway* v. *York* [3] was cited in support of that contention. But the effect of that decision is correctly stated in *Dart's Vendors and Purchasers* (6th ed.), p. 1126: "Specific performance, however, cannot be decreed against the trustee in bankruptcy of the purchaser"—that is to say, that the Court will not interfere to enforce the payment of 20*s.* in the pound, on one debt, at the expense of the other creditors. That decision has no

(1) 80 L. T. Journal, 322.
(2) 48 L. J. Bk. 15; 8 Ch. D. 367.
(3) 25 W. R. 627.

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application to a case where the trustee in bankruptcy of the vendor is defendant. If any authority is needed in support of that proposition, it is to be found in *Rabbidge, Ex parte.*[2] There Lord Justice James said in his judgment: "The result was that, upon the adjudication being made, the legal estate in the property vested in the trustee in the bankruptcy, subject to the equity of the purchaser under the contract. That equity gave him a right to have the property conveyed to him, upon payment of the purchase-money to the person to whom the property belonged." And Lord Justice Cotton said: "He (the trustee in bankruptcy) had vested in him the estate of the bankrupt in the property. He was not in the fullest sense of the word a trustee of the property for the purchaser, because the whole of the purchase money had not been paid. But he took the legal estate in the property, subject to the equity of the purchaser under the contract, which gave the purchaser the right to say, Convey me the estate on my paying the purchase money." Anything more explicit on this part of the case could hardly be imagined. All that the plaintiff asks the trustee to do is to execute the engrossment, already approved, assigning the property to him. Upon the plaintiff disclaiming any right of proof against the bankrupt's estate, an order must be made for such execution, and the defendant must pay the costs of the action.

Solicitors—Seeley & Son, for plaintiff; Ward, Perks & McKay, for defendant.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

BUCKLEY, J.
1901.
March 22, 26, 27.
RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
March 26.

SIDEBOTTOM, *In re*; BEELEY *v.* SIDEBOTTOM.

Charity—Devise of Real Estate—Sale—Extension of Time—Jurisdiction of Court—Mortmain and Charitable Uses Act, 1891 (54 & 55 *Vict. c.* 73), *ss.* 5 *and* 6.

The Court has jurisdiction under section 5 of the Mortmain and Charitable Uses Act*, 1891, *to extend the time for the sale of land devised by will to a charity for a reasonable period beyond the period of one year limited by that section; and the interests of the charity with regard to the present and probable future value of the land may be taken into consideration in determining as to the exercise of the jurisdiction.

Alfred Kershaw Sidebottom, who died in 1899, by his will gave certain real estates to the Ashton Infirmary. The executors sold a large portion of the property, but a considerable part of it remained unsold at the expiration of a year from the testator's death. Having regard to section 5 of the Mortmain and Charitable Uses Act, 1891,[1] the trustees

(1) Mortmain and Charitable Uses Act, 1891, s. 5: "Land may be assured by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any Judge thereof sitting at chambers, or by the Charity Commissioners."

Section 6: "So soon as the time limited for the sale of any lands under any such assurance shall have expired without completion of the sale of the land, the land unsold shall vest forthwith in the official trustee of charity lands, and the Charity Commissioners shall take all necessary steps for the sale or completion of the sale of such land to be effected with all reasonable speed by the administering trustees for the time being thereof, and for this purpose the said Commissioners may make any order under their seal directing such trustees to proceed with the sale or completion of the sale of the said land or removing such trustees and appoint-

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of the infirmary applied to the Court by originating summons for an extension of time, and on March 26, 1900, an order was made by Stirling, J., under the section that the time for the sale of the properties not already agreed to be sold should be extended for one year from the date thereof, and that the time for the sale of the properties agreed to be sold, but the sale of which was not completed, should be extended until June 30, 1900. The rest of the summons was ordered to stand over generally, with liberty for any of the parties to apply for further extension of time, and generally as they might be advised.

The plaintiffs now applied that the time might be extended as to the property remaining unsold for a term of seven years.

The most important part of the unsold real estate consisted of certain freehold land containing about sixteen acres. Several small pieces of the property had been sold as building land, and, amongst other evidence, there was an affidavit by a surveyor, who said that the vacant plots of land, part of the estate which had been sold since the death of the testator, had been sold in the aggregate after the rate of 602*l.* 17*s.* 7*d.* per statute acre, and if that price were realised for the portion remaining unsold the further sum of 9,371*l.* would be received as purchase-money. He stated that in his opinion that price would approximately be realised if the land were gradually sold in small lots, as the demand arose for building purposes, and the greater part of the land unsold was, or would be in course of time as the estate was developed, equally suitable for building purposes with that which had been sold. He considered that if a forced sale were made by auction at that time of the estate as a whole, whether in one lot or otherwise, it was very doubtful whether the total price realised would exceed 2,500*l.*; and the most advantageous method of dealing with the estate would be by retaining possession until a greater demand for building land arose, which would in the near future take place owing to better communication between the district and the adjoining towns, and the situation of the property close to Manchester.

The application first came before Buckley, J., and was shortly opened on March 22, and he extended the time for one week. On March 26 the application was renewed.

Astbury, K.C., and *S. O. Buckmaster*, for the plaintiffs.—The Court has power under section 5 of the Mortmain and Charitable Uses Act, 1891, to extend the time for the sale of land assured by will for a charitable purpose for a period beyond the one year limited by that section, and will, in considering whether an extension ought to be allowed, have regard to what is most for the benefit of the charity—*Hume, In re; Forbes* v. *Hume* [1895].[2] Here it is clearly for the benefit of the charity that the land should be sold gradually as building land. An immediate sale of the whole would result in a great sacrifice. The Act of 1891 was passed with a view to encourage gifts of land to charities, and at the same time to satisfy the requirements of the Mortmain Act by directing that the land should be sold, but not necessarily at once.

W. Baker, for the defendants, the executors, adopted the same line of argument.

BUCKLEY, J.—If I could find that Mr. Justice Stirling or Lord Halsbury had laid down any principle on this point, I need scarcely say I should be exceedingly grateful and should gladly follow that decision. But I am sorry to say I cannot do so. I do not think I should be doing my duty if I sheltered myself behind the order of Mr. Justice Stirling, which did not, I think, determine the point, and if I did not myself endeavour to put a construction on the Act of Parliament. Mr. Justice Stirling made an order extending the time limited for the sale of this land for one year, which expires to-day, and gave liberty to any of the parties to apply for a further extension, and I am now asked to grant a further extension

ing others, and may provide by any such order for the payment of the proceeds of sale to the official trustees of charitable funds in trust for the charity . . "

(2) 64 L. J. Ch. 267, 271; [1895] 1 Ch. 422, 434.

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for the term of seven years. The short effect of the evidence before me is that if the land is sold by a forced sale by auction it would not realise more than 2,500*l.*, and that if it is sold by degrees in plots it may realise more than 9,000*l.* A surveyor, speaking as an expert, says that by reason of the neighbourhood of Manchester this land will increase in value very considerably. It appears that if the charity can be allowed to keep this land as a speculation—not using that word in any offensive sense—in the expectation of improvement by nursing it, the charity will do better than if the land is sold at once.

The question is whether these are circumstances which enable me to grant a further extension of time. I desire to express as plainly as I can what I think are the principles which ought to be applied to applications of this kind. The principle of the Act is that land which formerly could not be devised to a charity may now be so devised upon certain terms. [His Lordship referred to sections 5 and 6 of the Mortmain and Charitable Uses Act, 1891, and continued:] These being the provisions of the Act, I have to ask myself what is to guide me in determining whether to allow this extension of time or not—can I take into consideration as my guide in the matter the mere fact that it is for the benefit of the charity that it should keep the land till a larger sum is realised? I regret to say that I have come to the conclusion that I ought not to do so. In section 6 there is a direction that the land shall be sold "with all reasonable speed"; and the authority who are to see that it is sold "with all reasonable speed" are the Charity Commissioners. They are one of the authorities who under section 5 can extend the time. I cannot think that they can, with a view merely to the benefit of the charity, extend the time under section 5 when, if section 6 takes effect, they have no discretion other than that to be implied from a direction to sell "with all reasonable speed." If a sale "with all reasonable speed" is the principle of section 6, I do not know why in section 5 the benefit of the charity is to prevail. If that were so, I should expect to find in section 6 a direction that the Charity Commissioners shall have regard to the benefit of the charity, but it is not there.

It appears to me that the extension of time in section 5 is to be an extension for the purpose of carrying out a sale, having regard to the principles which are common to both sections 5 and 6. An extension under section 5 might, for instance, be made to stop the vesting of the land under section 6 when a contract has been made but not completed within the year from the testator's death. If trustees have secured a purchaser, but the sale cannot be completed within the year, the Court can extend the time so that, instead of the official trustee, the trustees themselves may complete the sale. But it does not, I think, mean an extension because the charity will be benefited; it means an extension only for the purpose of a sale, within the year or "with all reasonable speed" after the year. If that is so, I cannot regard the benefit of the charity as an object to be considered. In this case, if I refuse to extend the time the result will be that the land will pass to the official trustee, and it will be his duty to sell it "with all reasonable speed." There are means of speedily putting this right if my decision is wrong. I refuse to grant the extension of time.

The plaintiffs appealed, and the appeal was heard at once.

Astbury, K.C., and *S. O. Buckmaster*, for the appellants, referred to *Hume, In re*; *Forbes* v. *Hume*.[2]

W. Baker, for the defendants.

RIGBY, L.J.—We will make an order extending the time for a month, with liberty to apply to the Judge to extend it further if he thinks fit to do so.

VAUGHAN WILLIAMS, L.J., and STIRLING, L.J., concurred.

Astbury, K.C.—Do your Lordships say that you have jurisdiction?

RIGBY, L.J.—We could not make the order if we had no jurisdiction to do so.

March 27.—*Astbury, K.C.*, mentioned the matter again to Buckley, J., and asked for an extension of time.

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SIDEBOTTOM, IN RE, APP.

BUCKLEY, J.—I have been informed of the views of the Court of Appeal, and will give an extension of time for one year from the expiration of the order of Mr. Justice Stirling—namely, an extension till March 26, 1902.

Solicitors—Woodcock, Ryland & Parker, agents for Leonard Bottomley, Ashton-under-Lyne, for plaintiffs; Bower, Cotton & Bower, agents for W. H. Vaudrey, Manchester, for defendants.

[*Reported by W. Ivimey Cook and A. J. Hall, Esqs., Barristers-at-Law.*

COZENS-HARDY, J. 1901. Jan. 21. } MÉGRET, *In re*; TWEEDIE *v.* MAUNDER.

International Law — Marriage Settlement — Construction — Movables — Form of Deed — General Power — Appointment — Property.

A domiciled Englishwoman, on the eve of her marriage with a domiciled Frenchman, executed a settlement of her property. The trustees of the settlement were English, and the trusts were for her appointees by deed or will, and in default of appointment for her separate use absolutely, but the settlement contained no declaration that it should take effect and be construed as an English settlement. The lady (her domicil being then French) exercised the power by a testamentary appointment executed in England according to English law:—Held, *that the proper inference was that the parties shewed an intention that the settlement should be construed as an English settlement, and that the will was effective according to its tenor to pass the fund, whether regarded as an exercise of the power of appointment, or a disposition of the property to which the testatrix was entitled to her separate use.*

By a settlement dated April 11, 1862, executed in England in contemplation of the then intended marriage between L. N. A. Mégret and the testatrix (then R. A. Davis), a sum of 8,000*l.*, and the investments thereof, were settled upon trust, after the solemnisation of the said marriage, that the trustees or trustee for the time being should hold, or apply and dispose of, the said trust money, stocks, funds, and securities, and the interest, dividends, and annual proceeds thereof, and of every part thereof respectively, for such person or persons, for such trusts, intents, or purposes, and in such manner and form, in all respects as the said R. A. Davis should by any deed or deeds, or by her last will and testament, or any writing in the nature thereof, appoint; and in default thereof, for the separate use of the said R. A. Davis absolutely. The settlement also contained a covenant to settle after-acquired property.

The marriage was solemnised on April 12, 1862. At that date the husband was a domiciled French subject, and the wife a domiciled English subject. The husband retained his French domicil down to the hearing of the present application.

The wife, by her will dated February 21, 1876, made in England, and duly executed and attested according to English law, recited and exercised the power of appointment contained in the settlement. And by a codicil dated July 9, 1884, she varied the trusts declared by the will of the fund appointed. According to French law, the testamentary disposition by the wife of her property would have been ineffective, as there were children of the marriage.

Mrs. Mégret died in England on July 22, 1899. Her executors renounced and disclaimed, and administration was granted to the plaintiff Tweedie as attorney of the husband on May 22, 1900.

The trustees of the settlement transferred the trust premises into Court, and the administrator and the husband petitioned for transfer and payment out to them, and also issued an originating summons to have the question determined whether the will and codicil were effective, having regard to the French domicil of Mrs. Mégret.

Eve, Q.C., and *F. H. L. Errington*, for the petitioners and plaintiffs.

Vernon Smith, Q.C., and *J. G. Wood*, for the son of the marriage.—We cannot

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MÉGRET, IN RE.

dispute the validity of the settlement—*Van Grutten* v. *Digby* [1862].[1] The terms of the settlement are such as to give the property to the absolute separate use of the testatrix—*London Chartered Bank of Australia* v. *Lempriere* [1873].[2] The lady's domicil was French, and there is nothing to displace the rule *Mobilia sequuntur personam*. *Hernando* v. *Sawtell* [1884][3] is distinguishable on two grounds: it applies to real estate, and there was an express bargain between the parties as to the law applicable. The power might have been exercised by a testamentary disposition not complying with the provisions of the Wills Act, 1837—*Price, In re*; *Tomlin* v. *Latter* [1900].[4] *Bald, In re*; *Bald* v. *Bald* [1897][5] is distinguishable, because here there is an express gift to the wife's separate use.

[Reference was also made to *Pouey* v. *Hordern* [1900][6] and *Barretto* v. *Young* [1900].[7]]

Theobald, *Q.C.*, and *Maclaren*, for grandchildren of the testatrix.—The contract must be construed according to English law—*Lloyd* v. *Guibert* [1865].[8] The cases of *Hernando* v. *Sawtell*[3] and *Bald, In re*,[5] are conclusive.

Vernon Smith, *Q.C.*, replied.

COZENS-HARDY, J.—In this case I think I am bound by authority to hold that the English law governs. An English lady on the eve of her marriage with a Frenchman, made a settlement of her property. The trustees are English. The limitations are such as are usual in an English settlement. [His Lordship then shortly stated the trusts, and continued:] Although there is no declaration that English law is to apply, it seems to me manifest that it is a settlement which would be nugatory unless English law were applied to it. I think it is governed by English law, and must be construed as an English settlement. The lady has made a will purporting to exercise the power of appointment over the funds comprised in the English settlement. These dispositions are, at least to some extent, of such a nature that they would not be permissible according to French law, if purporting to affect her own property.

Two points arise: First, is this will a good exercise of the power; and next, if it is not, is not the will a good disposition of that which is by the settlement given to her for her separate use? Now as I read the judgment of Mr. Justice Pearson in *Hernando* v. *Sawtell*,[3] he decided both points in favour of the grandchildren, although no doubt that case is distinguishable from the present case, in that there there was a declaration that the deed should take effect, and be construed, according to English law. In his view it was an implication necessarily arising from the language of the deed under which she took for her separate use that she should have such a power of disposition over it as the English law allowed. I have also the direct authority of *Bald, In re*,[5] where Mr. Justice Byrne decided that a general power of appointment created by a Scotch will must be governed by the Scotch law, whatever might be the domicil of the appointor. [His Lordship then read the judgment of Byrne, J., and continued:] I fail to appreciate the distinction suggested that here there is a gift in default of appointment. From whatever point of view the case is regarded, whether as an exercise of a power of appointment, or a valid disposition of property to which the testatrix was entitled for her separate use, I must hold that an English fund, comprised in an English settlement, and vested in English trustees, has been disposed of by a will which must be construed according to English law.

(1) 32 L. J. Ch. 179; 31 Beav. 561.
(2) 42 L. J. P.C. 49; 9 Moore P.C. (N.S.) 426; L. R. 4 P.C. 572.
(3) 53 L. J. Ch. 865; 27 Ch. D. 284.
(4) 69 L. J. Ch. 225; [1900] 1 Ch. 442.
(5) 66 L. J. Ch. 524.
(6) 69 L. J. Ch. 231; [1900] 1 Ch. 492.
(7) 69 L. J. Ch. 605; [1900] 2 Ch. 339.
(8) 35 L. J. Q.B. 74; 6 B. & S. 100; L. R. 1 Q.B. 115.

Solicitors—A. F. & R. W. Tweedie; E. G. Maunder.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

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[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
Feb. 28. March 1, 22.

SHUTTLEWORTH v. MURRAY.

Will—Construction—Eldest or Only Son for Time Being Entitled to Possession or Receipt of Rents and Profits of Estate—Exclusion of—Estate Disentailed—Testator not in Loco Parentis.

In construing limitations in an instrument excluding from certain benefits an eldest son for the time being entitled to the possession or to the receipt of the rents and profits of certain estates, a different rule is to be applied where the author of the instrument is a parent or person in loco parentis making provision for a family from that to be applied where the author does not stand in that relation to the objects of his bounty.

Testator, who died in 1875, *by his will made in* 1855, *devised his real estates to the use of his nephew for life, with remainder to all and every the son and sons of the nephew born in the lifetime of the testator, or in due time afterwards* ("*other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents and profits of certain estates*" *situate at C.*, "*after the decease*" *of the nephew* "*as tenant for life or any greater estate or interest whatsoever*"), *severally and successively in remainder one after another for their respective lives.*

In 1869, *the eldest son of the nephew, who was tenant in tail of the C. estates in remainder expectant on the death of his father, and was then twenty-one, joined with his father in disentailing the estates. The estates were sold, and the proceeds held on certain trusts, under which the eldest son took some benefit. He subsequently became bankrupt, and his interest in the proceeds was sold. The nephew was dead:*
—Held, *that the eldest son was not within the exception, and he was entitled to the first life interest after the death of the nephew in the estates devised by the testator's will.*

Collingwood *v.* Stanhope (38 L. J. Ch. 1; L. R. 4 H.L. 43) *distinguished.*

Decision of COZENS-HARDY, J. (69 L. J. Ch. 423; [1900] 1 Ch. 795), *reversed.*

Appeal from a decision of Cozens-Hardy, J. (reported 69 L. J. Ch. 423; [1900] 1 Ch. 795).

Edmund Grimshaw, who died in 1875, by his will dated January 29, 1855, devised his real estates in the county of Lancaster, in the events which happened, to the use of his nephew Richard Atkinson for life, with remainder to the use of his nephew Francis Frederick Brandt for life, with remainder to the use of all and every the son and sons of the said F. F. Brandt, and all and every the son and sons of the said Richard Atkinson who should be born in the testator's lifetime, or in due time afterwards, "other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents and profits of certain estates situate within the parish of Cockerham in the county of Lancaster after the decease of the said Richard Atkinson as tenant for life or any greater estate or interest whatsoever,' severally and successively in remainder one after another for their respective lives, in order of seniority as therein mentioned, the eldest or only one of such son or sons of the said F. F. Brandt taking the first turn, and the eldest or only one of such son or sons of the said Richard Atkinson (other than and except as aforesaid) taking the next turn.

F. F. Brandt died in the testator's lifetime without having married.

Richard Atkinson had several children. The eldest, R. N. Atkinson, who was born in 1847, was, until the execution of the disentailing deed hereinafter mentioned, entitled as tenant in tail male in remainder immediately expectant on the death of his father, the said Richard Atkinson, to the possession or the receipt of the rents and profits of the Cockerham estate.

By a disentailing deed dated January 16, 1869, duly enrolled in Chancery, and made between the said R. Atkinson of the first part, the said R. N. Atkinson of the second part, and William Thomas Sharpe of the third part, the Cockerham estate was limited to such uses as the said

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SHUTTLEWORTH *v.* MURRAY, App.

R. Atkinson and R. N. Atkinson should jointly appoint. By a deed of January 19, 1869, the estate was in exercise of the joint power appointed to trustees upon trust for sale; and by another deed of the same date it was declared that, after payment off of certain incumbrances and paying a sum of 7,000*l.* to R. Atkinson, the purchase-money should be invested and held upon certain trusts under which R. N. Atkinson took some benefit.

The property was sold for 69,000*l.*, and the purchase-money paid to the trustees.

R. N. Atkinson afterwards became bankrupt, and R. Atkinson purchased his interest in the proceeds of sale from his trustees in bankruptcy.

R. Atkinson had died, and this summons was taken out by the trustees of Edmund Grimshaw's will for the determination of the question who was entitled to the first life estate under the testator's will.

Cozens-Hardy, J., held that R. N. Atkinson answered the description of an eldest son for the time being entitled to the possession of the Cockerham estates after the decease of his father as tenant in tail, and was within the exception contained in the will of the testator. He therefore declared that he was excluded, and that his next surviving brother was entitled to the rents and profits of the devised estates.

The persons entitled to the interest of R. N. Atkinson appealed.

Haldane, K.C., *Macnaghten, K.C.*, and *T. H. Watson*, for the appellants.—Cozens-Hardy, J., decided against the appellant mainly on the authority of *Collingwood* v. *Stanhope* [1869],[1] but that case is clearly distinguishable, since there the two estates existed concurrently, whereas in the present case the Cockerham estates had been disentailed and dealt with before the date of the testator's death. The parties in the present case could not know what was in the testator's will until his death. *Collingwood* v. *Stanhope*[1] was also a case under a marriage settlement, and was an instance of the rule against double portions—*Twynham* v. *Webb* [1751].[2] That rule only applies to a provision by a father or person *in loco parentis*—*Domville* v. *Winnington* [1884][3] and *Sandeman* v. *Mackenzie* [1861].[4] It has no application here, and the limitation ought to be construed strictly and in the ordinary way—*Meyrick* v. *Laws* [1874],[5] *Glenorchy* (*Lord*) v. *Bosville* [1733],[6] *Scarisbrick* v. *Skelmersdale* (*Lord*) [1840],[7] and *Harrison* v. *Round* [1852].[8] "Possession or receipt of the rents and profits" means actual possession and receipt in the ordinary sense, and no technical meaning is to be attached to the words. Upon a proper construction of this will R. N. Atkinson is not excluded.

Vernon Smith, K.C., and *E. S. Ford* (*Swinfen Eady, K.C.*, with them), for the assignees of the share of the second son of R. Atkinson.—The decision was right. This is not a case of a shifting use or defeasance clause operating under the Statute of Uses. In such a case there would, no doubt, have to be a strict compliance with the words. Here it is not a question of divesting a primarily vested interest, but whether a person who claims comes within a certain class. "For the time being" is equivalent to an adjective qualifying "eldest son." R. N. Atkinson is now the eldest son of R. Atkinson within the meaning of the clause. He has had the benefit of the estate—*Collingwood* v. *Stanhope*,[1] *Harrison* v. *Round*,[8] *Macoubrey* v. *Jones* [1856],[9] and *Scarisbrick* v. *Skelmersdale* (*Lord*).[7]

The doctrine against double portions laid down in *Chadwick* v. *Doleman* [1705][10] is not limited to settlements by parents and persons *in loco parentis*, but is applicable to any provision made for a particular family even by a stranger—*Lewin on Trusts* (10th ed.), p. 450. We have to put ourselves, as James, L.J., said, "in

(1) 38 L. J. Ch. 421; L. R. 4 H.L. 43.

(2) 2 Ves. sen. 198.
(3) 53 L. J. Ch. 782; 26 Ch. D. 382.
(4) 30 L. J. Ch. 838; 1 J. & H. 613.
(5) 43 L. J. Ch. 521; L. R. 9 Ch. 237.
(6) Ca. t. Talb. 3; 2 Wh. & Tu. L.C. Eq. (7th ed.) 763.
(7) 4 Y. & C. 78. In H.L. *sub nom. Wilbraham* v. *Scarisbrick*, [1847], 1 H.L. Cas. 167.
(8) 22 L. J. Ch. 322; 2 De G. M. & G. 190.
(9) 2 K. & J. 684.
(10) 2 Vern. 528.

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the arm-chair of the testator" at the time of the will, and see what his words mean—*Boyes* v. *Cook* [1880].[11] "Entitled" here means "have got" or "have acquired," and the person indicated as being excluded is the individual who has acquired the rents and profits of the estate—*Domvile* v. *Winnington*.[3] The estate has come to R. N. Atkinson. It has passed through him. The material moment of time is the moment of distribution, the death of R. Atkinson—*Collingwood* v. *Stanhope*.[1]

Haldane, *K.C.*, in reply, referred to *Fazakerly* v. *Ford* [1831].[12]

Cur. adv. vult.

March 22.—RIGBY, L.J.—This is a case which turns, I think, entirely upon the construction of a particular portion of the will of one Grimshaw, in his lifetime a conveyancer, and the part to be construed occurs in the course of the limitation of uses of property of his own devised by his will. Trying to define more closely what has to be decided, we can limit it to the enquiry whether Richard Norton Atkinson, who was the first-born son of Richard Atkinson, the first tenant for life under these limitations, and therefore quite clearly came within the words "an eldest or only son for the time being," also came within the words "entitled to the possession or to the receipt of the rents, issues and profits" of the Cockerham estates.

[His Lordship referred to the facts, and continued:] From the time of the sale the Cockerham estates were possessed and held and enjoyed by strangers, not by Richard Atkinson or Richard Norton Atkinson. The estates went away completely, and looking to the meaning of any provision as to a son of Richard Atkinson being in possession or in receipt of the rents of those estates, one might as well have talked about the son being in receipt of the rents and profits, we will say, of Lancaster Castle. Of course it was possible that he might have re-purchased the estates, or that his father might have done so, and might have settled them upon his son, but nothing of the sort took place, and as a matter of fact neither of those persons from that time had any interest whatsoever in the Cockerham estates. All that Richard Norton Atkinson had was an interest in the proceeds of the sale of the estates, and that interest was after his bankruptcy purchased by his father. At any rate, Richard Norton Atkinson had no interest in any sense of the word in any part of the estates. It was not until 1875, about a quarter of a century after the sale and the bankruptcy of Richard Norton Atkinson, that the will took effect as a real operative instrument.

With regard to the construction of the clause in question, I will first observe that the words "entitled to the possession or to the receipt of the rents issues and profits" are of necessity carried on in point of construction to the subsequent words "as tenant for life or any greater estate." There is no break in the meaning throughout, and the words of exception should be read as if they had been "entitled after the decease of the said Richard Atkinson to the possession or to the receipt of the rents issues and profits." That makes a very great distinction between these words of exception, as they are called, and other clauses in other cases that have been cited—a distinction which, it appears to me, ought never to be lost sight of for a moment. The condition was that a person should be entitled, and that he should be entitled after the death of his father to the possession or to the receipt of the rents and profits as tenant for life, or for a greater estate, and that was the only thing that could bring him within the exception. From the first I have been quite unable to follow the reasoning by which the learned Judge arrived at the conclusion at which he did arrive, and that is really the only thing that has made me hesitate at all. I was not able to appreciate the decision, and when one does not appreciate the opposite point of view one always feels in doubt as to whether one appreciates the whole case at all; but, with that exception, if it can be called an exception, I have never had the slightest doubt, directly I knew the facts throughout the argument, or since the argument. The view of the learned Judge seems to be contained in the words

(11) 49 L. J. Ch. 350, 351; 14 Ch. D. 53, 56.
(12) 4 Sim. 390.

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which occur early in his judgment—"The words of the exception are technical words which have received an accepted construction for many years." I do not agree with that language. It took me by surprise, and I do not hesitate to say that I differ from it in its whole extent. The words of exception are not technical words. They are plain, ordinary English words, which should receive a plain interpretation if there is no rule of law against it. There is no such rule, and the words must receive their ordinary interpretation. So far as I know, the words have never been construed by a Court of Appeal down to the present time; and, so far from having received a settled construction for many years, I do not suppose that they have ever been construed or dealt with by any Court whatsoever. True it is that words in some respects resembling them, but in other respects totally different, have under certain conditions received an interpretation different from that which was recognised by the Judges who gave them the particular interpretation as their natural and *prima facie* meaning; but that has been done under the restraint of an overriding general intention attributed to the settlement for reasons independent of the words themselves. These words have never been interpreted, so far as I know, and certainly have not received a technical construction. I do not attempt to define the cases, or to make a definition which would include every case; nor do I bind myself to approve of every case which has been decided on the principle which the learned Judge has discussed and applied to this case. In general they have arisen out of a disposition of property entered into by a parent or a person *in loco parentis*, where there is a gift of the estate to one child, and a gift of portions arising out of the estate to the other children, generally of course, though not necessarily, the estate to an elder son, and the portions to the younger children. In cases of that class it has been taken as a paramount intention of the settlor that the same child should not take the estate and an interest in the portions fund. That is the general principle underlying the cases; and it has been held that the child who takes the estate, whether he be an elder child or in fact a younger, is not to take an interest in the portions fund. If a younger child takes the estate under the actual limitations, then the elder child is to be deemed a younger child for the purpose of coming in upon the portions fund, and in all of those cases a secondary meaning has been put upon the words "elder" and "younger." Instead of having their primary meaning of elder in point of birth, and younger in point of birth, "elder" has been taken to mean one who takes the estate, and "younger" has been taken to mean one who does not take the estate. In those cases, no doubt, on the general intention some liberty has been taken with the language—in some cases that have occurred, a very great liberty—and a wide latitude of interpretation has been adopted which may be justified, but which it is hard to say is justified, by the rule which lays down what the paramount intention of the parties is to be taken to be.

Reference was made to authorities, and especially to *Collingwood* v. *Stanhope*.[1] I need not say that that is a case of the very highest authority, and in any case that comes within the fair meaning of the decision it must be followed. I need not say that 'I for one, and I think all the members of the Court of Appeal, would strive to follow that decision in its real meaning, whatever we might think of it. We have no business to think anything of it except that it was rightly decided, and we are bound to follow it. But it is the fate of cases of importance to be relied upon under circumstances to which they have no sort of application; and that, I think, is the case here. *Collingwood* v. *Stanhope*[1] does not appear to me in the least to support the order that has been made. I will not cite the words of the Judges, because they have been cited over and over again and are in the minds of all concerned in the case. Lord Hatherley, who, when Vice-Chancellor, had decided the case in the Court below, apparently considered at the original hearing that he ought to be governed by the case of *Fazakerly* v. *Ford*[2] and the class of cases similar to that; but, after hearing the argument in the House of Lords, he came to see that in relying upon

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Fazakerly v. *Ford* [12] he had committed a mistake, which he of course acknowledged, and he admitted that *Fazakerly* v. *Ford* [12] could not be treated as in principle authorising the decision which he had come to in the Court of Chancery. *Fazakerly* v. *Ford*,[12] as explained by Lord Hatherley—and, as I venture to think, accurately—was a case in which a vested use in favour of a certain person was sought to be displaced, and another substituted for it; and in the House of Lords Lord Hatherley said it was clear that in a case of that kind the limitation must be strictly performed. By that he meant, no doubt, that you must give the words their primary and natural meaning, and if you find that they lead to a substitution of one use for another you must follow them; and, on the other hand, unless they lead to that naturally they are not applicable at all. It is true that in this case before us there is not, strictly speaking, a substitution of one use for another; but there is what I conceive is exactly the same thing in substance. If the limitation here had been to all and every the sons of Richard Atkinson who shall severally and successively, and so on, with a proviso following to the effect of the words of the exception, that would be precisely within the principle of *Fazakerly* v. *Ford* [12] as explained by Lord Hatherley and accepted, as I conceive, by the other Lords. Can it be supposed that there is really a difference between saying "I give to the use of all and every the sons except" a certain defined person, and "I give to all and every the sons," with a proviso that the gift shall not extend to one son described in the same manner as in the exception? I do not think there is, and therefore I take *Fazakerly* v. *Ford*,[12] as described in *Collingwood* v. *Stanhope*,[1] as an authority for this case. This is not a case of a person who is *in loco parentis* making a provision either in the whole, or as it were *in subsidium*, to an existing provision that the elder son shall have the estate and the younger sons portions out of it. It has indeed been attempted to be argued here, and I suppose in the Court below, and I think there are some signs of Mr. Justice Cozens-Hardy having leant to the view, that this was a case of a gift to a class involving a period of distribution. The arguments based on that hypothesis are unfounded. There is no gift to a class here. There is a gift to a succession, or a succession of gifts to individuals taken out of the class—that of sons, namely; but that is a very different thing, and there is absolutely no distribution to take place at all, and therefore no period of distribution in question. Lord Westbury and Lord Cairns, in *Collingwood* v. *Stanhope*,[1] appear to me to entirely accept the position that *Collingwood* v. *Stanhope* [1] was within the class of cases that has been recognised for very many years—upwards of a century, at any rate—in which the paramount object of the settlement was taken to be that the child taking the estate should not take a portion, and that a child who did not get the estate might have a portion, whether he was the eldest or not. It was explained very fully in the speeches of both, and I do not think it necessary to go through them.

Besides *Collingwood* v. *Stanhope* [1] Mr. Justice Cozens-Hardy referred to *Domvile* v. *Winnington*,[3] and he refers to it because of an *obiter dictum* of Mr. Justice Kay in that case, which he seems to admit was not a matter for decision. He says: "Although it was not perhaps necessary for his decision." I go further, and I say that the words relied upon were certainly not necessary for the decision, and certainly had nothing whatever to do with it. Mr. Justice Kay only said that if a case had arisen, which he himself considered had not arisen, he might have done a different thing from what he did. What he did was to reject the interpretation which is analogous to the one adopted in this case by Mr. Justice Cozens-Hardy. Those are the authorities relied upon. One of them is to my mind absolutely contrary to the rule laid down by Mr. Justice Cozens-Hardy, and the other is only an *obiter dictum* of a Judge who of course did not act upon it.

I think the true view is that the words of exception in this case should bear a primary and natural meaning—and that is, that a son is to be excepted who is entitled, after the death of his father Richard Atkinson, to the possession or the receipt of the rents, issues, and profits

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of certain estates at Cockerham. It is very curious that the estates are not mentioned. They are only referred to as "certain estates." I do not know that the testator really knew what he was talking about. He had got an idea that there were certain estates in the parish of Cockerham which in some way were or had been connected with the Atkinson family, but the ground of my decision is that it is quite clear that Richard Norton Atkinson was not entitled to the whole of the family estates in Cockerham of the Richard Atkinson family, and not being within the words of the exception he cannot be deprived of his position in the succession. This testator may have been a very learned conveyancer, but the dispositions in his will would not shew him to be a very wise man. The notion, which is shewn plainly in the limitation of uses, of having an estate carried over alternately from one family to another was, I venture to think, one that no wise man ever would have attempted to carry out. So long as the limitation lasted it was pretty sure to bring about the maximum of heart-burning and of jealousy between these two families, and I cannot conceive that the arrangement was anything but a blunder. If it were intended, the amiable intention of the testator was happily defeated, for it happened that Brandt died before the will took effect without ever having married. For that reason I have treated the limitation as a limitation in favour of Atkinson's family only.

On the whole, I am of opinion that the decision of the learned Judge upon the construction of the will was wrong, and that the order made ought to be reversed. There should be a declaration that R. N. Atkinson did not come within the exception upon its true meaning, and was not excluded from his place in the series of estates given to the children of Richard Atkinson, that place being the first, of course, because he was the eldest.

VAUGHAN WILLIAMS, L.J.—I agree. After the exhaustive exposition of the law by so great a master of the subject as Lord Justice Rigby, I hesitate to add anything; but I think I ought to do so, because, although I have arrived at the same result, I have not done so with the same freedom from hesitation that my Lord has.

Of course it is quite plain that the testator in no sense stood *in loco parentis* to those sought to be benefited by the will, and I take it to be the law that that rule with relation to family settlements, which let in what has been called a prodigious latitude of construction in the case of family settlements made by one *in loco parentis*, has no application in a case like the present. That rule has no application outside those family cases, as was laid down by Vice-Chancellor Wood in *Sandeman* v. *Mackenzie*,[4] and that is the acknowledged state of the law. I therefore approach this will minded to construe it simply according to the intention of the testator as deduced from the words within the four corners of the document.

I take it that the original rule applied in the case of family settlements, where equality amongst the children was held to be the overriding intent, was not an arbitrary rule adopted by the Court of Chancery, but was merely an instance in which the Court held itself entitled and bound to depart from the primary sense of the words in consequence of the overriding intention gathered from the words and from the circumstances of those who were privy to the instrument in question. Although it has been made, if I may so call it, a stereotyped rule that in the case of family settlements you are to deduce that intention, and deduce it to such an extent that you are to go even to a prodigious latitude of construction, the general principle applies to all documents; that is to say, you are not bound by the primary and most natural meaning of the words, if from the document itself and the surrounding circumstances you come to the conclusion that the author of the document had such an obvious intention as would compel one to depart from, or justify one in departing from, the primary meaning of the words; and I confess that I approached this will with the idea that it was hardly possible that the author of it could have intended that the person excluded by the exception from the benefits of the will because he took a particular estate should nevertheless have the bene-

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fits, even though he had sold the estate and had got the whole proceeds of it in his pocket. I therefore looked about to see whether the words of this exception were such as would enable me to give effect to an intention which, on the face of it, appears so inherently probable from the introduction of this very exception. For that reason, although I cannot pray in aid the family rule which would enable me to give a prodigious latitude of construction to the words, I still think that I am justified and bound to look about to see whether the words are sufficiently ambiguous to justify me in giving effect to an intention which in this case I am disposed to attribute to the testator, not from any circumstances outside the will, but from the very provisions of the will itself. But having looked at the words, I have come to the same conclusion that the Lord Justice has come to—that is, that the words are too strong for me.

So far as the first words are concerned, "except an eldest or only son for the time being," I feel no difficulty at all, and I think that I am justified in treating the words "for the time being" as defining merely the quality of the person to take. But then follow the words "entitled to the possession or to the receipt of the rents, issues and profits." There I do feel a great difficulty. I should like to read the words as if they ran, "entitled after the decease of the said Richard Atkinson under the disposition of the said estate to," and then the rest of it. But the whole will is vague here. The testator does not tell us what the estates are. He does not tell us by what instrument or document the limitations were created under which Richard Atkinson took as tenant for life. That makes it extremely difficult to read the words as if the testator intended merely to describe the person who was to be excepted as being the person entitled under a particular settlement immediately after the tenant for life.

Under those circumstances I read the words as Lord Justice Rigby does, in their natural sense; and reading them in their natural sense it seems to me impossible to say that Richard Norton Atkinson comes within this exception.

STIRLING, L.J.—I have arrived at the same conclusion. I do not think that the will of this testator is to be interpreted in accordance with the rules which have been laid down for the construction of instruments the object of which is to discharge the moral obligations of providing for children which fall upon parents, or those who stand *in loco parentis*. In such cases, the instrument, whether it be a marriage settlement or a will, is read so as to carry into effect what Lord Westbury in the case of *Collingwood* v. *Stanhope*[1] describes as "the great object of parties in making a provision for children, namely, that no one child should obtain a double portion at the expense of another." There is, however, a great body of authority shewing that this principle is only to be applied in cases of provision made by a parent, or a person standing *in loco parentis*. That was so laid down by Lord Hardwicke in *Hall* v. *Hewer* [1753].[13] It is again so laid down in a judgment, which is of great authority, in *Scarisbrick* v. *Skelmersdale* (*Lord*),[7] a judgment given by Mr. Justice Maule in the Court of Chancery of the Duchy of Lancaster, advising the Chancellor of that Duchy, along with Mr. Baron Rolfe. That case was carried, on appeal, to the House of Lords, and the Judges were summoned, and the opinion of the Judges was given by the Lord Chief Justice Wilde, who stated that the Judges had read the judgment given in the Court below, and entirely agreed with it; and Lord Brougham and Lord Chancellor Cottenham, who advised the House, both expressed concurrence in that same judgment. Lastly, the law is so stated in *Sandeman* v. *Mackenzie*.[4]

These are not the only cases that might be referred to, but they are a sufficient sample; and I observe that, according to the report, the attention of the learned Judge was not called to any of them in the Court below, which I think is to be regretted. The following passage occurs in the judgment of Mr. Justice Maule in *Scarisbrick* v. *Skelmersdale* (*Lord*),[7] which seems to me to be worthy of consideration: "It is not every act done by a parent which is to be construed on

(13) 1 Amb. 203, 204.

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principles different from those which would have been applied if the same thing had been done by a stranger, but only those acts which the parent does in fulfilment of some natural duty. Now, though it is a natural duty incumbent on a parent to provide for his children, and in doing so to use language which will secure some provision for all, it certainly is no natural duty to cause estates to shift in one course of succession rather than another." Accordingly, in the present case I come to the conclusion that in construing this will the ordinary rules of construction are to prevail, and that the language of the testator is to be read in accordance with its ordinary meaning, for the testator did not stand *in loco parentis* to Richard Atkinson, or his children. Richard Atkinson was his nephew, and the other object of his bounty, Francis Frederick Brandt, was also a nephew.

It must be observed upon this will that it is of a somewhat capricious character. In the first place, we find that the object of the testator was to create a series of limitations alternating between the sons of Francis Frederick Brandt and the sons of Richard Atkinson, so that the alternate eldest sons were to take estates for life, or estates tail, as the case might be; and secondly, it is a very remarkable thing in a will of this description to find that as regards the sons born in the lifetime of the testator he gives them successive life estates only, without making any provision for their children, whereas as regards sons who are born after his death he gives them estates tail. I only refer to that as shewing that this is not a will in which one can see any very predominant intention on the part of the testator, and that we are dealing with a somewhat capricious disposition on his part. [His Lordship referred to the limitations of the successive life estates in the will following after the life estates given to Richard Atkinson, and then to Francis Frederick Brandt, and to the words of the exception, and continued:] In the first place, an excepted son is to be an eldest or only son for the time being, because I think the words "for the time being" ought to be read in immediate connection with the words "eldest or only son." But what is the time referred to? It seems to me that it is plainly, seeing that we are dealing with the succession of life limitations, as each limitation comes into operation—that is to say, on the determination of the prior limitations, which in this case, in the event which happened, was the death of Richard Atkinson. But the person excepted is not only to be an eldest or only son at that time, but he is also to be entitled to the possession or to the receipt of the rents, issues, and profits of certain estates after the death of Richard Atkinson as tenant for life or a greater estate. It appears to me that those words, read according to their natural meaning, point to an actual enjoyment at the time of the Cockerham estates, but at this period the eldest son of Richard Atkinson had not the enjoyment of the estates, and does not fall within the words of exclusion read according to their *prima facie* meaning. It is true that he had been entitled to the Cockerham property for a greater estate than a life estate, and by his own act had deprived himself of that estate, but I cannot see that the testator has provided for that occasion, or that there is any manifest absurdity or inconsistency which follows from reading the words in their natural meaning. For anything that appears in the will, it seems to me that the testator simply considered that a son who was in actual enjoyment of the Cockerham estates did not in any way require his bounty.

I think, therefore, that the will ought to be so read, and that the decision of the learned Judge ought to be reversed.

Appeal allowed.

Solicitors—R. B. Dods, for appellants; Robins, Hay, Waters & Hay, for respondents.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

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WRIGHT, J. 1901. March 27. } NATIONAL UNITED INVESTMENT CORPORATION, *In re*.

Company — Winding-up — Judgment Creditor—Debt Due to Company—Attachment — Garnishee Order Nisi — Secured Creditor—Rights of Liquidator—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45.

Section 45 *of the Bankruptcy Act*, 1883, *is not attracted to the winding-up of companies by section* 10 *of the Judicature Act*, 1875, *so as to render receipt by the creditor necessary to effectually complete the attachment of a debt. The attachment of a debt due to a company by the service of a garnishee order nisi before the filing of a petition to wind up the company constitutes the garnisher a secured creditor and gives him priority over the liquidator.*

This was a summons by the liquidator of the above-mentioned corporation raising (*inter alia*) the question whether, by virtue of section 10 of the Judicature Act, 1875, the provisions of section 45 of the Bankruptcy Act, 1883, were attracted to liquidations, so as to entitle the liquidator of the above-mentioned corporation to a debt due to the corporation but attached—before the filing of the petition upon which the corporation was ordered to be wound up by the Court—by service of a garnishee order *nisi* obtained by one Seddon, the assignee of a judgment debt due from the corporation. The garnished debt had not been paid, nor had the garnishee order been made absolute. The liquidator claimed priority to the garnisher on the ground that the latter was not a secured creditor.

Austen-Cartmell, for the liquidator.—The winding-up has put an end to the garnishee proceedings, and the debt is payable to the liquidator, for section 10 of the Judicature Act, 1875, attracts section 45 of the Bankruptcy Act, 1883, to liquidations. The garnishee proceedings must be completed in order to take effect against the liquidator—*Stanhope Silkstone Collieries Co., In re* [1879],[1] treated as good law in *Croshaw* v. *Lyndhurst Ship Co.* [1897].[2] They have not been completed in this case because there has not been any receipt of the debt in compliance with section 45. The assignee therefore cannot be a secured creditor, and the liquidator's title must prevail—*Butler* v. *Wearing* [1885][3] and *Trehearne, In re; Ealing Local Board, ex parte* [1890].[4]

Brooke Little, for the respondent Seddon, the garnisher.—The corresponding section of the Bankruptcy Act, 1869, was held not to be applicable to winding up—*Withernsea Brickworks Co., In re* [1880].[5] Section 45 of the Act of 1883 does not apply to the administration of the estate of a dead man—*Hasluck* v. *Clark* [1899][6] and *Pratt* v. *Inman* [1889].[7] Section 10 of the Judicature Act, 1875, applies equally to the administration of the estate of a dead man and to the winding up of a company; and if section 45 of the Bankruptcy Act, 1883, had applied to a winding-up, it would have applied equally in *Hasluck* v. *Clark*.[6] From section 45 itself it is clear that it cannot apply to winding up, because it deals with matters antecedent to an act of bankruptcy, and that is not applicable to winding up. The service of the order *nisi* is the critical point—*Watt, In re; Joselyne, ex parte* [1878].[8]

Austen-Cartmell, in reply.—Section 10 of the Judicature Act, 1875, imports the rules of bankruptcy into liquidation, in order to ascertain what debts there are and in what order they are to be proved. Neither *Hasluck* v. *Clark*[6] nor *Withernsea Brickworks Co., In re*,[5] raised a question of security, and therefore section 45 was not attracted. The very fact that service of the order operated as a security makes it a question whether this debt is secured, and that being so, section 45 is at once attracted by section 10 of the Judicature Act.

L. Ryland and *P. Wheeler*, for other parties.

(1) 48 L. J. Ch. 409; 11 Ch. D. 160.
(2) 66 L. J. Ch. 576; [1897] 2 Ch. 154.
(3) 17 Q.B. D. 182.
(4) 60 L. J. Q.B. 50.
(5) 50 L. J. Ch. 185; 16 Ch. D. 337.
(6) 68 L. J. Q.B. 486; [1899] 1 Q.B. 699.
(7) 59 L. J. Ch. 274; 43 Ch. D. 175.
(8) 47 L. J. Bk. 91; 8 Ch. D. 327.

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NATIONAL UNITED INVESTMENT CORPORATION, IN RE.

WRIGHT, J.—I will deal with this question hypothetically, and treat it as if it were an abstract question of law. Previously to the commencement of the Bankruptcy Act, 1883, the law was that a garnishee order *nisi*, when served on the person who had the fund in his hands, bound the fund provisionally, constituting the garnisher a person having a charge upon the fund. Then came the Bankruptcy Act of 1883; and if section 45 of that Act applies at all in liquidations, it is clear that the law has been altered, and that the garnisher does not become entitled to the fund as against the liquidator until receipt of it, because section 45 provides that where a creditor has attached any debt due to the debtor he shall not be entitled to retain the benefit of the attachment against the trustee in bankruptcy of the debtor unless he has completed the attachment by receipt of the debt before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. The case of *Trehearne, In re; Ealing Local Board, ex parte*,[4] is an illustration of the effect of the section in bankruptcy, and that case seems to me to lay down the proposition just as I have laid it down above.

Now, in this case, the debt has not been received, therefore the question is, Does section 45 of the Bankruptcy Act apply to liquidations by virtue of the 10th section of the Judicature Act, 1875? The latter section attracts to the winding up of companies only so much of the bankruptcy law in force for the time being as relates to "the respective rights of secured and unsecured creditors," and "to debts and liabilities provable," and "to the valuation of annuities and future and contingent liabilities respectively." Now the material words there are "the respective rights of secured and unsecured creditors." I am only saying what is consistent with a fair interpretation of those words, when I say that they merely apply to the persons who, *ex hypothesi*, are secured or unsecured creditors, and that they do not alter the determination of who is, or is not, a secured creditor. In my opinion, therefore, section 45 is not attracted to liquidations, and that view is in accordance with the authorities mentioned in the course of the argument on behalf of the respondent. It seems to me that the cases of *Hasluck* v. *Clark*[6] and *Withernsea Brickworks Co., In re*,[5] tend strongly to shew that section 45 does not apply to liquidation. The latter case applies to the former Bankruptcy Act, and *Hasluck* v. *Clark*[6] did not turn on section 10 of the Judicature Act, 1875, but on section 125 of the Bankruptcy Act, 1883; but the principle of both cases, and also the judgment of Mr. Justice Chitty in *Pratt* v. *Inman*,[7] seem to shew that it was not intended that the provisions of sections 45 and 46 of the Bankruptcy Act, 1883, should be attracted by section 10 of the Judicature Act, 1875.

I need not read the Act in this case. I will only say that the language of section 45 seems to me to raise even more difficulty to its application to the present case than it did in the cases referred to, because effect cannot be given to section 45 before the commission of any act of bankruptcy by the debtor. That, to my mind, is an additional reason for saying that section 45 is not attracted. Therefore the old rule, which I have already stated and which was discussed in *Stanhope Silkstone Collieries Co., In re*,[1] applies to this case, and Seddon, having a garnishee order *nisi* which has been served on the whole of the fund, has secured a hold on that fund as against the liquidator of the National United Investment Corporation.

Solicitors—Pritchard, Englefield & Co., agents for Southam & Glanley, Manchester, for the liquidator; T. M. Richards, agent for Watson & Booth, Manchester, for Seddon; Belfrage & Co., agents for Reece & Harris, Birmingham; and Jaques & Co., agents for Layton, Melly & Layton, Liverpool, for other parties.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

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[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
March 13.

KNOTT END RAILWAY, *In re.*

Railway—Receiver—Railway not Completed — Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.

Assuming that there is jurisdiction to appoint a receiver under the Railway Companies Act, 1867, *s.* 4, *before the railway is opened for traffic, the Court will not exercise it in a case where the receiver if appointed would have no duties to perform.*

Decision of FARWELL, J., *reversed.*

The Railway Companies Act, 1867, *s.* 4, *discussed by* RIGBY, L.J., *and* VAUGHAN WILLIAMS, L.J.; *and* Manchester and Milford Railway, *In re* (49 L. J. Ch. 365; 14 Ch. D. 645), *explained.*

Appeal from an order of Farwell, J.

The Knott End Railway Co. was incorporated by special Act of Parliament to construct a light railway in Lancashire. Its nominal capital was 50,000*l.*, but only 5,000*l.* had been subscribed. A contractor had entered into an agreement to construct the line for payments partly in cash and partly in shares, and under this contract all materials brought upon the company's land for the purpose of constructing the line became the property of the company. The contractor had constructed the permanent way for the line, but had not laid the rails. The solicitor for the company had obtained a judgment against them for 1,100*l.*, and had taken in execution all the rails which the contractor had brought on the ground for the purpose of laying the line. The company's bankers had obtained judgment against the company for 2,900*l.* or thereabouts, and brought this petition for the appointment of a receiver and manager under section 4 of the Railway Companies Act, 1867.[1] There were no outstanding debts due to the company or other moneys receivable by the company. Farwell, J., made an order appointing a receiver. The company appealed.

Phipson Beale, K.C., and *Martelli*, for the appellant.—A receiver ought not to be appointed of a railway company before the railway is open for traffic. The case is not within the terms of section 4 of the Act of 1867, and therefore the Court has no jurisdiction; but in any case the Court will not exercise the jurisdiction even if it has it, since it is quite contrary to the practice of the Court to appoint a receiver where there is and can be nothing to receive—*Waterford, Dungarvan, and Lismore Railway, In re* [1880],[2] and *Southern Railway, In re* [1880][3] The case of *Manchester and Milford Railway, In re* [1880],[4] on which Farwell, J., relied, has been misunderstood. It does not decide that the two branches of section 4 are for all purposes independent. The Court in that case assumed that it was dealing with an open railway, and on that footing considered that the remedy by the appoint-

(1) The Railway Companies Act, 1867, s. 4: "The Engines, Tenders, Carriages, Trucks, Machinery, Tools, Fittings, Materials, and Effects, constituting the rolling stock and plant used or provided by a Company for the purposes of the Traffic on their Railway, or of their Stations or Workshops, shall not, after their Railway or any part thereof is open for Public Traffic, be liable to be taken in execution at law or in equity at any time after the passing of this Act, and before the first day of Sept. 1868, where the Judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the passing of this Act; but the Person who has recovered any such Judgment may obtain the appointment of a Receiver, and, if necessary, of a Manager, of the undertaking of the Company, on application by petition in a summary way to the Court of Chancery in England or in Ireland, according to the situation of the Railway of the Company; and all money received by such Receiver or Manager shall, after due provision for the working expenses of the Railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the Company and otherwise according to the Rights and priorities of the persons for the time being interested therein; and on payment of the amount due to every such judgment creditor as aforesaid the Court may, if it think fit, discharge such Receiver or such Receiver and Manager."

(2) 5 L. R. Ir. 102.

(3) 5 L. R. Ir. 165.

(4) 49 L. J. Ch. 365; 14 Ch. D. 645.

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ment of a receiver under the second branch of the section was available even though a company may have no rolling stock of its own which could have been taken in execution except for the first branch of the section.

[They also cited *Bedgellert Railway, In re* [1871],[5] *Midland Waggon Co.* v. *Potteries Railway* [1880],[6] *Mersey Railway, In re* [1888],[7] *East and West India Dock Co., In re* [1888],[8] and *Gardner* v. *London, Chatham, and Dover Railway* [1867].[9]]

Maugham (with him *Bankes, K.C.*), for the respondents.—It is for the benefit of every one that the receiver should be appointed. The appointment will enable the railway to be completed without execution being levied on the materials as they are brought on the ground.

[RIGBY, L.J.—The effect of appointing a receiver would be that the judgment creditor could not levy execution without leave of the Court.]

The Court would not grant leave looking to the provisions of section 4. The Court has jurisdiction under section 4 to appoint a receiver before the railway is open for traffic, and it is a proper case in which to exercise it. The two parts of section 4 are wholly independent—*per* Jessel, M.R., in *Manchester and Milford Railway, In re*[4]; and though the first part prohibits the levying of execution only after the railway is open for traffic, yet a receiver can be appointed under the second part before it is so opened.

Phipson Beale, K.C., replied.

RIGBY, L.J.—This case raises an important question as to the construction of the Railway Companies Act, 1867, s. 4, and as to the duty of the Court under that section.

On the present occasion, and for the purpose of this application, I do not think it necessary to lay down any final or complete rule as to the jurisdiction of the Court applicable to all circumstances under section 4. It appears to me that it will be sufficient to say that under the existing circumstances of the present case I can see nothing to justify the appointment of a receiver. Subject to what I have said as to not laying down any final rule, it is necessary to consider the terms of section 4 and the objects with which it was passed.

We all know that the holders of the debentures of a railway company were subjected to certain restrictions and limitations to which the general creditors were not subject. A general creditor who had recovered judgment against a railway company for his debt could levy execution and seize the rolling-stock of the company. The first part of section 4 of the Railway Companies Act, 1867, does this—it forbids any levying of execution on the rolling-stock or plant of the company "after the railway or any part thereof is open for public traffic," but it leaves the remedies of the creditors before the railway is opened for traffic entirely unaffected. Whatever power they had before the Act to seize the company's chattels, that power they still retain. Then the second part of the section gives a new remedy in place of that which was taken away by the first part—that new remedy being the appointment by the Court of a receiver, and if necessary of a manager, of the undertaking of the company on the application of a judgment creditor. In the present case an application was made for a receiver and manager, but when the case came to be heard the application, so far as it asked for the appointment of a manager, was given up, and a receiver only was asked for. Now consider the duties of a receiver appointed under this section. He has to receive the profits of the company as a going concern, and to apply them under the direction of the Court in the payment of the debts of the company. In the present case it is not suggested that there are any outstanding debts owing to the company, or any income which the receiver would be entitled to receive. All that he could receive would be the profits of the railway as a going concern when it is open for traffic. If there were nothing else to be considered, I should have thought the

(5) 19 W. R. 427.
(6) 50 L. J. Q.B. 6; 6 Q.B. D. 36.
(7) 57 L. J. Ch. 283; 37 Ch. D. 610.
(8) 57 L. J. Ch. 1053, 1059; 38 Ch. D. 576, 592, *per* Cotton, L.J.
(9) 36 L. J. Ch. 323; L. R. 2 Ch. 201.

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meaning was clear that no receiver ought to be appointed until the railway is opened or is on the point of being opened for public traffic, because only under these circumstances would the appointment of a receiver be efficacious. But it has been argued that though the two clauses of section 4—the first which restricts the right of execution, and the second beginning with the word "but," which introduces the power to appoint a receiver—are parts of one section, yet the two parts are quite independent of each other, and should be treated as if they were two sections, and the judgment of Sir G. Jessel, M.R., is cited as an authority that they ought to be treated as two sections. I entirely dissent from that. No Court can by its finding alter facts. No Court by its finding can say that there are two sections and not one. But in my opinion the judgment which is relied on in *Manchester and Milford Railway, In re*,[4] has no such effect as has been attributed to it. No doubt in that case Sir G. Jessel, M.R., speaks of the new right conferred by the second part of the section as "wholly independent of the fact that the railway company had or had not rolling-stock to be taken in execution," and as "an entirely new right given to all judgment creditors of railway companies"; but we must consider what the facts in that case were. The line there had been opened for public traffic, and the Court was asked to appoint a manager of the undertaking. The appointment was apparently objected to on the ground that the petitioning creditor was not deprived of any right by the first part of section 4; and the Court said that the second part of the section applied notwithstanding that the company had no rolling-stock to be taken in execution; but no one, I think, would have been more astonished than the learned Judges who decided that case if they had been told that their language was to be wrested out of its meaning, out of the context in which it occurs, and out of the facts to which it was applied, to mean that the two branches of the section could be treated as two sections having no relation to one another. All that the learned Judges meant to say, I think, was this—that it was not necessary for a creditor to shew that he had been deprived of a special or particular right by the first part of the section before he could have the benefit of the new general right which is conferred by the second part. That, in my opinion, is all the Court meant to lay down in that case. Now I must not be understood as saying that there is jurisdiction under the section to appoint a receiver unless the railway is opened or about to be opened for public traffic, but I think that there is reasonable ground for contending that the words which restrict the rights of judgment creditors after the railway is open for traffic apply equally to the appointment of a receiver. What I do say is this—that whether there is jurisdiction or not, it would not be right or in accordance with the practice of the Court to appoint a receiver who in all probability would not have any duties to perform for some considerable time, and perhaps none at all if the railway is never opened for traffic. This alone is a sufficient ground for saying that a receiver ought not to be appointed in the present case—I cannot see that there would be anything for him to do until the line is opened for traffic. And indeed my present view is that any judgment creditor of the company who but for the appointment of a receiver would have been entitled to seize any chattels belonging to the company, would be able by an application *pro interesse suo* to obtain leave from the Court to seize those chattels notwithstanding the appointment of a receiver, the only reason why such a creditor must seek the leave of the Court being that he must not interfere with an officer of the Court without such leave. It is not that his right is in any way affected. No judgment creditor's rights are affected by section 4 until the line is open for traffic; but, if a receiver were in fact appointed and placed in possession of chattels of the company, the Court would, I think, on the application of a judgment creditor order the receiver to relinquish possession.

Under these circumstances I see no use in appointing a receiver in this case, and it would be contrary to the practice of the Court to do so. I am of opinion, therefore, that the appeal must be allowed,

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KNOTT END RAILWAY, IN RE, App.

and the order of Mr. Justice Farwell discharged.

VAUGHAN WILLIAMS, L.J.—I assent, for I understand that according to the practice of the Courts of equity it would not be usual in circumstances like these to appoint a receiver who would have no functions which he could usefully perform. I do not myself know sufficient of the practice in such matters to enable me to arrive at an independent judgment in the matter, and therefore I think I am right in accepting the view of the other members of the Court. But I think I ought to say a word or two on the construction of section 4 of the Act of Parliament.

The section is divided into two parts. It begins with the part which is intended for the protection of rolling-stock and plant used or provided by the railway company for traffic, and the protection which is afforded is by taking away from individual judgment creditors their right of taking in execution at law or in equity the rolling-stock and plant. It is quite plain by the express words of the section that the protection does not arise, and the right to levy execution is not taken away, until there is public traffic on the railway; everything in that part of the section is governed by the words "after their railway or any part thereof is open for public traffic." But the first part of the section having thus taken away the right of individual creditors, the second part of the section goes on to give a new right, not to the individual creditor, but to creditors in general. It is not a substituted right given to individual creditors, but any judgment creditor may obtain the appointment of a receiver. I understand the language of Sir G. Jessel, M.R., in *Manchester and Milford Railway, In re*,[4] in exactly the same sense as my brother Rigby does—namely, as meaning that the right which is conferred is a new right independent of the exercise of the creditor's old right. And when we look at the first part of the section we see at once that the right of execution which is taken away is limited to a comparatively small subject-matter, whereas the part of the section relating to the receivership applies to a much larger and wider subject-matter. For instance, the first part of the section does not take away any right of execution against surplus lands of the company, whereas a receivership order under the second part would apply to surplus lands.

Taking this view of the section, I have to ask myself whether there is jurisdiction to appoint a receiver in the present case, and I do not conceive it is necessary to do more under the circumstances than to say that I must not be taken as expressing any opinion that no order for the appointment of a receiver can be made under the latter part of the section until the railway is open for traffic. But assuming for the present purpose that there is jurisdiction before there is traffic on the railway, I will consider whether, apart from the practice of the Court of equity, the order, if made under the second part, would be a useless order, because, notwithstanding the making of the order, the rights of the individual creditors continue unless and until there is traffic on the railway. In my judgment, if it is true to say that the new remedy is a remedy for all the creditors, it would seem to follow that the moment the new remedy is put in force the rights of individual creditors would be suspended—not because they are taken away by the express words of the first part of section 4, but because they are superseded by the new remedy which operates as an execution for the benefit of the whole class of creditors instead of individual creditors only. Could it be said for a moment that, supposing traffic on the railway had commenced and the railway company had in its possession some property subject to execution, as, for instance, surplus lands, a judgment creditor, after the appointment of a receiver under the second part of the section, could issue an *elegit* against the lands because there is nothing in the first part of the section to take away his rights? In my view, if it is true that the appointment of a receiver is for the benefit of a class of creditors, no member of the class ought to be allowed to exercise his individual rights. It is, however, as I understand, not according to the practice of the Court to appoint a receiver unless there is an immediate prospect of there being something for him to receive, and it may be that it would not be his duty to

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protect the property of the company; but, speaking for myself, in the first place, I am by no means satisfied that there is no jurisdiction to appoint a receiver under section 4 unless and until the line is open for traffic; and in the second place, I am by no means satisfied that, if a receiver were appointed before the traffic had begun, it would be possible for any judgment creditor to proceed with his execution notwithstanding the appointment.

Stirling, L.J.—I am of the same opinion. I need not add anything about the construction of section 4, and I will assume that there is jurisdiction in this case to appoint a receiver. But what is it that a receiver, when appointed, has to do? Section 4 says that all money received by him shall, after due provision for the working expenses of the railway, and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein. That I think shews that the view of the Legislature was that the receiver, when in possession of the railway, would work it to a profit, so that the surplus earnings would go to pay the creditors. In the present case there is a railway which is far from completion; there is nothing for the receiver to distribute or even to receive in the shape of money. It has not been suggested that there are any outstanding debts or other moneys which he could receive. That being so, the first thing he would have to do would be to complete the railway, so that it might become a going concern. From what source are the funds for that purpose to come? The petitioning creditors are not prepared to undertake to supply them, so that it must be left to the company or to the contractors to find the money. I should in any case be very loth to appoint a receiver when there was nothing for him to do. But in this case I think the appointment of a receiver would be an obstacle to the completion of the line. The circumstances are peculiar. The contractor, who is to be paid partly in cash and partly in shares, has a strong interest in the completion of the line. A judgment creditor, in the exercise of his undoubted legal rights, has seized some rails which had been brought upon the company's land, and which under the agreement between the company and the contractor had become the property of the company; and since then the contractor has, not unnaturally, held his hand. Under these circumstances I think the appointment of a receiver would not tend to bring about the completion of the line; and I can see no use in making an appointment which would probably be an obstacle to its completion. I think therefore that this is not a case in which the jurisdiction, if it exists, should be exercised. And if authority were needed in support of this view, I find it in the observations of Lord Justice Cotton in *East and West India Dock Co., In re*,[8] where he said, "the Act does not require the Court to make an order, but only gives the Court power to make an order if the company is a company coming within the definition. If therefore the Dock Company had not made the Railway, although it would still be within the definition, yet the Court if asked to make an order under this Act might say: 'The company may be within the definition, but we are not compelled to make an order, and under the circumstances of the case we shall not make an order.'"

Appeal allowed.

Solicitors—Ashurst, Morris, Crisp & Co., for appellants; Rowcliffes, Rawle & Co., agents for Houghton, Myres & Reveley, Preston, for respondents.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

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[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
March 1, 4, 5. April 1.

MANCHESTER SHIP CANAL CO. *v.* MANCHESTER RACECOURSE CO.

Contract — Statutory Confirmation — Vagueness—Remoteness—Contract to Give "First refusal" of Land—Outside Purchaser—Satisfaction of Contract—Definite Offer at Proposed Purchase-Price—Interest in Land—Breach of Original Contract—Injunction.

An agreement by an owner of land to give to another person the "first refusal" of the land in certain events either means that he must on the happening of the events give the other person the opportunity of refusing a fair and reasonable offer, or that he must give the other person the opportunity of refusing the land at a price acceptable to the owner offered by some third person. The owner does not, on either view, comply with the condition if he offers the land to the first person at a price higher than he would accept from other would-be buyers in the event of the refusal of the first person to buy at that price.

Where an agreement between parties is confirmed by Act of Parliament, every clause in it has statutory validity, and no objection can be taken to any provision in it on the ground that it is void for remoteness or uncertainty.

The defendants agreed with the plaintiffs that in the event of certain lands belonging to the defendants ceasing to be used as a racecourse, or being proposed to be used for dock purposes, the defendants would give to the plaintiffs the "first refusal" of the lands: —Held (*dissenting from* FARWELL, J., *on this point*), *that this agreement did not create an interest in land; but that the plaintiffs not having had a first refusal, it could be enforced against third persons proposed alienees of the land, the action being to restrain a breach of a contract threatened to be carried out in pursuance of a subsequent contract by the defendant with a third person having full knowledge of the first contract.*

Principle of Lumley *v.* Wagner (21 L. J. Ch. 898; 1 De G. M. & G. 604) *applied.*

Decision of FARWELL, J. (69 L. J. Ch. 850; [1900] 2 Ch. 352), *affirmed.*

Appeal from a decision of Farwell, J. (69 L. J. Ch. 850; [1900] 2 Ch. 352).

The facts are fully stated in the report of the case in the Court below. For the present purpose, the following statement is sufficient:

The action was brought by the Manchester Ship Canal Co. against the Manchester Racecourse Co., Lim., and the Trafford Park Estates, Lim., claiming a declaration that the defendants were not and are not entitled to enter into any contract for the sale and purchase of the lands used by the defendants, the Racecourse Co., as a racecourse, without first complying with clause 3 of a certain agreement of March 7, 1893, between the Racecourse Co. and the plaintiffs. The plaintiffs also claimed an injunction restraining both the defendants from completing or carrying out any agreement for the sale and purchase of the said racecourse in violation of clause 3 of the said agreement, and in particular from carrying out an agreement entered into between the defendants for the sale of the Racecourse Co. to the Trafford Park Estates Co.

The agreement of March 7, 1893, was scheduled to the Manchester Ship Canal (Surplus Lands) Act, 1893 (56 & 57 Vict. c. lxxiii.), whereby, after reciting the agreement, and that it was expedient that the agreement should be confirmed, which object could not be obtained without the authority of Parliament, the agreement was confirmed, and declared to be valid and binding upon the parties thereto. The successors and assigns of both companies were included in the agreement where the context required.

By clause 1 of the agreement the Racecourse Co. withdrew a certain claim which they had against the Canal Co. Clause 3 was as follows:

"If and whenever the lands and hereditaments belonging to the Racecourse Co., and now used as a racecourse, shall cease to be used as a racecourse, or should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes, then and in either of such cases the Racecourse Co. shall give to the Canal

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Co. the first refusal of the aforesaid lands and hereditaments *en bloc*."

Clauses 5 and 6 contained provisions, in the event of the land belonging to the Racecourse Co. abutting on the ship canal being used for the purpose of docks, and the lands not being purchased by the Canal Co., for access into the docks from the canal, and for the rates to be charged for the carriage of merchandise from such docks. Clause 10 was as follows: "The Racecourse Co. and the Canal Co. shall respectively execute such deeds as may be required by the other of them for the purpose of giving effect to these presents, and the form of any such deed shall in case of dispute be settled by the senior conveyancing counsel for the time being of the Chancery Division of Her Majesty's High Court of Justice."

In July, 1899, the Ship Canal Co. were proposing to sell a part of their property, Duke's Dock, Liverpool, with the object of purchasing with the proceeds the land of the Racecourse Co. for dock purposes; and early in August the Canal Co. informed the Racecourse Co. that they proposed to take compulsory powers for the purchase of the racecourse land, but were willing to negotiate with a view of coming to an agreement if the Racecourse Co. were disposed to sell. These negotiations continued until September without the intervention of any other person or company as a proposed purchaser, but on or about September 29 the Trafford Park Estates Co began to negotiate with the Racecourse Co. for the purchase of the racecourse land. The Trafford Park Co. proposed to use the land, or some of it, for dock purposes. The Trafford Park Co. offered 250,000*l.*, and thereupon the Racecourse Co. offered the land to the Canal Co. for 350,000*l.* subject to two conditions—first, that the Racecourse Co. should have a reasonable time within which to prepare for the continuance of their racing business on a site belonging to them at Castle Irwell; and secondly, that the sale should be subject to the necessary licence being obtained for that purpose—that is, the licence for the Castle Irwell course—from the Jockey Club. The Canal Co. did not accept this offer, and beyond offering 200,000*l.*, which the Racecourse Co. refused to accept, made no counter-proposal. The Racecourse Co. then and there, immediately after refusing the Canal Co.'s offer of 200,000*l.*, offered the land to the Trafford Park Co. at 300,000*l.*, instead of the 350,000*l.* at which they had offered it to the Canal Co. Their agent had invited the agent of the Canal Co. to bid 250,000*l.*, but not on such terms as to amount to an offer on the part of the Racecourse Co. to sell at that price, as he had refused to bind his company to sell at that price.

Afterwards the Racecourse Co. agreed to sell the land to the Trafford Park Co. for 280,000*l.*, together with an option to the Racecourse Co. to purchase 150 acres of the Trafford Park land for a racecourse at 1,500*l.* an acre. The agreement was also subject to other conditions, but they were not such as, in the opinion of the Court, would increase the price. The agreement was expressed to be subject to the right of the Canal Co. under clause 3 of the agreement of March 7, 1893, and the Trafford Park Co. undertook to indemnify the Racecourse Co. against all claims by the Ship Canal Co. under that clause. The Canal Co. were not informed of the terms offered by the Trafford Park Co.

Farwell, J., granted an injunction restraining the Racecourse Co. from selling to any person or company without having first offered to the Canal Co. the whole of the property in question at a cash price, the same cash price which the intending purchaser was willing to give. He also granted an injunction restraining the defendants from completing or carrying out the agreement between them unless and until that had been done.

The defendants appealed.

Upjohn, K.C., and *Stewart-Smith*, for the Trafford Park Estates Co.—Clause 3 of the agreement only applied if the owner ceased to use as a racecourse or proposed to use the land for docks. There is no evidence that the Racecourse Co. or any one else proposed to use the land for docks. Giving the "first refusal" is only giving an offer of buying at the same price as some one else is willing to give. The Canal Co. is to have the option of taking on the terms which the Racecourse Co. is willing

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MANCHESTER SHIP CANAL CO. *v.* MANCHESTER RACECOURSE CO., App.

to take from any one else. What took place in October, 1899, was in compliance with the agreement as to giving the "first refusal."

The agreement created a perpetuity and is void—*London and South-Western Railway* v. *Gomm* [1882].[1] Section 10 of the Act makes the agreement binding on the parties but not on the land. The objection of perpetuity does not apply to the contract *qua* contract, but only as creating an interest in land. There is no jurisdiction to restrain a breach of contract generally—*Heathcote* v. *North Staffordshire Railway* [1850][2] and *Fothergill* v. *Rowland* [1873].[3] The Court could not grant relief by way of specific performance of this contract, as no price is fixed. There may be a right of action against the Racecourse Co., but not against these defendants.

Warmington, K.C., *Hughes*, K.C., and *A. L. Ellis*, for the Manchester Racecourse Co.—Farwell, J., in fact has restricted our power of disposition to a sale *en bloc* for cash only. That is not justified by clause 3. The rights of the plaintiffs only arose on the land ceasing to be used for a racecourse or being used for dock purposes.

Moulton, K.C., *Swinfen Eady*, K.C., *Cripps*, K.C., and *Leigh Clare*, for the plaintiffs.—The clause was meant to be a restraint on the powers of the Racecourse Co. They were obliged to offer to sell *en bloc* to the Canal Co. on the happening of the events which have happened. The clause applied if the land was proposed to be used for dock purposes either by the Canal Co. or by other persons.

The Canal Co. were to have the "first refusal." That means that when the land came into the market they were to have the right of pre-emption—that, other things being equal, they were, if they wished, to be the buyers. They must have an offer on equal terms with other people. This has not been done, and the Canal Co. are entitled to the injunction asked for—*London and County Banking Co.* v. *Lewis* [1882].[4]

(1) 51 L. J. Ch. 530; 20 Ch. D. 562.
(2) 20 L. J. Ch. 82, 86; 2 Mac. & G. 100, 112.
(3) 43 L. J. Ch. 252; L. R. 17 Eq. 132.
(4) 21 Ch. D. 490.

[VAUGHAN WILLIAMS, L.J., referred to *Jones* v. *South Staffordshire Railway* [1869].[5]]

Upjohn, K.C., replied.

Cur. adv. vult.

April 1.—VAUGHAN WILLIAMS, L.J., read the judgment of the Court. He stated the facts to the effect set out above, and continued: The main question in this action is whether or not, according to the true construction of the scheduled agreement, the Racecourse Co. did give a "first refusal" of the racecourse land to the Canal Co. There appear to be two possible meanings of the words "first refusal." One is that they mean the opportunity of refusing a fair and reasonable offer by the Racecourse Co. to sell the lands *en bloc* to the Canal Co.; the other is that they mean the opportunity of refusing the land at a price acceptable to the Racecourse Co. offered by some person other than the Canal Co., which is what we understand by the term "right of pre-emption." Now, the obligation to give a first refusal arises in either of two events—namely, first, if and whenever the lands shall cease to be used as a racecourse; and secondly, should the lands be proposed to be used for dock purposes. Clause 5 of the agreement appears to me to shew that it was in the contemplation of the parties that the lands might be used for dock purposes while remaining in the hands of the Racecourse Co., and consequently without that company having determined to sell or part with the ownership of the lands. The object of clause 3, read in connection with clauses 5 and 6, appears to be to protect the Canal Co. as dock-owners against competition; and the risk intended to be guarded against is the same whether the Racecourse Co. or some third party is owner of the docks. The agreement does not provide that the first refusal shall be given at any particular price or on any particular terms; nor that the price and other terms shall be ascertained by arbitration, or in any other way. Looking at these circumstances, we think there is at least fair ground for the contention that the clause only imports that the Race-

(5) 19 L. T. 603.

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course Co. shall, in either of the prescribed events, make a fair and reasonable offer to sell the lands to the Canal Co., and we wish to consider the case from this point of view, which is the view most favourable to the defendants.

We start with this, that the directors of the Racecourse Co. were on August 10, 1899, approached by the Canal Co. with a view to the purchase of the lands by the latter company, and expressed themselves willing to discuss terms, and that negotiations between the two companies went on down to the beginning of October. About September 18 the Racecourse Co. appear to have consulted their solicitor as to their obligation under clause 3. He advised them, and the minutes record that "it was thought that no harm could come from our naming a figure, say 350,000*l*." Negotiations with the Trafford Park Co. began on September 29, and on October 4 a verbal offer was made by the Trafford Park Co. to the Racecourse Co. to become the purchasers at the price of 250,000*l*., with the benefit of certain stipulations in favour of the Racecourse Co., which are stated in a letter dated November 1, 1899, of Mr. Marshall Stevens, who was acting for the Trafford Park Co. On October 11 an interview took place between Mr. Davis, on behalf of the Racecourse Co., and Mr. Wallis, on behalf of the Canal Co., at which Mr. Davis offered the property to the Canal Co. for 350,000*l*. Mr. Wallis appears to have insisted that a legal notice was necessary. Mr. Davis stated that the Racecourse Co. had been advised that that company would comply with the clause if they offered the property to the Canal Co. for 1,000,000*l*., and failing acceptance they could sell it next day to any other persons for 100,000*l*. Mr. Wallis naturally (and as we think rightly) took a different view of the meaning of the clause. So to construe the clause would be to nullify it altogether. On October 20, 1899, Mr. Davis, on behalf of the Racecourse Co., wrote to the Canal Co. a letter, of which the material part is as follows: "The conditions which I understand Mr. Wallis to accept as the basis of negotiations are (1) that we should have a reasonable time within which to prepare for the continuance of our racing business on the site belonging to us at Castle Irwell, and (2) that the sale should be subject to the necessary license being obtained for that purpose from the Jockey Club. Subject to the above two conditions we are prepared to sell you fee simple of our property at New Barnes containing a little over 99 Acres for the sum of 350,000*l*. I shall be obliged by your informing me within one week from this date whether or not the offer is accepted, and if not accepted by your stating what is the highest sum you are prepared to give for the property subject to the above mentioned conditions." On October 27 the chairman of the Canal Co. wrote to Mr. Davis, neither accepting the offer nor making any counter-offer, but expressing a desire that negotiations should continue. On October 30 Mr. Davis wrote to the chairman of the Canal Co. that as the Canal Co. had not accepted the offer of the Racecourse Co., or made any counter-proposal, the Racecourse Co. felt at liberty to deal with their property as they might think fit. An interview subsequently took place between Mr. Wallis and Mr. Davis, at which the former offered 200,000*l*. for the property. Mr. Davis pressed Mr. Wallis to offer 250,000*l*., but the latter said he could go no further unless Mr. Davis was in a position to settle. Mr. Davis said he could only carry the offer to his co-directors. The Racecourse Co. thereupon refused the offer of 200,000*l*., and, without making any further offer to the Canal Co., immediately offered the land to the Trafford Park Co. at 300,000*l*., and ultimately entered into a contract with the Trafford Park Co. for the sale of the property at the price of 280,000*l*., with the benefit of certain stipulations in favour of the Racecourse Co., the value of which Mr. Justice Farwell finds to be nothing like 70,000*l*. We think that the price of 350,000*l*. was one which the Racecourse Co. did not really expect to get, and that the offer made by the letter of October 20, 1899, was not a fair and reasonable one. We also think that it was not the duty of the Canal Co. to make a counter-proposal. That company was entitled to a "refusal," which we agree with Mr. Justice Farwell in thinking imports an offer on the part

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of the Racecourse Co. In our judgment, the evidence shews that at the very moment when the Racecourse Co. were offering the land to the Canal Co. at 350,000*l.* the Racecourse Co. had determined to sell to the Trafford Park Co. for a less sum, and that in this sense the offer made by the letter of October, 1899, was not a fair and reasonable one. The contrast of figures is not so violent as in the supposed case where the Racecourse Co., for the purpose of freeing themselves entirely from the obligations of clause 3, offer at 1,000,000*l.*, and, having got their freedom by the continued refusal of that offer, subsequently sell at 100,000*l.*; but taking the consecution of events here, and the range of prices discussed at the previous negotiation between Davis for the Racecourse Co. and Wallis for the Canal Co., we have no more doubt than we should have had in the supposed case but that 350,000*l.* was an offer made at a figure which was above the price which the Racecourse Co. were willing to take from the Trafford Park Co., and we do not think such an offer is an offer within the meaning of clause 3, whatever construction is put upon it. We think that the very words "first refusal" in clause 3 import that the price at which the Racecourse Co. give the Canal Co. the "first refusal" is a price at which the Racecourse Co. will offer the land to other would-be buyers in the event of the refusal of the Canal Co. to buy at that price. If there is no person negotiating a purchase it may not be easy to prove that the price offered to the Canal Co. is above the price which the Racecourse Co. are willing to take from persons other than the Canal Co.; but whenever this can be proved, it seems to me that there is no real offer, and there is a clear infraction of the right of pre-emption given to the Canal Co. by clause 3. In the present case, however, there is no difficulty of proof.

Having thus disposed in the negative of the question whether the Racecourse Co. did give the Canal Co. a "first refusal" within the meaning of clause 3, we will now deal with the question whether either of the alternative conditions occurred giving rise to the right of refusal. The lands do not seem to have ceased to be used as a racecourse, and therefore one must consider the second alternative condition—namely, whether the lands were proposed to be used for dock purposes. We do not agree with Mr. Justice Farwell that the words "should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes" include a proposal so to use the lands by the Ship Canal Co. We think that the proposal must be by the Racecourse Co., their successors, or assigns—in other words, by a possible competitor in the dock business. But this is not very important, except as bearing on the construction of the clause, because we agree with Mr. Justice Farwell that within the meaning of this clause the Trafford Park Co. proposed before and at the time of the contract of sale entered into between themselves and the Racecourse Co. to use the land for dock purposes. The Trafford Park Co., who were negotiating the purchase of the land, proposed to use it, and the Racecourse Co. proposed to sell it for that purpose. This being so, the Canal Co. became entitled to a "first refusal"; and whatever those words may mean the Canal Co. in our opinion have not had a "first refusal"; for if one takes, as we have done in this judgment, the construction of clause 3 most favourable to the defendants, the Racecourse Co., on the happening of either of the alternative conditions came under the obligation to make a fair and reasonable offer to sell the lands to the Canal Co., and this, in our opinion, for reasons which we have already given, the Racecourse Co. have never done. If, on the other hand, clause 3 means that the right of "first refusal" is not to arise until some person or company other than the Ship Canal Co makes an offer acceptable to the Racecourse Co. and that the Racecourse Co. will then come under an obligation to offer the land at the same price to the Canal Co., it seems clear that the Racecourse Co. have not done so. In either case the fact that the Racecourse Co. offered and sold the lands to the Trafford Park Co. at a less price than that at which they offered the lands to the Canal Co. seems conclusive. The offer to the Ship Canal Co. was not fair and reasonable, because the Racecourse Co.

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were willing at the very time of the offer to take a less price from the Trafford Park Co., and alternatively the Ship Canal Co. never had the refusal of the offer made by the Racecourse Co. to the Trafford Park Co.

We have already said that we agree with Mr. Justice Farwell that the value of the option to the Racecourse Co. to take land of the Trafford Park Co. for a racecourse is not sufficient to account for the 70,000*l.*, the difference between the cash price at which the Racecourse Co. offered the land to the Ship Canal Co. and the cash price at which they actually sold to the Trafford Park Co. We agree with Mr. Justice Farwell that there is no evidence that the option was anything like the value alleged. We do not decide that the Racecourse Co. could only negotiate with the Trafford Park Co. for an exclusively cash price; but we do decide that, even if the Racecourse Co. could negotiate for a mixed price, yet the cash price at which they offer the land to the Ship Canal Co. for acceptance or refusal must not exceed the total of the cash price at which they have offered the land to the third person *plus* the reasonable cash value of the option which they take as part of the purchase-price.

It only remains now to deal with a few objections to Mr. Justice Farwell's judgment which were urged. First, it was urged before us that the agreement in clause 3 was void for remoteness or uncertainty. We think, for the reasons given by Mr. Justice Farwell, that every clause of the agreement has statutory validity, and that no objection can be taken on that score.

Then it was objected that clause 3 could not be enforced against the Trafford Park Co., who are only alienees of the land. Mr. Justice Farwell thought that clause 3 created an interest in land, and that this objection could be thus answered. We do not think that clause 3 does create an interest in land, nor do we think that there is anything in the decisions in *Tulk* v. *Moxhay* [1848][6] or in *London and County Banking Co.* v. *Lewis*[4] which gets over the objection. It seems, however, from the decision in *Willmott* v. *Barber* [1880][7] that the Trafford Park Co. could not obtain specific performance of a contract for sale and purchase of land, if such sale would be a breach of a prior contract with a third person; and it seems to us to follow that we ought to treat this case on the basis of an action to restrain a breach of a contract threatened to be carried out in pursuance of a subsequent contract by the defendant with a third person having full knowledge of the first contract. This seems to bring the case within the principle of *Lumley* v. *Wagner* [1852].[8] The contract here to give the Ship Canal Co. the "first refusal" involves a negative contract not to part with the land to any other person without giving that first refusal. If the action had been brought against the Racecourse Co., the party to the contract, alone, the injunction asked for could not have been granted without affecting the rights and interests of the Trafford Park Co. They are necessary parties to the action, just as Mr. Gye was a necessary party to the action of *Lumley* v. *Wagner*,[8] for to grant the injunction in that case was to prevent Miss Wagner from carrying out her contract to sing at Mr. Gye's opera-house; and if the defendant, thus brought in, comes and insists on his right to have the second contract carried out, I do not see why the injunction should not be granted against him. *Heathcote* v. *North Staffordshire Railway*[2] was cited to us to shew that no injunction could be granted against the third person in such a case, but so it was cited in *Lumley* v. *Wagner*[8] with the same object, but Lord St. Leonards, nevertheless, granted the injunction against Mr. Gye.

There are only two more objections to mention: one is that it is said that, if the agreement for the sale of the racecourse to the Trafford Park Co. is carried out, the plaintiffs will not be hurt, because the contract of sale is expressly subject to their rights. But the answer to this is, on the question of the amount of compensation to be paid on compulsory purchase, it may make a great difference to the Ship Canal Co., who are the claimants. Then it is said that the plaintiffs could

(6) 18 L. J. Ch. 83; 2 Ph. 774.

(7) 49 L. J. Ch. 792; 15 Ch. D. 96.

(8) 21 L. J. Ch. 898; 1 De G. M. & G. 604.

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not insist on the first refusal, because they could not buy without taking fresh statutory powers. It seems to us that the answer to this is that all the parties to the contract were perfectly well aware of this at the time when the contract was made.

For the reasons which we have given we think the judgment of Mr. Justice Farwell ought to be affirmed.

Appeal dismissed.

Solicitors—Ashwell, Browning & Tutin, agents for Ashwell & Tutin, Nottingham and Manchester, for Trafford Park Estates Co.; L. W. Byrne, agent for Taylor, Kirkman & Colley, Manchester, for Manchester Racecourse Co.; Grundy, Kershaw, Samson & Co., for plaintiffs.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
COLLINS, L.J.
STIRLING, L.J.
1901.
April 16.

BELHAM, *In re*; RICHARDES *v.* YATES.

Administration—Right of Retainer—Creditor Administrator — Administration Bond—"Not unduly preferring."

Under an administration bond entered into by a creditor administrator with a condition that he "do well and truly administer according to law (that is to say) do pay all and singular the debts which he (the deceased) did owe at his decease in a due course of administration rateably and proportionably and according to the priority acquired by law and not unduly preferring his own debt or the debts of any other of the creditors of the said deceased by reason of his being an administrator. . .," the administrator is not precluded from exercising his right of retainer in respect of debts due to himself from the deceased.

Davies *v.* Parry (68 L. J. Ch. 346; [1899] 1 Ch. 602) *approved.*

Appeal from a decision of Joyce, J.

J. D. Belham died intestate on October 26, 1898, and letters of administration of his personal estate and effects were on November 25, 1898, granted to the defendant Yates, who was a creditor of the deceased. The condition of the administration bond contained this clause: that the administrator "do well and truly administer" the estate and effects of the deceased "according to law (that is to say) do pay all and singular the debts which he did owe at his decease in a due course of administration rateably and proportionably and according to the priority acquired by law and not unduly preferring his own debt or the debts of any other of the creditors of the said deceased by reason of his being an administrator as aforesaid."

On January 25, 1899, the plaintiff took out an originating summons on behalf of himself and all other the creditors of the deceased, asking for the administration of the real and personal estate of the deceased. On February 22, 1899, an administration order was made by Kekewich, J., directing the usual accounts and enquiries. The Master made his certificate, dated January 17, 1901, whereby he certified that the total debts of the deceased amounted to 3,350*l.* 10*s.*, which sum included a sum of 957*l.* 7*s.* 5*d.* due to the defendant the administrator; and that the outstanding personal estate of the deceased consisted of a sum of 452*l.* 7*s.* 10*d.* on deposit and in Court to the credit of the action, and a sum of 514*l.* 6*s.* 8*d.* cash balance due from the defendant on account of personal estate.

The defendant claimed to exercise his right of retainer as administrator in respect of his own debt.

The plaintiff moved in the Probate Division that the bond might be varied by striking out the word "unduly," or that the bond might be otherwise altered so as to carry out the true intent and meaning of the words of the bond, and to secure the rateable and equal distribution of the assets among the creditors generally without preferring or giving advantage to the defendant as administrator or otherwise; or in the alternative that the administration already granted to the defendant might be revoked, and that administration might be re-issued to

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the plaintiff or to some other creditor willing to give such a bond.

The motion came before Gorell Barnes, J., on February 12, when he reserved judgment. He delivered judgment on March 8, when he refused to make any order on the motion. He considered himself bound by the decision of Romer, J., in *Davies* v. *Parry* [1899],[1] that an administration bond in the form of the bond in the present case did not deprive a creditor administrator of his right of retainer; but he expressed some doubt as to it, and he gave reasons why in his opinion a Court of Appeal might take a different view of a bond in that form as regards the question of retainer—*Belham, In re; Richardes* v. *Yates* [1901].[2] On March 28, 1901, the administration action came on on further consideration before Joyce, J., and he declared that the defendant was entitled to retain the sums of 452*l.* 7*s.* 10*d.* and 514*l.* 6*s.* 8*d.*, in payment of his debt. He said that he agreed with the decision of Romer, J., in *Davies* v. *Parry*.[1] The words of the bond were "not unduly preferring," not "not preferring at all," and all that the administrator was debarred from was "unduly" preferring—that is, he was not to retain as against a debt of a higher degree.

The plaintiff appealed.

Griffith Jones and *Morgan Griffith-Jones*, for the appellant.—The intention of the Probate Court clearly is that personal representatives should not be able to prefer their own debts to others—*Brackenbury, In the goods of* [1877][3] Romer, J., in *Davies* v. *Parry*,[1] has decided that that intention has not been carried out by the present form of bond; but Gorell Barnes, J., is evidently of the contrary opinion. The point, therefore, remains for this Court. Romer, J., attached importance to the word "unduly"; but to say that that one word is to defeat the known intention of the Court is a very narrow construction. There are other controlling words, "rateably and proportionably," and full effect must be given to them. The word "unduly" cannot have been inserted to prevent misappropriation of the money or preferring simple contract to specialty creditors. It was not required for that. An administrator is a mere creature of the Court, and has no inherent right of retainer. He only takes subject to such conditions as the Court chooses to impose upon him. The whole intent of the bond must be looked at. A right of retainer may be lost—*Stahlschmidt* v. *Lett* [1853].[4]

Ingpen, K.C., and *Whinney*, for the administrator.—There is no question that the right of retainer exists unless the administrator has before the grant of administration given it up. The Court can refuse to make the grant unless it is given up, but that was not done in the present case; and there are no words in the bond which amount to a contract not to exercise the right. The condition of the bond is that the administrator "do well and truly administer according to law," and all that follows is merely an explanation and amplification of that. He must not retain unduly—that is, he must not retain against creditors of a higher degree—*Wilson* v. *Coxwell* [1883].[5] The effect of the expression "unduly preferring" has been fully explained in *Davies* v. *Parry*,[1] and by Joyce, J., in the present case.

[COLLINS, L.J.—Do the words "rateably and proportionably" add anything to the duty of the administrator?]

No. After an administration decree the executor or administrator must administer rateably. He cannot prefer creditors, but he may retain his own debt, notwithstanding the decree—*Nunn* v. *Barlow* [1824].[6] If the word "unduly" were left out of the bond the administration would not be according to law, though it might be according to an arrangement.

Griffith Jones replied.

RIGBY, L.J.—I am of opinion that the decision arrived at by the learned Judge is right, and ought to be affirmed. No doubt one can see that there is reason for wishing perhaps that the law was simpler, and that the mere fact that a man had obtained the right to administer should

(1) 68 L. J. Ch. 346; [1899] 1 Ch. 602.
(2) 84 L. T. 300; 17 Times L. R. 340.
(3) 46 L. J. P. 42; 2 P. D. 272.
(4) 1 Sm. & G. 415.
(5) 52 L. J. Ch 975; 23 Ch. D. 764.
(6) 2 L. J. (o.s.) Ch. 123; 1 Sim. & S. 588.

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not always give him the right if money be owing to him from the deceased to retain part of the assets in respect of his debt, but that is beyond the case. If there is plenty of money, and no trouble, people will insist upon their rights, and any one would agree that whatever moneys there are should be divided among the creditors. That is right enough, but there are plenty of cases where, if the right of retainer is exercised, no other debts would be paid at all. That may be the rule, but it is by no means a desirable one. However, it would be the general rule in such cases.

I agree with Mr. Justice Joyce, who decided that in the absence of any other rule the rights of the administrator must prevail, and that the administrator in this case is entitled to payment of his own debt in preference to the other debts.

COLLINS, L.J.—I am of the same opinion. I think that the point was in substance decided in *Nunn* v. *Barlow*,[6] which has been followed in a number of other cases, as Mr. Justice Romer pointed out. It was decided in that case that, notwithstanding an administration decree, the administrator keeps his right of retainer. That, as it seems to me, when analysed, decides the whole point in this case. The administration bond does this: it writes at large that which is contained in an ordinary administration decree—that is, the obligation to administer rateably and proportionably and according to priority. If that be so, and if these words are in the ordinary administration decree, *Nunn* v. *Barlow* [6] distinctly decides that that is not incompatible with the legal right of the administrator to retain his debt. If that is conceded, it disposes of the whole point upon which Mr. Justice Gorell Barnes relied in differing from the view of Mr. Justice Romer, as Mr. Justice Gorell Barnes said that in his view Mr. Justice Romer had not sufficiently considered the effect of the words "rateably and proportionably." That being so, these words, being as they are inherent in the ordinary administration decree, add nothing to what is written at large in the bond signed by the administrator. So we have got to this—that unless the bond can be construed as a waiver by the administrator of the right which he would otherwise have, he retains that right. It seems to me that by merely writing out at large what is already in an administration decree the administrator does not lose his right of retainer.

In my opinion, the decision of Mr. Justice Romer is amply justified by the previous decisions, and the opinion of Mr. Justice Gorell Barnes cannot be sustained. The appeal from Mr. Justice Joyce must be dismissed.

STIRLING, L.J.—I am of the same opinion. Mr. Justice Romer, in deciding the case of *Davies* v. *Parry*,[1] refers to the terms of the bond which imposes upon the administrator the duty of paying the debts rateably and proportionably and according to the priority required by law. Now upon that he remarks that the administrator is not prohibited absolutely from preferring his own debt. All that he is prohibited from is from "unduly" preferring. What does that mean? Clearly it means that he cannot pay his own debt before any debt which in law ought to be paid before it. That would be an undue preference. But then it is said that it would be undue preference if he paid his own debt before those of equal degree with his own. That Mr. Justice Romer did not see. Neither do I. The right of retainer which it is sought to enforce here is given to the legal personal representative by reason of this—that he being at once creditor and legal personal representative, he is unable to sue himself, so he is entitled to use the assets that come to his hands to meet his own debt. I cannot say that that is undue preference within the meaning of the bond. I think, therefore, that the decision of the Judge in the Court below is right.

Appeal dismissed.

Solicitors—Woosnam & Smith, agents for Smith & Davies, Aberystwith, for appellant; H. B. Worrell & Son, for respondent.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

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[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
Feb. 8, 11, 12, 18.
April 1.

TAYLOR *v.* LONDON AND COUNTY BANKING CO.
LONDON AND COUNTY BANKING CO. *v.* NIXON.

Mortgage—Priorities—Trust—Fraud of Trustee—Legal Estate—Relation Back—Notice—Conveyancing Act, 1882 (45 & 46 *Vict. c.* 39), *s.* 3.

An equitable mortgagee, who has made an advance without notice of a prior equitable title, cannot gain priority by getting in the legal estate if at the time when he so gets it in he has notice that it is held on an express trust in favour of persons who assert a claim to the property.

A person who on being appointed a trustee of property requires and obtains a transfer of the legal estate in that property from his co-trustee to himself and the co-trustee jointly, becomes a purchaser for value of the property, inasmuch as he gives up a right of action against the co-trustee for the property.

Thorndike *v.* Hunt (28 L. J. Ch. 417; 3 De G. & J. 563) *and* Taylor *v.* Blakelock (55 L. J. Ch. 97; 32 Ch. D. 560) *followed.*

Where one of two trustees is a solicitor, the lay trustee on a transfer of property to the two will not be affected with notice of a prior equitable interest known to the solicitor trustee by reason of a previous independent transaction, and fraudulently concealed by him, if such prior interest would not have been disclosed if an independent solicitor had been employed on behalf of the trustees and had made reasonable enquiries and inspections.

Where the relationship between an equitable incumbrancer and the person in possession of the title-deeds to property is not merely that of mortgagee and mortgagor, but is of a fiduciary nature (for example, of cestui que trust and trustee, or of client and solicitor), the equitable incumbrancer will not be deprived of his priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the incumbrancer has no ground to suppose any want of good faith on the part of that person.

Shropshire Union Railways and Canal Co. *v.* Reg. (45 L. J. Q.B. 31; L. R. 7 H.L. 496) *and* Vernon, Ewens & Co., *In re* (56 L. J. Ch. 12; 33 Ch. D. 402), *applied.*

A purchaser for value without notice is entitled to the priority conferred by the legal title not only where he has actually got it in, but also where he has a better right to call for it; for instance, if he procures at the time of his purchase the person in whom the legal title is vested to declare himself a trustee for the purchaser, or even to join as party in a conveyance of the equitable interest.

These were three appeals from Farwell, J., which raised questions of priority between three sets of claimants—namely, the trustees of two marriage settlements and the London and County Bank—to four mortgages for sums amounting to 1,400*l.*, which were originally made in favour of one Frederick Talbot Tasker, a solicitor, who had absconded after dealing with the mortgages in such a way as to give rise to the present contest.

The facts as established in the Court of Appeal differed in important respects from those on which the case was dealt with in the Court below, and were as follows:

On February 14, 1882, Tasker advanced out of his own moneys to Richard Ward the sum of 1,400*l.* on the security of four indentures of mortgage, by which each of four leasehold houses, known as Nos. 14, 15, 16, and 18 Park Terrace, Kensal Green, was assured by way of sub-demise to Tasker as security for 350*l.* and interest at 5 per cent.

In December, 1889, F. J. Tasker and Charles William Chubb were trustees of a settlement, dated April 12, 1850, and made on the marriage of a Mr. R. T. Brockman (hereafter referred to as "the Brockman settlement"). In that capacity Tasker received on behalf of himself and his co-trustee a sum of 1,000*l.*, which had been invested on a mortgage given by Messrs. King & Brown, who had paid it off. Tasker appeared to have applied to his own use 700*l.*, part of this sum. In respect of it he paid to the beneficiaries

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under the Brockman settlement the half-yearly sum of 17*l.* 10*s.* (less income tax) by way of interest. In Tasker's books of account, under the heading "Trustees of R. T. Brockman Income Account," the interest on the 1,000*l.* lent to King & Brown was entered half-yearly down to February, 1889, "By ½ year's interest 1,000*l.* King & Brown." Opposite the last entry of this kind was a pencil memorandum "now 700*l.* Ward." Subsequently to 1889 the half-yearly payments of interest were entered in most cases, "By ½ year's interest on 700*l.* Ward," though in the year 1891 the entries were, "By ½ year's interest on 700*l.*" Some of the earlier entries were open to suspicion, as alterations had been made in them; but those made in 1893 and following years did not fall within this observation. Farwell, J., held that although Tasker executed no formal declaration of trust, and still less any legal assignment of the mortgages or any of them, nevertheless these entries established that previously to 1895 Tasker had appropriated 700*l.*, part of the mortgage debt of 1,400*l.* due to himself from Ward, to answer the 700*l.* which he had taken from the Brockman settlement funds. It did not in the view of the Court of Appeal appear that this appropriation was ever communicated by Tasker to his co-trustee, Mr. C. W. Chubb. Further, they thought there was no evidence that the appropriation was communicated to any of the beneficiaries previously to 1896; but in that year it certainly became known to one of them, Mr. Brockman, a solicitor, who acted on behalf of the others. All these beneficiaries were in 1889 and subsequently *sui juris* and entitled to absolute interests in possession in the trust funds. Mr. Brockman made no enquiries on the subject of this 700*l.* mortgage, and the explanation he gave was, "I did not suspect anything wrong and I had no occasion to. It was the trustees' responsibility and I did not think there was anything wrong." It was to be inferred that Mr. Brockman did nothing to relieve either trustee from any responsibility he had incurred.

In December, 1889, Tasker and John Karslake Blake were trustees of another settlement dated April 18, 1873, and made on the marriage of William Tasker (hereafter referred to as "the Tasker settlement"). Blake died on July 18, 1890, and thenceforth until February, 1895, Tasker was sole trustee of this settlement. In that month Mr. Samuel Nixon was applied to to become co-trustee with Mr. Tasker of the Tasker settlement.

Thereupon Mr. Nixon enquired what the funds subject to the trusts were, and Tasker furnished him with a list in which he included as one of the investments "1,400*l.* lent to Mr. Ward on mortgage of houses in Park Terrace, Kensal Road." Nixon subsequently went to Tasker's office to see the securities for this sum, and had produced to him the four leases and mortgages; and he required that these should be transferred into the joint names of Tasker and himself. It was proved before the Court of Appeal by the evidence of Charles Henry Gingell, a clerk of Tasker's, that transfers of the mortgages were prepared accordingly and were executed by Tasker. The transfers had been searched for and could not be found; but completed drafts of them were produced, and in the view of the Court of Appeal the mortgages were legally transferred to and became vested in Tasker and Nixon as joint tenants. The above evidence as to these transfers was not given before Farwell, J., on the hearing of *Taylor* v. *London and County Banking Co.*

The appointment of Nixon as trustee of the Tasker settlement bore date February 25, 1895, but appeared to have been executed later. The transfers were executed in June, 1895. All this took place before the appropriation in favour of the Brockman settlement was communicated to the beneficiaries.

The leases and mortgages remained in the possession of Tasker, who in August, 1897, deposited them with the London and County Bank by way of security. He also executed an instrument under seal dated August 14, 1897, on a printed form, which on the face of it appeared to be one used by the bank where security is given by a single member of a firm for the debt of the firm, but so as to cover also the private account of the partner giving the security. It began by a declaration that the person signing the

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document had deposited the deeds and documents mentioned in the schedule thereto as a security for the payment of all moneys for the time being due or owing to the bank from the partnership of [here followed a blank] or from himself individually. In the present case the blank was filled up with the name of Talbot & Tasker, being that of the firm of solicitors of which Tasker was a member. The deeds mentioned in the schedule included the four leases and mortgages of the four houses in Park Terrace, Kensal Green. The document proceeded as follows:

"And by this deed I charge all my present and future estate and interest both legal and equitable in all the hereditaments and other property comprised in the said deposited deeds and documents and all money which may or but for these presents might become payable to me or my representatives or assigns by virtue of any sale further mortgage or charge which I or any person claiming under me may make of or on the same or any part thereof or interest therein with payment of the said moneys on demand And I declare that you shall accordingly be deemed mortgagees under this deed of all the said premises hereby charged And I undertake that I and all other necessary parties (if any) will on any request for this purpose to be addressed and sent to me in manner aforesaid make execute and deliver to you or to such person or persons as you may appoint such further valid legal or other mortgage or mortgages by deed or otherwise of the premises hereby charged as you may require And that every such mortgage shall be prepared by your solicitors at my expense and shall contain such expressed and implied covenants powers and provisions as your said solicitors shall think proper including a provision that the mortgagees' powers and rights shall be exercisable immediately after any such demand as aforesaid And I declare that in the meantime you shall have and may exercise at any time after any such demand and without any further notice to or default by me or any person claiming under me such power of sale and other powers as by any statute shall for the time being be exercisable by a mortgagee by deed when default has been made in payment of the mortgage money for more than three months or other the statutory period after service on the mortgagor of notice requiring payment thereof And I declare that during the continuance of the present security I will hold all my present and future estate and interest hereby charged in trust for you as such mortgagees thereof as aforesaid and will convey the same as you shall direct And I authorise you during the continuance of the present security by deed to remove me or any other person from being a trustee in respect of the trust hereinbefore declared and to appoint yourselves or any persons or person to be trustees or a trustee in respect of the said trust and thereupon to make a declaration vesting all my said estate and interest in such new trustees or trustee And I hereby irrevocably appoint Henry Dean your present Head Office Manager William Hall your present Chief Accountant and Josiah Blaylock James your present Country Manager and every two and one of them . . . jointly and severally my Attorneys and Attorney for me and on my behalf and as my act and deed to make execute and deliver every or any such further mortgage or mortgages as aforesaid or (without executing any such mortgage) to make execute and deliver any conveyance of all my present and future estate and interest in the said hereditaments and premises or any part thereof to any purchaser or purchasers thereof on a sale by you as mortgagees."

On March 26, 1898, Tasker was adjudicated a bankrupt.

By an indenture dated April 5, 1898, the attorneys appointed by the deed of August 14, 1897, in the name and on behalf of Tasker purported to convey the leasehold messuages in Park Terrace to the bank as a security for all moneys secured by the deed of August 14, 1897.

When the last mentioned deed was executed the bank had no notice of the title either of the Brockman trustees or of the Tasker trustees; but before April 5, 1898, the bank had acquired notice of that of the Tasker trustees, but not of that of the Brockman trustees. In August, 1898, the plaintiff Charles

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Hewlett Taylor was appointed a trustee of the Brockman settlement in the place of Tasker, and along with Charles William Chubb.

In February, 1899, the plaintiff William Lindsay Chubb was appointed a new trustee of the Brockman settlement in the place of Charles William Chubb, and along with Charles Hewlett Taylor. On February 6, 1899, the plaintiffs Taylor and Chubb, as such trustees, commenced an action against the bank, Samuel Nixon and Tasker claiming to have the mortgages and deeds transferred to them as security for 700*l.* and interest, or in the alternative to have the rights and priorities of all parties ascertained and determined.

At the trial of this action Nixon failed to prove the execution of the transfers of the mortgages to Tasker and himself; and by the judgment dated March 19, 1900, it was declared by Farwell, J., that the plaintiffs were entitled to a charge in respect of the sum of 700*l.* and interest on the sum of 1,400*l.* secured by the four mortgages, and that the sum of 700*l.* and interest had priority over the claim of Nixon and Tasker as trustees of the Tasker settlement, but that such charge was subject to the deed of charge of August 14, 1897, and the deed of April 5, 1898, in favour of the bank.

On April 25, 1900, the bank commenced an action against Samuel Nixon and Richard Greswell, the latter of whom had been appointed a co-trustee with Nixon of the Tasker settlement; and thereby the plaintiffs claimed a declaration that they were entitled to hold the four mortgages as securities for the debt due to them in priority to the charge of the defendants.

The defendants counterclaimed, claiming priority over the bank.

At the trial the defendants succeeded in proving the execution of the transfer; and by the judgment of Farwell, J., the bank's action was dismissed, and upon the counterclaim it was declared that the defendants' securities had priority over those of the plaintiffs.

From the judgment in *Taylor* v. *London and County Banking Co.* two appeals were brought.

The first was by Nixon, who claimed a declaration that he and Tasker as trustees of the Tasker settlement were entitled to the 1,400*l.* secured by the four mortgages in priority to the claims of the trustees of the Brockman settlement and the bank. Upon the hearing of this appeal further evidence was by leave of the Court adduced as to the execution of the transfers, with the result already stated. The second appeal was by the trustees of the Brockman settlement, who claimed that their charge had priority over that of the bank. They gave a cross-notice to the like effect in Nixon's appeal.

From the judgment in *London and County Banking Co.* v. *Nixon* an appeal was brought by the bank, which claimed priority over the defendants Nixon and Greswell.

The appeals in *Taylor* v. *London and County Banking Co.* were first heard.

Badcock, K.C., and *E. Ford*, for the appellant Nixon, after proving the transfers of the legal estate to Tasker and Nixon.—The Tasker settlement trustees are proved to have been purchasers of the legal estate in these houses for value, and Nixon had no constructive notice of any other rights—*Hewitt* v. *Loosemore* [1851].[1] The case is covered by *Taylor* v. *Blakelock* [1886],[2] which shews that Nixon, having given up his right to sue for the debt to the trust, was entitled to be treated as a purchaser for value without notice—*Thorndike* v. *Hunt* [1859].[3] Nixon did nothing to disentitle him from relying on the legal estate. The rule in favour of the legal estate is very strong—*Pilcher* v. *Rawlins* [1872].[4] To displace the priority it gives you must shew a superior equity—*Rooper* v. *Harrison* [1855].[5] Tasker's knowledge of the claim of the Brockman trustees did not affect Nixon's conscience.

Levett, K.C., and *G. Cave*, for the plaintiffs, the trustees of the Brockman settlement. — Tasker's notice affected Nixon. Notice to one of two joint

(1) 21 L. J. Ch. 69; 9 Hare, 449.
(2) 56 L. J. Ch. 390; 32 Ch. D. 560.
(3) 28 L. J. Ch. 417; 3 De G. & J. 563.
(4) 41 L. J. Ch. 485; L. R. 7 Ch. 259.
(5) 2 K. & J. 86, 108.

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tenants will affect both—*Freeman* v. *Laing* [1899].[6] Nixon is therefore not a purchaser without notice.

[VAUGHAN WILLIAMS, L.J., referred to *Wallace* v. *Kelsall* [1840].[7]]

In the case of a gift to two joint tenants upon a trust one cannot rely on the fraud of the other. Each is affected by a secret trust imposed on the other —*Jones* v. *Badley* [1868],[8] *Robotham* v. *Dunnett* [1878],[9] *Russell* v. *Jackson* [1852],[10] and *Jarman on Wills* (5th ed.), vol. i. p. 194.

Tasker is a trustee of at least half the legal estate for the Brockman trustees. Secondly, Nixon, who left everything to Tasker as his solicitor, is affected by Tasker's notice—*Dixon* v. *Winch* [1900].[11] A solicitor is a man's *alter ego*, and he is affected with the solicitor's knowledge—*Boursot* v. *Savage* [1866][12] and *Dart's Vendors and Purchasers* (6th ed.), vol. ii. pp. 990 and 992.

[STIRLING, L.J., referred to the Conveyancing Act, 1882, s. 3.]

The Brockman trustees, being prior in time, come first.

Warmington, *K.C.*, *Bramwell Davis*, *K.C.*, and *Edward Chitty*, for the bank.—*Boursot* v. *Savage*[12] shews that Tasker transferred to us in 1898 the legal estate in one moiety of the houses, and we are entitled to priority to that extent. Anyhow, the bank have priority to the Brockman trustees. The possession of the deeds gave them priority. By the appropriation Tasker became mortgagor in regard to the Brockman settlement, and to the extent of 700*l.* had the equity of redemption. In so far as he was in the position of mortgagor it was negligence to allow him to retain the custody of the deeds. Omission to obtain possession of the deeds, unless it is sufficiently accounted for, will postpone an equitable mortgagee to one subsequent in date who has the deeds—*Rice* v. *Rice* [1854][13] and *Farrand* v. *Yorkshire Banking Co.* [1888][14] The bank has the deeds. They did all they could to enquire into Tasker's title, and they searched the Middlesex Registry, and the title seemed to be clear. They therefore have a better equity than Nixon.

Assuming that Nixon succeeds as against the bank, the bank come before the plaintiffs and are then entitled to be subrogated to the rights of the plaintiffs, and take their place to the extent of 700*l.* Where a man takes subject to an incumbrance that incumbrance has to be satisfied, but if, when dealing with the incumbrance, it is found that some one else has a prior right, then that person has to be paid off in priority —*Kensington* (*Lord*), *In re*; *Bacon* v. *Ford* [1885],[15] *Wyatt*, *In re*; *White* v. *Ellis* [1891],[16] and *Benham* v. *Keane* [1861].[17]

G. Cave, in reply for the plaintiffs.—The question of subrogation cannot properly be dealt with until the case between Nixon and the bank has been determined. The other two parties ought not to be in a position to oust the plaintiffs until they have settled the question of priorities between themselves.

[STIRLING, L.J.—Unless you can say that the bank took with notice of your charge, it is simply a question of priority upon the deeds.]

If a mortgagee without any sufficient excuse leaves the deeds in the hands of the mortgagor that will postpone him; but there is no evidence that the Brockman trustees knew of the appropriation. Supposing that they did, there was no negligence in taking a security in the name of a trustee, or in leaving the deeds in his hands. After the appropriation, the mortgage was in effect a contributory mortgage, and there is no negligence in taking a contributory mortgage in the name of a third person, and leaving the deeds in his hands. He is in such a case a trustee, and is entitled to the deeds—*Bradley* v. *Riches* [1878].[18]

(6) 68 L. J. Ch. 586; [1899] 2 Ch. 355.
(7) 10 L. J. Ex. 12; 7 M. & W. 264.
(8) L. R. 3 Ch. 362.
(9) 47 L. J. Ch. 449; 8 Ch. D. 430.
(10) 10 Hare, 204.
(11) 69 L. J. Ch. 465; [1900] 1 Ch. 736.
(12) 35 L. J. Ch. 627; L. R. 2 Eq. 134.
(13) 23 L. J. Ch. 289, 292; 2 Drew. 73, 81.
(14) 58 L. J. Ch. 238; 40 Ch. D. 182.
(15) 54 L. J. Ch. 1085; 29 Ch. D. 527.
(16) 61 L. J. Ch. 178, 185; [1892] 1 Ch. 188, 208.
(17) 31 L. J. Ch. 129; 1 J. & H. 685; 3 De G. F. & J. 318.
(18) 47 L. J. Ch. 811; 9 Ch. D. 189.

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Tasker was a trustee, and there was no reason to distrust him. It is not usual in such a case to put an indorsement on the deeds. The object is generally to keep notice of the trust off the title.

[STIRLING, L.J.—Tasker was not a sole trustee. What difficulty would there have been in getting a transfer to Tasker and his co-trustee?]

Probably none; but there was no obligation in the matter.

Leaving title-deeds with a solicitor is not in itself negligence such as to postpone an equitable mortgagee—*Cook* v. *Bramwell* [1890].[19] Tasker was not only the solicitor, but also the active trustee, so that there was a double reason for leaving the deeds with him.

Negligence has not been alleged in the pleadings, so the plaintiff's evidence was not framed to meet that case.

If a trustee appoints an attorney to convey away the legal estate of trust property, the person who takes does so subject to the possibility of the agency not being complete.

Badcock, K.C., in reply for Nixon.—In the case of equities only, notice to one of a body of trustees might be sufficient to affect them all—*Freeman* v. *Laing*[6]; but Nixon has the legal estate, and he is entitled to the benefit of that. If it is said that notice to one of two trustees is notice to both, because they are seised *per mie et per tout*, that involves that knowledge of a fact by one is the knowledge of the other, which is absurd. Nixon cannot be said to have known of Tasker's frauds. The cases cited of trustees of wills being affected by secret trusts depend upon the principle that a man cannot avail himself of his own fraud, and in those cases parol evidence has been admitted to prevent a man from taking property contrary to a secret trust which he has accepted, but the principle of those cases is not applicable to Nixon.

Though Tasker could transfer to himself and Nixon, that does not make any difference. The trustees together held for the whole trust. The trust property cannot be split up, so as to say that one trustee holds one half of the legal estate for one set of persons and the other trustee holds the other half for another set. The rights of the beneficiaries cannot depend upon the number of the trustees.

The decision in *Dixon* v. *Winch*[11] went upon special circumstances. The Court, no doubt, will not assume that a man has concealed a thing because it was to his interest to do so, but it is another matter where he has concocted a fraud which cannot be carried out unless he conceals facts. In that case concealment must be assumed. The communication of facts by one trustee to another and by a solicitor to his client is presumed from the relationship, but that may be rebutted—*Hewitt* v. *Loosemore*[1] and *Ware* v. *Egmont* (*Lord*) [1854].[20] The proved facts in the present case are inconsistent with the presumption that Tasker had informed Nixon of the prior charge. Tasker was solicitor to the trust, and if Nixon had employed a separate solicitor he probably would have had to pay his own costs; but Tasker was never Nixon's solicitor in the sense of being his *alter ego*. To postpone Nixon it must be shewn that he was guilty of some neglect, and it cannot be shewn that he was in any way wanting in his duty as a careful trustee.

Section 3 of the Conveyancing Act, 1882, does not apply in this case. To affect a purchaser with knowledge of a fact known to his solicitor, the fact must under sub-section 1 (ii) have come to the knowledge of the solicitor "as such." That is, come to his knowledge acting as solicitor in the matter, not as a person concocting a fraudulent scheme. There is really no case of notice, either actual or constructive.

[RIGBY, L.J.—We cannot give judgment until we have heard the other appeal.]

The appeal in *London and County Banking Co.* v. *Nixon* was heard on February 18.

Warmington, K.C., *Bramwell Davis, K.C.*, and *Edward Chitty*, for the appellants, the bank.—The bank can retain the legal estate which they have acquired

(19) W. N. (1890), 72.

(20) 24 L. J. Ch. 361, 366; 4 De G. M. & G. 460, 473.

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by the transfer from Tasker to them by the power of attorney contained in the deed of August 14, 1897—*Cooke* v. *Wilton* [1860][21] and *London and County Banking Co.* v. *Goddard* [1897].[22] An equitable mortgagee can get in the legal estate so as to use it against another equitable mortgage of which he has notice. We have the legal estate in one moiety of the mortgaged property, and we took that by virtue of a document which gave us the right to acquire it when we had no notice of any other equitable charge. The question of notice is important at the time the advance is made, not at the time when the legal estate is obtained. There is nothing inequitable in the bank's relying on the legal estate. If the bank were merely a depositee of title-deeds they could not take advantage of the legal estate got in after notice of another charge, but under the contract of August 14, 1897, the bank acquired the right to get in the legal estate.

We are now tenants in common with Nixon. The effect of the deed of 1897 is the same as if Tasker had then conveyed to the bank one moiety of the legal estate. The important time is the time of the purchase—*Pilcher* v. *Rawlins*.[4]

[STIRLING, L.J., referred to *Saunders* v. *Dehew* [1692].[23]]

Badcock, K.C., and *E. Ford*, for the respondent.—Tasker was a mere trustee, and had no legal or equitable estate which he could transfer to the bank—*Sharples* v. *Adams* [1863][24] and *Taylor* v. *Russell* [1892].[25] A person who gets in the legal estate after notice of a prior equity cannot avail himself of it—*Willoughby* v. *Willoughby* [1787],[26] *Allen* v. *Knight* [1846],[27] and *Taylor* v. *Russell*.[25] The form of security given to the bank would not enable them to use the power of attorney for robbing us of the legal estate. *Cooke* v. *Wilton*[21] was merely a case of tacking. In *London and County Banking Co.* v. *Goddard*[22] the question was who had best right to the legal estate. It does not decide that a trustee can pass on the legal estate. We are entitled to the title-deeds—*Cooper, In re; Cooper* v. *Vesey* [1882],[28] and *Manners* v. *Mew* [1885].[29] The conveyance to the bank is either void, or the bank cannot avail themselves of the conveyance against the respondent.

Bramwell Davis, K.C., replied.

Cur. adv. vult.

April 1.—RIGBY, L.J.—I do not propose to deliver a judgment on the majority of the points that arose in this case, because, as will appear hereafter, I am content to rely upon the judgment to be given by Lord Justice Stirling, but I do wish to state my view upon the position of the Brockman beneficiaries. They claim to have an appropriation of 700*l.* out of the 1,400*l.* lent by Tasker, the solicitor whose frauds have given rise to this question, on four mortgages of 350*l.* each. [His Lordship dealt with the facts relating to the appropriation of 700*l.* in favour of the Brockman settlement, and continued:] It is to my mind quite clear that Tasker had no power at all to appropriate by the entries in his books the security for the 700*l.* in such a way as to bind either the beneficiaries or Mr. Chubb. He could do something which if not interfered with would be to their interest, and which they might certainly choose to consider to their interest if they liked; but he had no authority and no power whatever to appropriate. It was not an approved security, or even a competent or authorised security. It was altogether an illegal appropriation, which they might not care for at all. Let us test it in this way: Suppose that the title to the mortgaged property had failed entirely. Tasker could not say, "I appropriated that fund to you and you must bear the loss." It would be ridiculous to suggest it. Nothing done by him would have bound the beneficiaries or have bound his co-trustee to abide by the appropriation; but, of course, if it had for all purposes been an appropriation, then if the property had been lost the

(21) 30 L. J. Ch. 467; 29 Beav. 100.
(22) 66 L. J. Ch. 261; [1897] 1 Ch. 642.
(23) 2 Vern. 271.
(24) 32 Beav. 213.
(25) 59 L. J. Ch. 756; 60 ib. 1; 61 ib. 657; [1891] 1 Ch. 8; [1892] A.C. 244.
(26) 1 Term Rep. 768, 773.
(27) 15 L. J. Ch. 480; 5 Hare, 272; affirmed [1847], 16 L. J. Ch. 370; 11 Jur. 527.
(28) 51 L. J. Ch. 149, 862; 20 Ch. D. 611.
(29) 54 L. J. Ch. 909; 29 Ch. D. 725.

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beneficiaries would have had to bear the loss. [After further dealing with the facts, and stating the legal transfer to the trustees of the Tasker settlement, his Lordship continued:] It appears to me pretty clear that, that having taken place, the opportunity which otherwise might have arisen for the trustees of the Brockman settlement to make an election to avail themselves of the appropriation had gone. They could no longer elect to take what was in no sense theirs and in every sense the property of the Tasker trustees, and I am unable to say there was any appropriation at all which they can rely upon.

Having gone into that question, I do not propose to deal with the other questions at all, being content to rest upon the judgment of Lord Justice Stirling, which I have read, and in which I concur in all other respects.

VAUGHAN WILLIAMS, L.J.—I have also seen the judgment of Lord Justice Stirling, and propose to say nothing more than that I quite concur in it.

STIRLING, L.J., after stating the facts above set out relating to the appropriation of the mortgage securities in favour of the trustees of the Brockman settlement, proceeded: At this point arises a question of fact—Was an appropriation actually made by Tasker in favour of the trustees of the Brockman settlement, or did it rest only in intention? Speaking for myself, I am unable to differ from the conclusion of Mr. Justice Farwell. I place no reliance either on the pencil memorandum or on the earlier entries to which I have referred; but I think the entries in 1893 and 1894 shew that an actual appropriation was made, and that the case is brought within the decisions in *Middleton* v. *Pollock* [1876][30] and *New, Prance, and Garrard's Trustee* v. *Hunting* [1897],[31] affirmed in the House of Lords under the name of *Sharp* v. *Jackson* [1899],[32] which establish that such a transaction may be good though not communicated by a trustee to his beneficiaries. [His Lordship stated the further facts in both cases, and continued:] From the judgment in *London and County Banking Co.* v. *Nixon* an appeal has been brought by the bank, which claims priority over the defendants Nixon and Greswell. Although a mortgage debt is a *chose in action*, yet where the subject of the security is land the mortgagee is treated as having an interest in land, and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty. The reason is thus stated by Sir William Grant, M.R., in *Jones* v. *Gibbons* [1804][33]: "A mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment"—that is of the mortgage—"is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt." See also *Wilmot* v. *Pike* [1845].[34] Leaseholds are real estate for the purposes of this rule—*Wiltshire* v. *Rabbitts* [1844][35] and *Union Bank of London* v. *Kent* [1888].[36]

In dealing therefore with these appeals, the first point to be determined appears to be the state of the legal title. It must now be taken that previously to August 14, 1897, this was vested in Tasker and Nixon as joint tenants. On that day Tasker executed the instrument already stated, and it becomes necessary to ascertain the legal effect of it. As has been pointed out, it is in a form adapted for use in a particular class of cases. It is intended to be employed with the view of creating a security on property in which the estate and interest of the person giving the security may differ widely in different cases. This circumstance ac-

(30) 45 L. J. Ch. 293; 2 Ch. D. 104.
(31) 66 L. J. Q.B. 554; [1897] 2 Q.B. 19.
(32) 68 L. J. Q.B. 866; [1899] A.C 419.
(33) 9 Ves. 407.
(34) 14 L. J. Ch. 469; 5 Hare, 14.
(35) 13 L. J. Ch. 284; 14 Sim. 76.
(36) 57 L. J. Ch. 1022; 39 Ch. D. 238.

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counts for and explains the generality of the language found in the operative part of it. In construing that language in any particular case great weight, as it seems to me, must be attributed to the title disclosed by the scheduled deeds which form the basis of the whole instrument. In the present case those deeds shewed a good legal title in Tasker; and, in my judgment, Tasker intended to declare himself a trustee of that legal interest, and to authorise the officers of the bank as his attorneys to execute a proper mortgage of it to the bank. The case of *Fausset* v. *Carpenter* [1831] [37] might appear at the first sight to be an authority for a different conclusion; but, regard being had to the criticisms to which that case was subjected by Lord St. Leonards in *Drew* v. *Norbury* (*Earl*) [1846],[38] and by Lord Hatherley in *Carter* v. *Carter* [1857],[39] it must be taken to have been decided on its own particular circumstances, which differ widely from those now under consideration. In *Drew* v. *Norbury* (*Earl*) [38] Lord St. Leonards states the general rule applicable in such cases to be as follows: "when a person having several estates and interests in a denomination of land, joins in conveying all his estate and interest in the lands to a purchaser, every estate or interest vested in him will pass by that conveyance, although not vested in him in the character in which he became a party to the conveyance." *A fortiori* in the present case ought the instrument under consideration to be held to deal with that estate and interest to which Tasker appeared to be entitled on the face of the deeds enumerated in the schedule. In my judgment, the deed of April 5, 1898, operated in execution of the authority conferred on the officers of the bank by the deed of August 14, 1897, and is effectual to the same extent as if it had been executed by Tasker himself; and consequently the joint tenancy subsisting between Tasker and Nixon was thereby severed, and an undivided moiety of each of the legal terms created by the four mortgages became vested in the bank, the other moiety remaining vested in Nixon.

It is next to be considered to what extent the bank and Nixon can avail themselves of the legal titles which have thus become vested in them. A legal mortgagee who makes an advance without notice of a prior equitable title is a purchaser for value without notice. From such a purchaser a Court of equity takes away nothing which he has honestly acquired—*Pilcher* v. *Rawlins* [4] and *Heath* v. *Crealock* [1874].[40] Further, an equitable mortgagee who has made an advance without notice of a prior equitable title may gain priority by getting in the legal title, unless there are circumstances which make it inequitable for him so to do. One case that falls within this exception is where the mortgagee has notice that the legal title at the time when it is so got in is held on an express trust in favour of persons who assert a claim to the property—*Saunders* v. *Dehew*,[23] *Allen* v. *Knight*,[27] *Sharples* v. *Adams*,[24] and *Taylor* v. *Russell*.[25] Now in the present case the legal title was not got in by the bank by the instrument of August 14, 1897. No doubt Tasker thereby declared himself a trustee of the mortgages for the bank; but the legal title such as it then existed remained undisturbed, and Tasker had previously made himself (along with Nixon) an express trustee of the mortgages for the beneficiaries under the Tasker settlement to the full extent of 1,400*l.*; and of this and Nixon's claim the bank had notice before April 5, 1898. In my judgment, it was inequitable in the bank to get in the legal title against Nixon or the Tasker beneficiaries; and against neither ought the bank to be allowed to gain priority by virtue of it. It was, indeed, contended that the deed of April 5, 1898, related back to August 14, 1897; and the cases of *Cooke* v. *Wilton* [21] and *London and County Banking Co.* v. *Goddard* [22] were cited; but in neither had the equitable mortgagee notice of any express trust affecting the legal title at the time when it was got in. Further, these cases do not support the proposition for which they were cited, and

(37) 2 Dow & Cl. 232; 5 Bligh (N.S.) 75.
(38) 3 Jo. & Lat. 267, 284.
(39) 27 L. J. Ch. 74; 3 K. & J. 617.
(40) 44 L. J. Ch. 157, 162; L. R. 10 Ch. 22, 33.

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in the absence of authority the contention appears to be wholly without foundation.

As regards Nixon, the cases of *Thorndike* v. *Hunt*[3] and *Taylor* v. *Blakelock*,[2] both decided in Courts of Appeal, establish that he must be treated as a purchaser for value, on the ground that by accepting the transfers he gave up a right of action which he had against Tasker for the 1,400*l*. It is not alleged that Nixon had himself any actual knowledge or notice of the appropriation made in 1889 by Tasker in favour of the beneficiaries under the Brockman settlement; but it is contended that he had constructive notice thereof either personally or through Tasker, who (it is said) acted as solicitor in the preparation of the transfers. In this respect the case is governed by the Conveyancing Act, 1882. By the definition contained in section 1, sub-section 4 (ii.) of that Act "purchaser" includes a mortgagee or an intending purchaser or mortgagee or other person who, for valuable consideration, takes or deals for property. Section 3 provides that "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless—(i) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of . . . his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." This section has been to some extent judicially construed in *Bailey* v. *Barnes* [1893].[41] In delivering the judgment of the Court of Appeal, Lord Justice Lindley says: "'Ought' here does not import a duty or obligation; for a purchaser need make no inquiry. The expression 'ought reasonably' must mean ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances."

Now, applying this to the present case, as regards (i.), by means of what possible enquiries or inspections on the part of Nixon would the prior appropriation have come to his knowledge? All that could be suggested by counsel in argument was an enquiry whether the mortgages were subject to any incumbrances. It is now settled that a vendor is not bound to answer such a general enquiry—*Ford and Hill, In re* [1879].[42] As regards (ii.), though the appropriation was perfectly well known to Tasker, still it did not come to his knowledge as Nixon's solicitor, nor "in the same transaction with respect to which" the question of notice arises. Again, if Nixon had employed an independent solicitor or other agent, what enquiries or inspections ought reasonably to have been made which would have brought the appropriation to his knowledge? It is said that an independent solicitor ought to have called for an abstract of Tasker's title, and that such an abstract would have disclosed the appropriation. But the leases and mortgages were produced by Tasker, and I fail to see why in the case of a title so simple an abstract ought to have been called for. An independent solicitor might without negligence have dispensed with an abstract. Even if an abstract had been called for, I cannot believe that it would have disclosed the appropriation. The transfers actually prepared by Tasker do not disclose it. In support of the contention that Nixon had notice of the prior appropriation were cited two cases—*Freeman* v. *Laing*,[6] decided by Mr. Justice Byrne, and *Boursot* v. *Savage*,[12] decided in 1866 by Vice-Chancellor Kindersley. As to the former, it seems sufficient to say that it was decided on the law relating to tacking, and the learned Judge expressly states that no question arose as to the effect of a purchase for value without notice; and it may for the present purpose be left out of consideration. As to the latter, I do not doubt that it was correctly decided according to the law as it stood in 1866; but the Conveyancing Act, 1882, has introduced very considerable modifications to which the Court is now bound to give effect. In my opinion Nixon became a purchaser, for value and without notice, of a legal interest

(41) 63 L. J. Ch. 73; [1894] 1 Ch. 25.

(42) 48 L. J. Ch. 327; 10 Ch. D. 365.

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in one moiety of these mortgage debts and the legal terms by which they were secured. It was not contended that he has been guilty of any act or omission which, as against the plaintiffs or the bank, would deprive him of priority against either of them, nor, regard being had to the rules laid down by the Court in *Northern Counties of England Fire Insurance Co.* v. *Whipp* [1884],[43] could such a contention succeed. The result, therefore, is that, as regards the undivided moiety legally vested in Nixon, he and his *cestuis que trust*, the beneficiaries under the Tasker settlement, are entitled to priority over both the bank and the beneficiaries under the Brockman settlement; while, as regards the undivided moiety legally vested in the bank, the latter gain no priority as against Nixon and his *cestuis que trust*.

I next proceed to consider the order of priority between the purely equitable titles. This is governed by order of time unless there has been some act or omission on the part of the owner of an equitable title prior in point of time such as to cause that title to be postponed to a subsequent equitable interest. The rules which govern the postponement of a prior legal estate to a subsequent equitable estate were in the year 1884 laid down by Lord Justice Fry in delivering the judgment of the Court of Appeal in *Northern Counties of England Fire Insurance Co.* v. *Whipp*.[43] In 1890 Mr. Justice Kay, in *Taylor* v. *Russell*,[25] carefully considered the law with respect to the postponement of a prior to a subsequent equitable interest, and came to the conclusion that the same rules as those laid down in *Northern Counties of England Fire Insurance Co.* v. *Whipp*[43] applied to the case before him. On appeal, his Lordship's decision was reversed on another ground, and the Court of Appeal declined to consider any question as to the relative equities which arose under the circumstances of the case. In the House of Lords the decision of the Court of Appeal was affirmed on the same ground; but Lord Macnaghten, in advising the House, took occasion to remark that he was not satisfied of the correctness of the view taken by Mr. Justice Kay. I am not aware that the precise point considered by that learned Judge has since arisen for decision; and if it were necessary to decide it in the present case I should think it my duty to examine with the utmost care his judgment in *Taylor* v. *Russell*[25] and the authorities relied on by him. I think, however, that on the present occasion such an examination may be dispensed with. The ground of postponement relied on in this case is that the prior equitable claimants allowed Tasker to remain in possession of the title-deeds, including the mortgages to himself. There are undoubtedly cases (as, for example, *Waldron* v. *Sloper* [1852][44] and *Farrand* v. *Yorkshire Banking Co.*[14]) where an equitable mortgagee, who has allowed his mortgagor to retain or regain possession of the title-deeds, has been postponed to a subsequent equitable incumbrancer who has obtained possession of the deeds. But where the relationship between the equitable incumbrancer and the person in possession of the title-deeds is not merely that of mortgagee and mortgagor, but is of a fiduciary nature (as, for example, that of *cestuis que trust* and trustee or client and solicitor), there is a great body of authority to shew that the equitable incumbrancer is not to be deprived of his priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the incumbrancer had no ground to suppose that there was any want of good faith on the part of the custodian of the deeds.

The leading authorities on this point appear to be *Cory* v. *Eyre* [1863],[45] *Shropshire Union Railways and Canal Co.* v. *Reg.* [1875],[46] and *Vernon, Ewens & Co., In re* [1886],[47] before the Court of Appeal. This last case in some of its features bears a resemblance to the present. A client left in the hands of his solicitors 11,000*l.* for investment. The solicitors represented that this sum was invested on mortgage of certain specified property, and the client made no further enquiry. The solicitors were in fact the holders of a mortgage for 55,000*l.* on the specified property, and afterwards dealt with the

(43) 53 L. J. Ch. 629; 26 Ch. D. 482.

(44) 1 Drew. 193.
(45) 1 De G. J. & S. 149.
(46) 45 L. J. Q.B. 31; L. R. 7 H.L. 496.
(47) 56 L. J. Ch. 12; 33 Ch. D. 402.

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mortgage by giving it up in exchange for other property in which they acquired an equity of redemption; and this equitable interest they subsequently sold. It was held that the solicitors must be treated as having become trustees for their client of 11,000*l.* out of the 55,000*l.* secured by the mortgage, and having as against the client dealt improperly with this mortgage; and consequently that the latter was entitled to a charge on the substituted property. It was further held that the client was entitled to enforce this charge against the purchasers. Lord Justice Cotton makes these remarks: "Then there was a case of *Waldron* v. *Sloper*[44]; and that is the case which may be said to be most like the present; but what was it? Waldron had an equitable security which was the first incumbrance on the property, and he put the deeds, not into the hands of a person who owed any duty to him, but into the hands of his mortgagor, and then that mortgagor kept them, without any enquiry from Waldron, and dealt with the property on the footing that he was entitled to the deeds. In my opinion that is an entirely different case from one in which a person lets his solicitor have his deeds in his hands, or trusts to his solicitor when the solicitor has undertaken a duty for him, and has, as in this case, made himself a trustee of that which he ought to have acquired in the name of his client, but has in fact acquired in his own name"; and his Lordship also says, "it is not a sufficient ground for postponing the client, for whom the solicitor had become a trustee, but was not openly a trustee, simply because the client had not made enquiry as to how the solicitor had performed his duty." The principle was applied by Mr. Justice Chitty in *Carritt* v. *Real and Personal Advance Co.* [1889][48]—a strong case. I think that it must also be applied here. So far as the title of Nixon or the beneficiaries under the Tasker settlement is equitable only, he and they were entitled to rely on Tasker for the performance of his duty as one of the trustees of that settlement. In my judgment, the bank are not entitled to say that the Tasker trustees have lost priority in respect of their equitable title. The same principle applies as between the Tasker trustees and the Brockman trustees, so far as the title of the Tasker trustees is equitable only.

It was contended on behalf of the Brockman trustees that, as between them and the Tasker trustees, they are prior in point of time, and even although they may not be entitled to priority as between themselves and the bank, they ought to the extent of their charge to be allowed to stand in the place of the Tasker trustees, in accordance with the rule applied to the priority of judgment creditors in *Benham* v. *Keane*,[17] and treated by Lord Justice Fry in *Wyatt, In re; White* v. *Ellis*,[16] as applicable between incumbrancers. Now a purchaser for value without notice is entitled to the benefit of a legal title, not merely where he has actually got it in, but where he has a better title or right to call for it. This rule is laid down in *Wilkes* v. *Bodington* [1707].[49] It has accordingly been held that if a purchaser for value takes an equitable title only, or omits to get in an outstanding legal title, and a subsequent purchaser for value without notice procures, at the time of his purchase, the person in whom the legal title is vested to declare himself a trustee for him, or even to join as party in a conveyance of the equitable interest (although he may not formally convey or declare a trust of the legal estate), still the subsequent purchaser gains priority—see *Wilkes* v. *Bodington*,[49] *Maundrell* v. *Maundrell* [1805],[50] *Stanhope* v. *Verney* (*Earl*) [1761],[51] *Wilmot* v. *Pike*,[34] and *Rooper* v. *Harrison*.[5] Here Nixon, on being appointed a trustee of the Tasker settlement, insisted that the mortgages for 1,400*l.* should be legally transferred to himself and Tasker as trustees of that settlement. Tasker was not merely a formal but an actual conveying party to the instruments by which this was done. By accepting the transfers Nixon gave up a right of action which he had against Tasker and became a purchaser for value without notice of any prior incumbrance.

(48) 58 L. J. Ch. 688; 42 Ch. D. 263.

(49) 2 Vern. 599.
(50) 10 Ves. 246, 270.
(51) 2 Eden, 81.

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There was no suspicion attaching to Tasker at this time, and it would have been a breach of trust to vest the legal title to these securities in any persons other than Tasker and Nixon, the duly constituted trustees of the Tasker settlement. Everything therefore was done that could be done to deal with the legal title in such a way that the securities should be vested in the proper persons, with the object that they should be effectually held on behalf of the Tasker beneficiaries. The position of the Brockman trustees and beneficiaries is very different. They got from Tasker no declaration of trust nor any assignment of the legal title. None of them gave up any right whatever against Tasker, or gave other valuable consideration for what Tasker did. The securities were never legally vested in the Brockman trustees as such; and the appropriation made was the voluntary act of Tasker, and of Tasker alone. In my judgment, the Tasker trustees have acquired a better right than the Brockman trustees to call for the legal title which, prior to April 5, 1898, was vested in Tasker. The result is that the Tasker trustees are entitled to the mortgages of the Park Terrace property in priority to the other claimants.

In the action of *London and County Banking Co.* v. *Nixon* a question arises between the bank and the trustees of the Tasker settlement with reference to a mortgage for 800*l.* on two houses in Stanley Gardens. The contest is precisely similar to that between the same parties as to their priority with regard to the mortgages on the Park Terrace property, and must have a similar result—namely, the Tasker trustees have priority over the bank.

Solicitors—Freeman & Son, for Nixon; White, Borrett & Co., agents for A. D. & L. J. D. Brockman, Folkestone, for trustees of Brockman settlement; Harries, Wilkinson & Raikes, for London and County Banking Co.

[*Reported by A. J. Spencer, Esq., Barrister-at-Law.*

Cozens-Hardy, J.
1901.
Jan. 28, 29, 30, 31.
Feb. 1, 4, 5, 6, 21.

MERTTENS v. HILL.

Custom—Tenure of Ancient Demesne—Customary Freehold—Fine on Alienation—Title to Manor—Possession—Presumption of Lost Grant—Recital in Inclosure Act—Evidence.

The freehold of land held by the tenure of ancient demesne is in the tenant and not in the lord of the manor. A custom for the lord of a manor of ancient demesne to receive a fine arbitrary upon the purchase of lands within the manor is bad, whether limited to purchases by "strangers" (that is, persons not already tenants of the manor) or not, as being contrary to the statute Quia Emptores and other statutes.

Semble, *where a manor has existed in the hands of the Crown, and the Crown has granted some of the lands of the manor to a subject by a grant which did not pass the manor, but the successors in title of the grantee have held manorial courts and kept court rolls continuously, and shew a long modern paper title to the manor, a grant of the manor itself from the Crown will be presumed.*

Recitals in an Inclosure Act are not conclusive evidence against persons claiming through original allottees under the Act, but may be rebutted by other evidence.

Action by the plaintiff, who claimed to be lord of the manor and soke of Rothley in Leicestershire, claiming a fine from the defendant as purchaser of certain lands called "Wongs" in the vill of Grimston, one of the dependencies of the manor, at the rate of one shilling in the pound on his purchase-money.

The statement of claim alleged as follows: The plaintiff is entitled to a fine due, according to the custom of the said manor and soke, from every purchaser of tenements situate within the said manor and soke, who is a foreigner—that is, of every person not already a sokesman or tenant of the said manor and soke at the time of such purchase, for licence of entry into such tenements. The lands of the manor are holden of the lord by fealty,

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suit, and service, and subject to certain customary incidents of tenure in the nature of a customary freehold. Any person becoming entitled to any tenements holden of the lord of the manor ought to appear at the court of the lord to do fealty, suit, and service, pay the customary fine and take admittance, and the title of any person so becoming entitled, and specially of any foreigner, is incomplete until admittance. The said fine was, according to the custom of the said manor, a fine arbitrary for licence of entry into the said tenements. For 150 years and upwards the lords of the said manor and soke have accepted, as a composition for such fines arbitrary, a poundage, at the rate of one shilling in the pound, on the amount of the consideration-money paid by foreigners for tenements purchased by them.

The plaintiff further alleged that if a foreigner, who had purchased any tenements within the manor, neglected after being duly summoned to come to court to take admittance, he would be amerced by the homage, and the lord was entitled to enter *quousque*; and that the foreigner was bound before and as a condition of admittance to take a customary oath that he had not contracted or agreed for any further or greater purchase of lands than those to which he was admitted.

The defendant had refused to take admittance or pay a fine. The homage had amerced him at forty shillings. The plaintiff claimed the amercement and fine.

The defendant denied that the manor of Rothley existed, contending that it had come into the hands of the Crown on the suppression of the monasteries, but had been destroyed by successive grants from the Crown of the lands of the manor, most of which had been made or transferred to the plaintiff's predecessors in title to be held in common socage and not in chief. None of these grants expressly included the manor itself. The defendant also denied that Wongs was within the ambit of the manor, and that the alleged custom existed. He also pleaded that the custom was bad in law, and denied that he was a foreigner within the meaning of the alleged custom. The defendant had been born within the manor, but neither he nor his parents had ever held lands within it.

The evidence consisted almost entirely of the court rolls and ancient documents, the nature and effect of which sufficiently appear from the arguments and the judgment.

Swinfen Eady, K.C., *Eve*, K.C., and *Stuart Moore*, for the plaintiff.—The land purchased by the defendant is within the manor of Rothley. Predecessors in title of his were admitted, and appear on the rolls. Part of the land was allotted to Trueman, the defendant's predecessor in title, by the award under the Grimston Inclosure Act, 1765 (5 Geo. 3. c. lxviii.). That Act recites that Grimston is within the manor and soke of Rothley, and the defendant is privy to that Act, and bound by it. In 1825 Needham, one of the defendant's predecessors in title, was admitted, and in 1826, by an action in the Common Pleas, he procured the reversal of a fine levied by his immediate predecessor. That can only have been done on the ground that the land was not freehold, and therefore not a proper subject for a fine.

The plaintiff is lord of the ancient manor of Rothley. It is admitted that the manor was owned by the Templars, and came into the hands of the Crown in 32 Hen. 8. There were several grants by the Crown to the plaintiff's predecessors in title of lands of the manor. The manor itself is not expressly named, but the grant of the lands of a manor will pass the manor—*Marsh and Smith's Case* [1585].[1] The plaintiff's predecessors have held Courts for the manor, and acted as lords thereof ever since those grants. The court rolls are continuous except for a gap from 1604 to 1675, and the plaintiff shews a good paper title to the manor for more than 150 years. Under these circumstances a legal origin will, if necessary, be presumed for the rights so long enjoyed—*Halliday* v. *Phillips* [1889].[2]

It is admitted that the manor is of

(1) 1 Leonard, 26; *sub nom. Morris* v. *Smith*, 1 Cro. Eliz. 38.

(2) 58 L. J. Q.B. 404; 23 Q.B. D. 48.

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the tenure of ancient demesne. That is proved by Domesday Book, where the manor is entered as being *terra regis* in the time of William the Conqueror and of Edward the Confessor. That tenure continues when the manor is granted to a subject—*Rolls Abridgment*, I. p. 324, 8, pl. "Ancient Demesne." The Knights Templars in 1285 established their title as lords of a manor of ancient demesne by proceedings before the Justices in Eyre, in Leicester.[3] In those proceedings Ralph FitzRoger sued Ralph de Warkenetheby for land in Warkenetheby, one of the dependencies of the manor, in the King's Court, and he was non-suited because he ought to have sued in the court of the lord of the manor by the Little Writ of Right Close. The same proceedings shew that the agreement made in 56 Hen. 3, between the Master of the Templars and the tenants of the outlying dependencies of the manor of Rothley,[4] on which the defendant relies, did not alter the tenure or customs of those dependencies. The right so established has continued ever since. Land of the tenure of ancient demesne is privileged copyhold, not freehold; that is laid down in *Blackstone's Law Tracts* (3rd ed.), "Consideration of Copyholds," p. 213 *et seq.*, quoting Bracton, Fleta, and Britton; and by *Watkins on Copyholds* (4th ed.), vol. i. p. 44. In this manor, at any rate, the lands passed by admittance, and that is proof that the freehold is in the lord. The custom of paying a fine on purchase by a foreigner is proved by a long course of entries in the rolls. It is stated in the Grimston Inclosure Act by which the defendant is bound. It is said that this is a restriction on alienation. But there was no right of alienation until the statute of Quia Emptores (18 Edw. 1. c. 1), and that statute does not apply to tenants in ancient demesne. There is no statute which forbids a customary fine on alienation.

Micklem, K.C., Wurtzburg, and *H. J. H. Mackay*, for the defendant.—Lands of the tenure of ancient demesne are freehold. All the dealings with this property are consistent with this view, and not with any other. The whole point of the case of 13 Edw. 1 relied on by the plaintiff's counsel is that the land was frank fee within the manor If it were not, the Little Writ of Right Close would not have applied. But if this is so, it is fatal to the plaintiff's contention. The custom he pleads necessarily implies that the lands were not freehold, and a custom must be continuous; one break destroys it; modern usage is immaterial — *The Case of Tanistry* [1609].[5]

In any case, the lands in Grimston were enfranchised by an agreement made before the Judges at Westminster, in the 29th year of Henry 3 (A.D. 1245), between the Master of the Templars and the men of certain dependencies of the manor of Rothley, including Grimston, which was confirmed by *Inspeximus* in 1377,[6] whereby the tenants agreed to pay an extra farm of three shillings per year per carucate "for all works tallages and other villein customs which the said master exacted from them."

This agreement enfranchised the lands in Rothley — *Watkins on Copyholds* (4th ed.), vol. i. p. 446. If not, it released them from the custom.

The plaintiff is not lord of the old manor of Rothley. The different grants by the Crown of lands within the manor to be held on different tenures destroyed the old manor. If it was not absolutely destroyed, the grant to Wright and Holmes in 1553[7] of certain lands at Grimston to be held as of the manor of East Greenwich took out of the manor all the lands in Grimston which were ever in it. It is clear from Domesday Book that only a very small part of Grimston ever was within the manor.

The defendant relies on his possessory title, the recital in the Inclosure Act, and the admission to Wongs. But in dealing with a manor a possessory title cannot be set up against an express grant. On the rolls the earlier entries relating to Grimston

(3) De Banco Roll, 13 Edw. 1; Roll 34 D, Easter Term.

(4) Exemplification Pat. Roll, 51 Edw. 3. M. 37.

(5) Davies, 78, 91.

(6) Patent Roll Ch. 51 Edw. 3. M. 37.

(7) Patent Roll Ch. 7 Edw. 6. part 4, M. 13.

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refer to the adjoining manor of Dalby and not Rothley. It is impossible to trace any particular piece of land in Grimston on the rolls, much less the whole. The fact that Grimston tenants had to attend the manor court, which was reserved by the compromise, may have made them take admission to secure the benefit of "the Writ of Little Right Close." This would explain the admission to Wongs.

The Inclosure Act, being a private Act of Parliament, is only evidence between parties and privies—*Brett* v. *Beales* [1829][8] and *Taylor* v. *Parry* [1840].[9] It cannot be used against the defendant until it is shewn that he claims through some one who took a benefit—*Carnarvon* v. *Villebois* [1844][10]—and then the evidence may be rebutted—*Reg.* v. *Haughton Inhabitants* [1853][11] and *Rex* v. *Greene* [1837].[12] So court rolls are only evidence between the lord and his tenants—*Att.-Gen.* v. *Hotham* [1823].[13]

But assuming Grimston to be within the manor, the custom as alleged is not proved. The earlier entries seem to refer to a fine on alienation, not for licence of entry. There is no proof whatever of a customary oath or the lord's right to seize *quousque*. The customaries are of very doubtful authority, and they do not agree with each other or with the recital in the Inclosure Act.

The fine is illegal because contrary to the general statutes Quia Emptores (18 Edw. 1. c. 1), Magna Charta, s. 15, and to a statute of 8 Edw. 2, which is on the Roll of Parliament (vol. i. p. 298), but not in the statute books.[14] A custom cannot prevail against an Act of Parliament—see *Case of Tanistry*,[5] *Noble* v. *Durell* [1789],[15] *Trescott* v. *Merchant Tailors Co.* [1856],[16] and *Wood* v. *Lovatt* [1796].[17]

The custom is also bad because it is uncertain—*Coke's Law Tracts*, *The Compleat Copyholder*, p. 62, and the *Case of Tanistry* [5] — and unreasonable because without consideration the tenants' title is good without admission, and they gain nothing by it.

Eve, K.C., in reply.—A fine on alienation of freeholds may be good—*Damerell* v. *Protheroe* [1847],[18] citing *Mayne* v. *Cros* [1412].[19]

[*Micklem, K.C.*—The quotation of *Mayne* v. *Cros* [19] is a mistake. We have referred to the *Year-book*, and no such point was decided.]

Cur. adv. vult.

Feb. 21.—COZENS-HARDY, J.—This action is brought to try the right of the plaintiff as lord of the manor and soke of Rothley, in the county of Leicester, to a fine of one shilling in the pound on the purchase-money paid by the defendant for certain property situate at Grimston known as the Wongs. My attention has been directed to a mass of ancient documents, and some of them will require special mention. It will, however, be convenient in the first instance to state the propositions, six in number, which are asserted by the plaintiff and denied by the defendant. (1) That the plaintiff is lord of the ancient manor of Rothley. (2) That Wongs is within the ambit of the manor. (3) That the Grimston tenants of the manor are only privileged copyholders, and that the freehold is in the plaintiff as lord. (4) That by the custom of the manor all such tenants are bound to pay a fine of one shilling in the pound on alienation by way of sale to a "foreigner," or alternatively that the "foreigner" is bound to

(8) Moo. & M. 416, 425.
(9) 9 L. J. C.P. 298; 1 Man. & G. 604.
(10) 14 L. J. Ex. 233; 13 M. & W. 313.
(11) 22 L. J. M.C. 89; 1 E. & B. 501.
(12) 6 Ad. & E. 548.
(13) Turn. & R. 209, 217.
(14) Parliament Roll (Chancery), 8 Edw. 2. No. 36: "It is agreed and assented by the archbishops bishops abbots priors earls and barons and others of the realm in the Parliament of our Lord the King which was summoned at Westminster in the Octaves of St. Hilary in the 8th year of his reign that from henceforth none should demand or take any fine from freemen for entering upon the lands and tenements which are of their fee so always that by such feoffment they be not losers of their services nor that their services be denied."
(15) 3 Term Rep. 271.
(16) 11 Ex. 855.
(17) 6 Term Rep. 511.
(18) 10 Q.B. 20.
(19) Year-book, Mich., 14 Hen. 4. fol. 2 B. pl. 6.

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pay such a fine on entry. (5) That the defendant is a "foreigner" within the meaning of the custom. (6) That the custom is good in law. I propose to deal with these propositions separately as far as may be.

(1) It appears from Domesday Book that William the Conqueror then held the manor of Rothley and that King Edward had held it. To the manor pertained twenty members, of which Grimston was one. "In Grimestone are three carucates of land less one bovate and a half." In these members there were stated to be "204 sockmanni with 157 villani and 94 bordarii, having four score and two ploughs, and they render among them all 31*l.* 8*s.* 1*d.*" It follows from what I have stated that the manor was "ancient demesne" and that the tenants had certain rights and privileges peculiar to that tenure. The manor was granted by the Crown to the Templars, who had also the adjacent manor of Dalby. Both manors continued in their hands or in those of the Hospitallers until 1540, when they were vested by statute in the Crown. The dealings of the Crown, so far as Rothley and Grimston are concerned, were peculiar. In 1543 King Henry 8 granted to Henry Cartwright (*inter alia*) "all that the site of our manor of Rothley." The grant included, not all the demesne lands of the manor, but only such as were then or late in the tenure or occupation of Humphrey Babington or his assigns under a twenty-nine years' lease from the Templars in 1530, reserving a rent of 6*l.* 13*s.* 4*d.* The grant to Cartwright was to hold in chief by the service of the thirtieth part of one knight's fee and rendering a yearly rent of 13*s.* 4*d.* in respect of the site of the manor. This grant to Cartwright did not pass the manor, nor, on the other hand, did it extinguish the manor. But the lands granted were severed from the manor. Whatever passed to Cartwright is apparently vested in the plaintiff. In 1544 Henry 8 granted the manor of Dalby to Andrew Nowell to hold in chief. The manor of Dalby included part of Grimston. In 1553 Edward 6 granted certain lands in Grimston, part of the possessions of the late monastery of Kyrkbybellers, to Wright and Holmes as of the manor of East Greenwich in free socage and not in chief. In 1561 Queen Elizabeth granted to Cave and Williams all her remaining lands in the vill of Rothley, and certain rents reserved on prior grants out of other lands in the vill, in free socage and not in chief. This grant did not pass the manor. Whatever passed by this grant is apparently vested in the plaintiff. In 1564 and 1576 certain lands in Grimston, formerly belonging to the dissolved monastery of Launde and to the dissolved monastery of Kyrkbybellers, were granted by Queen Elizabeth to persons through whom the plaintiff does not shew title. In 1590 Queen Elizabeth granted to Forcitt and West certain lands and rents in Grimston to hold in free and common socage. In 1609 James 1 granted to Sewall and others, through whom the plaintiff claims, all perquisites of courts of the lordship or preceptory of Rothley. In 1670 Charles 2 granted to Lord Hawley and others certain rents arising from that part of Grimston which was within the manor of Dalby. There is nothing in any of the Crown grants which suffices to pass the manor of Rothley. On the other hand, it appears that manor courts have been held by the plaintiff's predecessors in title since 1576, if not earlier, without interruption, except during a period from 1604 to 1675, when the court rolls are not forthcoming. It is recited in the Grimston Inclosure Act of 1765 that Thomas Babington, through whom the plaintiff claims, was lord of the manor and soke of Rothley; and a good paper title is shewn from the beginning of this century. Under these circumstances I think I must hold that the plaintiff has sufficiently established his title as lord of the ancient manor of Rothley, notwithstanding the gaps above referred to. If necessary, a lost grant from the Crown must be presumed.

(2) Is Wongs within the ambit of the manor of Rothley? This is, in my judgment, extremely doubtful. It is clear that only part, and probably only a small part, of Grimston ever was within that manor. The various Crown grants above

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referred to and also the minister's accounts, which have been put in evidence, satisfy me of this. The plaintiff strongly relies upon the Inclosure Act of 1765, under which Wongs (except a small portion) was allotted to a predecessor in title of the defendant. Now a mere recital in a local and personal Act of Parliament, though admissible against persons claiming under the Act, is not conclusive, and the Court is at liberty to consider the fact, or the law, to be different from the statement in the recital—see *Reg.* v. *Haughton Inhabitants*.[11] I am satisfied that the recitals in the Inclosure Act were inaccurate in treating the whole of Grimston as parcel of the manor of Rothley; and it is remarkable that there is no entry on the rolls of the court relating to the Wongs until 1825, although in the interval of sixty years since the Inclosure Act there had been many devolutions or dispositions of the property. But as against the defendant I think there is evidence upon which I must act. The defendant claims title through Jane Kirkby, who in 1820 conveyed to Matthew Needham. Now in 1816 Jane Kirkby levied a fine of her land in Grimston in the Court of Common Pleas. The effect of this was to make the land, if then ancient demesne, frank fee. But in November, 1825, Matthew Needham was admitted tenant to the Wongs, and in 1826, by a judgment in an action of *Babington* v. *Needham* in the Court of Common Pleas, the fine levied in 1816 was annulled, reversed, and made wholly void on the ground that the land in question was only pleadable in the manor court by Writ of Right Close, and not elsewhere. The subsequent dealings have not been wholly consistent, but I think I must hold as against the defendant, and in the absence of any proof as to the boundaries of the manor, that the Wongs is within the ambit of the manor.

(3) What is the legal position of the tenants of the manor? The tenure in ancient demesne is in many ways peculiar, and it is not possible to reconcile all the authorities. The clearest and best description is contained in the *Third Report of the Real Property Commissioners* (pp. 12–14), of which the following is an extract: "There is great confusion in the law books respecting this tenure. All agree that it exists in those manors, and in those only, which belonged to the Crown in the reigns of Edward the Confessor and William the Conqueror, and in Domesday Book are denominated Terra Regis. But the copyholders of these manors are sometimes considered tenants in Ancient Demesne, and land held in ancient demesne is said to pass by surrender and admittance. This appears to be inaccurate. It is only the freeholders of the manor who are truly tenants in ancient demesne, and land held in ancient demesne passes by common law conveyances without the instrumentality of the lord. The copyholders in an ancient demesne manor, like other copyholders, are merely to be considered as occupying a part of the lord's demesne, and do not hold of the manor. They form the customary Court. The Court of Ancient Demesne, which is analogous to the Court Baron, is constituted by those who hold in socage of the lord of the manor. . . . The tenants in ancient demesne, properly so called, were made subject to certain restraints and entitled to certain immunities. . . . They were forbidden to bring or to defend any real action touching their tenements, except in the lord's Court. . . . In ancient demesne there are no subdivided or conflicting interests in the soil. The timber and minerals belong to the tenant, and the rents, fines, and services due to the lord are certain." Applying this passage, I think the freehold of the lands in this manor is in the tenants, and not in the lord. But, apart from that high authority, I arrive at the conclusion for several reasons. (*a*) They are called "free tenants" in very early documents. (*b*) Their tenements ordinarily passed by feoffment, with livery of seisin, and not by surrender. (*c*) They used the Writ of Right Close, which seems to have been only available to freeholders. According to FitzHerbert, *Natura Brevium*, 11 F., a Writ of Right Close is a writ which is directed unto the lord of ancient demesne which lieth for those tenants within ancient demesne, who hold their lands by

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charter in fee-simple, or in fee-tail, or for life, or in dower. But it does not lie for copyholders. (*d*) They disposed of their tenements by will, without any surrender to the use of the will. The Statute of Wills of 1540 (32 Hen. 8. c. 1) only applied to lands holden "in socage or of the nature of socage tenure" or to lands holden by knight's service. It did not extend to copyholds. Now devises of the tenements are found soon after 1540. I have not traced any will prior to that date. If there be an entry of an earlier will, it must be due to a custom in the manor analogous to the custom of gavelkind. (*e*) There is no trace of any claim by the lord, until quite modern times, to either timber or minerals, and on the other hand there are express dealings by the tenants with minerals. (*f*) The Inclosure Act of 1765 speaks of them as owners and proprietors who are "seised" in their land, and recognises their right to trees growing on their land.

(4) As to the custom of the manor relied upon by the plaintiff. Among the documents produced by the plaintiff is one purporting to be a copy of the old customary of Rothley with the soke. The copy is apparently dated in 1527, but from internal evidence I gather that the original must have been much earlier. It states the customs as to descent and dower, which are different from the common-law rules, and are very like gavelkind customs. It then proceeds as follows: "Item sciendum est quod si aliquis velit terram suam vel partem ex ea dare vel vendere alicui infra sokam, bene licet ei, sed extra sokam nequaquam, et quando dat illam, oportet quod in plena curia fiat donacio et seisina tradatur, et tunc irrotulabitur in rotulo curiæ modus donacionis." It seems to me to be an absolute prohibition of alienation except to a person *infra sokam*, whatever that may mean. This is substantially repeated in an English customary of 1608. In 1579 there is entered on the rolls a verdict of the jurors "for Rothley only" as to the court baron, which may be translated as follows: "Who say upon oath as to divers questions or articles touching the customs within the soke and will aforesaid concerning which, among other things, the same jurors are charged, first, that an *extrinsecus* or one born without the soke, or one born within the soke between persons who are not free tenants within that soke and tenants of that manor, by the custom of the manor cannot acquire any lands or tenements within this soke unless they shall have first made a fine (*finem fecerint*) with the lord for such lands and tenements, and such purchase be acknowledged in the full Court of the lord in order that it may be enrolled in the Court rolls; and as to the second article they say that children of natives (*liberi indigenorum*) from their very cradles are heritable to any lands within the soke, although they may not have been previously presented to be heirs by descent feoffment or by testament of the father or any other ancestor, if they shall afterwards be presented so to be, and to the third article they say that *extrinseci et forenses nati*, or those born within the soke of such parents as have not any lands or tenements by inheritance or by their own acquisition, cannot become free within the soke, nor can their sons by the custom of this soke inherit or possess their lands, unless they previously agree with the lord for their fine and such their estate be inquired into by the homage, and found, and afterwards enrolled in the Court rolls, although such purchasers or buyers have seisin from the vendors." I am not satisfied that this verdict purports to relate to anything beyond the customs of "Rothley only" as distinct from Grimston and certain of the members. But, however that may be, it differs materially from the two customaries, one prior, the other subsequent in date. And the verdict itself is extremely difficult to understand. Put most favourably for the plaintiff, it is a statement that an *extrinsecus* cannot purchase unless he first makes terms with the lord, who can refuse consent altogether, or can exact such terms as he thinks fit as the price of his consent.

There is an addition in English at the foot of a Latin survey of the manor dated 1360 which says: "If an alienation be made to a stranger of any lands or tenements in Rothley without the lord's license the fine for such alienation shall be arbitrable between the lord and the tenant." I doubt the authority of this

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addition, but it will be observed that it is not consistent with the custom as pleaded. It draws no distinction between a purchaser for value and a voluntary alienee. There is no trace of a fixed fine of one shilling in the pound until 1675. On the other hand, the court rolls contain very numerous entries—mainly, if not entirely, in Rothley proper—from the fourteenth century downwards, of fines paid for entry because the person entering was extraneous or *extrinsecus* or *forinsecus*, or a "foreigner" or a "stranger." For the most part the persons paying these fines were purchasers, but there are not wanting instances of fines paid by persons who were not purchasers but heirs or devisees, and by purchasers who apparently were not "foreigners."

The Grimston Inclosure Act of 1765 contains a recital that the lord "is entitled to an alienation fine from every purchaser of land or hereditaments within the said manor and soke, who hath no lands in the said manor at the time of the purchase, of 1*s.* in the pound for every pound of the consideration money for such purchase." It will be observed that this recital does not agree with any of the ancient documents as to the definition of a foreigner.

There is no record of the oath which the plaintiff pleads as part of the custom until 1768. Nor is there any record of an actual seizure *quousque* by the lord to enforce payment of a fine from a "foreigner." In my judgment the custom as pleaded is not proved.

(5) Is the defendant a foreigner within the meaning of the alleged custom? Now it is proved that he was born within the manor and soke, at his father's house, but the father never owned any land within the manor and soke. In the middle of the sixteenth century there are a number of entries stating that no fine was paid "because he was born within the soke." I find no trace of the addition which is contained in the verdict of 1572—namely, "born within the soke of parents who have lands within the soke." And some of the entries seem to be inconsistent with this addition. Upon the whole, I think that it is not proved that the defendant is a foreigner within the meaning of the alleged custom.

(6) Is the alleged custom good in law? Now, if the freehold is in the tenants and not in the lord, as I think it is, I think it is bad as inconsistent with the nature of the estate and as a restraint upon alienation. The plaintiff is driven to rely not on the comparatively modern one shilling in the pound composition, but upon an absolute right to prohibit alienation except to a person who is not "a foreigner," and to exact a fine as the price of his assent to an alienation to "a foreigner." This is inconsistent with the statute Quia Emptores, which enacts that from henceforth it shall be lawful to every freeman to sell of his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the same chief lords by the same services and customs as his feoffor held before. It is also inconsistent with an Act of Parliament of 8 Edw. 2.,[14] which is found in the Parliament Roll, though not printed in the statute book, and which counsel for the plaintiff admitted to be or to have the effect of a statute (see 4 *Co. Inst.* 50). It enacted "that from henceforth none should demand or take any fine from freemen for entering upon the lands and tenements which are of their fee, so always that by such feoffment they be not losers of their services nor that their services be denied." It was faintly argued that, by custom, a fine may be payable on the alienation of a freehold, but the only authority in support of this contention was a *dictum* in *Damerell* v. *Protheroe*.[18] "In *Mayne* v. *Cros*[19] the right to a fine on alienation of lands held in fee simple, within the honour of Gloucester was considered valid." On referring to the *Year-book* it seems that no such point was decided. Moreover, no such custom can, in my opinion, hold good against the express language of the statutes I have referred to. I do not pause to consider whether this custom is bad also for uncertainty. I have thus far drawn no distinction between Rothley proper and Grimston, which is one of the members, but the defendant lays great stress upon the distinction. It seems that in 1245 a composition and agreement was made between the master of the Templars and the reeve of Grimston, for himself and for the men of the same vill (as also for

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the men of certain other members), in the following terms: "That they ought to increase their farm beyond the farm which they were wont to render to the master of the Knights of the Temple in England, to wit, for every carucate of land which they hold in the aforesaid vills three shillings by the year for all works, tallages, and other villein customs which the said master exacted from them, and that they ought to come to the view of frank pledge and do suit at the Court of the aforesaid master of Rothley when any should be impleaded there by writ of the King of right, and when a robber is to be there indicted by afforcement of the Court, and all those who are of the body (*de corpore*) of the manor of Rothley ought to do suits and all other villein customs which before they were accustomed to do to the same master, &c." This composition was entered on the rolls of the King's Court. Its validity was expressly acknowledged in 1285. In that year a writ was issued in the King's Court claiming a moiety of some land in Warkenetheby, one of the members, like Grimston, affected by the composition. The then master of the Templars took proceedings before the Justices in Eyre, at Leicester, to enforce his claim to exclusive jurisdiction. The Court held that the composition had not "changed any estate of the same men in respect of the aforesaid custom of impleading, nor to them remitted or quit claimed the aforesaid custom." It was considered that the plaintiff should take nothing by his writ, but be in mercy for false claim, and that he should sue by another Writ of Right Close according to the custom of the manor if it seemed expedient to him. This decision does not seem to me to have the effect which the plaintiff attributes to it. It only decided that, the land being within the manor, the Writ of Right Close must still be used. This was not a villein custom touched by the composition. It does not decide anything beyond this. The defendant asserts (*a*) that any such custom as is alleged by the plaintiff was a "villein custom" which was expressly released by the composition, and that, even if it is still in force in Rothley proper, it is gone so far as Grimston is concerned. I agree with this contention. He also asserts (*b*) that the effect of the composition was to extinguish the ancient demesne tenure and to turn it into free and common socage. The case of *Griffith* v. *Clarke* [1583],[20] which was approved by Lord Ellenborough in *Doe d. Reay* v. *Huntington* [1803],[21] tends to support this contention. In that case it was adjudged that the effect of a release in the time of Edward 2 by the lord of the manor in ancient demesne to one who was tenant "de omnibus servitiis et consuetudinibus, salvis servitiis infra scriptis (viz.) pro una 'virgata' terræ 2*s.* rent, sect' curiæ et relevio" (suit of Court and relief)—was an extinguishment of the custom of ancient demesne, but the rent, suit of court and relief continued by the saving. I doubt, however, whether the decision of 1285 is consistent with the view that the land at Grimston was made frank fee by the composition of 1245. I may add that it is remarkable that there is no entry of any alienation fine in Grimston prior to 1528, and that there were but few in Grimston until comparatively modern times, the great majority being in Rothley proper. Upon the whole, I think that even if the conclusion at which I have arrived is wrong as to Rothley proper, it is right as to Grimston, having regard to the composition of 1245.

The result is that, in my opinion, the action fails, and I must give judgment for the defendant with costs.

Solicitors—Millington & Drew, agents for Macaulay & Bennett, Leicester, for plaintiff; Stileman & Neate, agents for Latham & New, Melton Mowbray, for defendant.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

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(20) Moore, 143.
(21) 4 East, 271, 290.

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JOYCE, J. 1901. March 6, 14, 26. } ETHELL AND MITCHELL AND BUTLER'S CONTRACT, *In re*.

Vendor and Purchaser — Mortgage — Payment Off—Reconveyance—Habendum unto and to the Use of Mortgagor "in fee"—No Words of Limitation—Legal Estate for Life—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 51.

Upon payment off by the mortgagor of a mortgage debt created in 1895, *the property which had constituted the security for the debt was conveyed by the mortgagees unto the mortgagor "to hold the same unto and to the use of" the mortgagor "in fee freed and discharged" from the mortgage debt secured by, and all claims and demands under, the mortgage-deed*:—Held, *that to supply the word "simple" after "fee" from the obvious intention as appearing by other parts of the deed of reconveyance would not be a compliance with the terms of the Conveyancing and Law of Property Act*, 1881, *s.* 51; *that in the absence of the words "and his heirs," as words of limitation in the habendum, the deed could not operate to pass the legal estate in fee-simple; and that therefore only a legal estate for life passed under the deed to the mortgagor, leaving the legal estate in remainder outstanding in the mortgagees.*

Vendor and purchaser summons.

This was a summons taken out by the above-named purchasers, Mitchell & Butler, Lim., against the vendor, Edward Ethell, in respect of certain freehold hereditaments in Springfield Street, Birmingham, contracted to be sold by him to the purchasers by an open contract dated October 5, 1900.

The abstract of title disclosed that by a mortgage-deed dated January 24, 1882, the property in question had been conveyed by Thomas Manton, a predecessor in title of the vendor, to the mortgagees in fee-simple by way of mortgage for securing the principal sum and interest therein mentioned.

By an indenture of December 12, 1895, which was made between the said mortgagees of the one part and Thomas Manton, the said mortgagor, of the other part, the mortgagees, in consideration of the payment off of the mortgage debt (the receipt of which was thereby acknowledged), thereby conveyed "unto the said Thomas Manton" the property comprised in the above-mentioned mortgage-deed, "to hold the same unto and to the use of the said Thomas Manton in fee freed and discharged from all principal money and interest secured by and all claims and demands under" the said mortgage-deed.

The purchasers raised the objection in one of their requisitions that the mortgagor, in the absence of proper words of limitation, took only a life estate under the reconveyance of the mortgaged property, and that the legal estate in the remainder or reversion upon such life estate was outstanding in the mortgagees.

The negotiations between the parties resulted in the present summons, which asked for a declaration that the purchasers' requisition relating to the legal estate under the reconveyance had not been sufficiently answered, and that a good title had not been shewn.

Younger, *K.C.*, and *E. P. Hewitt*, for the purchasers.—Section 51 of the Conveyancing Act, 1881, substitutes the words "in fee simple" for the old words of limitation "and his heirs." One form or the other must be used if the legal estate in fee-simple is to pass, and the section can only be utilised by the use of the prescribed words "in fee simple." "In fee" will not do.

[JOYCE, J.—If you can prove from the deed that words have been accidentally omitted, is not that enough?]

But that will not pass the legal estate in fee-simple—*Whiston's Settlement, In re; Lovatt* v. *Williamson* [1894].[1] The intention cannot be regarded; this is not a suit for rectification. The substitution of words reduces the question at once to one of intention, and intention only. There is no expression of the intention in technical terms elsewhere in this deed, and so no word can be supplied.

[They also referred to *Elphinstone on the Interpretation of Deeds*, p. 240, and *Tudor's L.C. on Real Property* (3rd ed.), p. 716.]

(1) 63 L. J. Ch. 273; [1894] 1 Ch. 661.

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ETHELL AND MITCHELL AND BUTLER'S CONTRACT, IN RE.

Hughes, K.C., and *S. B. L. Druce*, for the vendor.—This is a reconveyance, and it is quite obvious what it was intended to reconvey. Section 51 was intended to get rid of technicalities. If the contention urged on behalf of the purchaser is correct, the mere misspelling of the word "simple" might render a deed ineffective. A word can be supplied in a deed where necessary in order to arrive at the sense—*Wight* v. *Dickeons* [1813],[2] where the word "coal" was supplied. The name of the grantor or grantee can be supplied—*Trethewy* v. *Ellesdon* [1689],[3] *Lord Say and Seal's Case* [1729],[4] *Bustard* v. *Coulter* [1601],[5] and *Butler* v. *Dalton* [1579].[6] In *Coles* v. *Hulme* [1828][7] the word "pounds" was supplied in a bond. In *Wall* v. *Wright* [1837][8] the word "heirs" was read as being "heirs of the body," and so in *Littledale* v. *Smeddle* [1818],[9] both of which were followed in *Smith's Estate, In re* [1891].[10] Here the intention is clear beyond any doubt; and the Court, seeing the intention, can, on the authority of the cases, read the deed as if the word "simple" had been inserted. There is sufficient ground for reading the deed according to the intention and its obvious meaning—*Flight* v. *Lake* [1835][11] and *Daniel's Settlement Trusts, In re* [1875].[12]

E. P. Hewitt, in reply.—The words "to have and to hold to him and his heirs" are necessary—*Co. Lit.*, pp. 1, 2. If they are omitted, then the grantee takes only a life estate—*Holliday* v. *Overton* [1852],[13] *Lucas* v. *Brandreth* [1860],[14] *Tatham* v. *Vernon* [1861],[15] *Meyler* v. *Meyler* [1883],[16] and *Whiston's Settlement, In re*.[1] The cases relied upon for the vendor are all on a different principle from that involved in this case. The vendor has not shewn that the legal estate in fee-simple would have passed before the Act, or that the case comes within the Act.

Cur. adv. vult.

March 26.—JOYCE, J.—In this case the respondent was ill-advised or unfortunate enough to enter into what is known as an open contract for sale of certain freehold hereditaments in Springfield Street, Birmingham. In due course the title came to be investigated, when it was found that upon the payment off of a mortgage on the property in the year 1895 (after the Conveyancing Act of 1881) the reconveyance was by a conveyance to the mortgagor, a former owner, *habendum* "unto and to the use of" the mortgagor—not in "fee simple," but "in fee," freed and discharged from the mortgage; and it is now objected on behalf of the purchasers that the effect of this reconveyance was, under the circumstances, to pass only an estate for life to the mortgagor and to leave the legal estate in the remainder or reversion upon such life estate outstanding in the mortgagees.

To my mind it is perfectly plain upon a mere perusal of this reconveyance that the deed was framed as it is by accident, or through inadvertence, ignorance, or carelessness, and that if necessary the vendor is entitled, as a matter of course, to have the reconveyance rectified or to a vesting order with respect to the before-mentioned legal estate. This could probably have been obtained for less than a quarter of the costs incurred in the present proceeding, which is a summons under the Vendor and Purchaser Act, by the purchasers, to have it declared that their requisition with respect to the before-mentioned legal estate in the remainder or reversion has not been sufficiently answered or a good title shewn.

During the argument it occurred to me, and I suggested, whether upon a reference to the authorities collected in *Elphinstone on the Interpretation of Deeds*, at p. 78 *et seq.*, it might not be possible to make out that the word "simple" after the word "fee" could and ought to be supplied by construction, and that the reconveyance should thus be made to read as a conveyance "in fee simple," especially as there is not wanting

(2) 1 Dow, 141.
(3) 2 Vent. 141.
(4) 3 Bro. P.C. 113; 10 Mod. 40.
(5) Cro. Eliz. 902.
(6) Cary, 86 (1820 ed. p. 123).
(7) 7 L. J. (o.s.) K.B. 29; 8 B. & C. 568.
(8) 1 Dr. & Wal. 1.
(9) 2 B. & Ald. 126.
(10) 27 L. R. Ir. 121.
(11) 4 L. J. C.P. 263; 2 Bing. N.C. 72.
(12) 45 L. J. Ch. 105; 1 Ch. D. 375.
(13) 21 L. J. Ch. 769; 14 Beav. 467.
(14) 28 Beav. 274.
(15) 29 Beav. 604.
(16) 11 L. R. Ir. 522.

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some authority for the proposition that where fee is mentioned it shall be intended fee-simple (III. *Co. Lit.* 189 A.). Upon further consideration, however, I regret to say that I do not think this can be done. There cannot be any doubt about the intention of the parties with respect to the effect of the reconveyance in question, but it does not appear to me that I can come to the conclusion that the word "simple" was intended to have been inserted but has been omitted in the copying or by some similar accident, even if that would suffice. I cannot find that the parties when they executed the reconveyance did not really know and intend the deed to be drawn and to stand in the precise terms in which it is now found to be, although there cannot be the slightest doubt as to what they intended to be its operation and effect.

Before the Conveyancing Act of 1881, however plain the intention might be as to the effect of a conveyance of freeholds, the deed could not operate as a grant of the legal estate in fee-simple without the word "heirs." Now section 51 of the Conveyancing Act, 1881, provides that, "In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs"; and I think that in the absence of the word "heirs," however plain the intention of the parties may be to pass the legal estate in fee-simple, this absence can only be compensated for by the actual insertion and use of the words "fee simple," and notwithstanding the decision in *Flight* v. *Lake*[11] I am compelled to hold that to supply the word "simple" by construction from a consideration of the obvious intention as expressed in other parts of the instrument itself would not be a compliance with the terms of the Act. The result, therefore, is that the purchasers are entitled to succeed upon their summons.

Solicitors—Preston, Stow & Preston, agents for A. Pointon, Birmingham, for purchasers; Gamlen, Burdett & Gamlen, agents for Cottrell & Son, Birmingham, for vendor.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

JOYCE, J. 1901. March 6, 7. } MARYON-WILSON'S SETTLED ESTATES, *In re.*

Settled Land—Leases by Tenant for Life—Application of Capital Moneys—Commission Payable to Estate Agent for Procuring Leases—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* 10.

The commission payable to an estate agent for letting parts of a settled estate on building leases is a charge or expense incidental to the exercise of some of the powers of the Settled Land Act, 1882, *and is payable out of capital moneys arising under the Act.*

Summons.

By a settlement dated October 28, 1887, and made on his marriage, the applicant, Sir Spencer Pocklington Maryon Maryon-Wilson, Bart., became tenant for life of certain lands at Charlton and Woolwich, in the county of Kent, known as the Charlton estate. This estate was in process of development as a building estate.

Messrs. Farebrother, Ellis & Co., of No. 29 Fleet Street, London, had for many years been the agents and surveyors to the estate, and as such had done the work and managed the business relating to and incidental to the ordinary sales and letting for building purposes and overlooking and checking of builders' operations. Included in their charges were three items, charged against the estate as commission for letting land on building lease on different parts of the estate, amounting to 95*l.* 18*s.*

An application was made under the Settled Land Acts, 1882–1890, by the tenant for life, asking (*inter alia*) that the surviving trustee of the settlement, a respondent to the summons, might be authorised to pay these charges out of capital moneys in his hands arising under the Settled Land Acts, 1882–1890.

The evidence shewed that these charges were reasonable and proper.

Hughes, K.C., and *Austen-Cartmell*, for the tenant for life.—These commissions are costs, charges, and expenses incidental to the exercise of the powers within the meaning of section 21, sub-section 10 of the Settled Land Act, 1882.[1] The fairest

(1) Settled Land Act, 1882, s. 21: "Capital money arising under this Act . . . . shall, when

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MARYON-WILSON'S SETTLED ESTATES, IN RE.

way is that they should be paid out of capital, as then the tenant for life and the remaindermen would suffer in proportion to their interests. If the sub-section does not cover these costs, it is difficult to see what it does cover; it clearly covers the costs of a sale, and also of an abortive sale.

W. F. Hamilton, K.C., and *F. P. Onslow*, for the respondents.—Unless the words of the sub-section are limited in some way or other, they are sufficient to cover these expenses, but we submit that it does not apply to leases at all. If it does so apply, then a tenant for life might grant occupation leases for short terms of three years constantly, and charge the costs always to *corpus*; this would be an entirely new departure. There must be an implied limitation in the words, which must be restricted to the granting of leases which are calculated permanently to improve the property.

The principle that the expenses of renewals of leaseholds are to be borne proportionately by tenants for life and remaindermen still subsists, and is a guide to the Court in coming to a decision on the meaning of this sub-section.

Hughes, K.C., replied.

JOYCE, J.—All I can say is that the exercise of the power of leasing appears to me to be as much an exercise of one of the powers of the Act under sub-section 10 of section 21 as an exercise of the power of sale under section 3; and I do not see my way out of the words here. No section seems to have been pointed out to me that affects it. I must therefore hold that these charges are payable out of capital moneys arising under the Act.

Solicitors—Bell, Steward, May & How, for all parties.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely):

"(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act."

COZENS-HARDY, J. 1901. March 5, 6, 11, 18. } BELMORE (COUNTESS) *v.* KENT COUNTY COUNCIL.

Highway—Grass Space between Hedge and Metalled Road—Margin—Presumption of Dedication to Public.

There is no irrebutable presumption that a strip of land left between a metalled highway and the fence of the adjoining property has been dedicated to public use as part of the highway.

The fact that the margin of such a strip adjoining the metalled road has occasionally been walked over by the public is too indefinite a use to form the foundation of a public right or to establish a dedication as part of the highway.

Action for declaration (*inter alia*) that an unenclosed strip of land by the side of the main road at Otford, in Kent, lying between the main road and certain inclosed lands (known as Bartram Farm) belonging to the plaintiff, the Dowager Countess of Belmore, as tenant for life in possession, and in the occupation of the plaintiff, Godfrey Kipping, as tenant, was the property of the plaintiff, the Countess of Belmore, free from any right of the public to enjoyment thereof as a highway; and for an injunction to restrain the defendants, their agents, servants, and workmen, from occupying or using the said strip of land, or any part thereof, or from levelling or paving the same, as aforesaid, and from placing or permitting to remain thereon any drain, earth, rubbish, or materials for filling up the same, or from destroying or interfering with the herbage thereon, or from otherwise wrongfully trespassing on the said strip.

The following facts in the case were either admitted, or not substantially controverted.

The road had not been laid out under any Inclosure Act, but seemed to be an ancient highway, which had been kept in repair under a turnpike trust from the middle of last century until a few years ago, when the trust had expired. It was now a main road under the control and management of the Kent County Council. The defendants had begun to deposit

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rubbish and to lay a drain along the strip for the purpose of rendering it suitable for public use. The strip lay on the west side of the road, and was about three hundred yards long and about fifty feet wide at the broadest part, tapering off to nothing at each end. It was not part of the waste of the manor. The land adjoining the strip on the west was a farm of which the plaintiff, the Countess of Belmore, was tenant for life in possession, the co-plaintiff, Kipping, being her tenant. The farmhouse and farm buildings lay a short distance to the west of the strip. The tenant who had occupied the farm from 1865 to 1870 had constructed a cartway from the high road across the strip. This cartway was raised some three or four feet, and a drain was placed under it to carry off the water from the upper part into a ditch which was dug along the strip. In 1893 the plaintiff Kipping had made another similar cartway to the north of the cartway already constructed. There was an old hedge between the fields and the strip at the top of a small bank. The land sloped down from the hedge eastwards and from the high road westwards, and until the making of the first drain and ditch the bottom of the strip had been a very swampy place, and even now it was soft and wet except in summer weather. Willows and rough grass grew on the strip, and these willows were from time to time cut and carried away by the tenants of the farm. The rough grass was occasionally cut by the tenants. There was no evidence that any vehicle ever went along the strip, and, indeed, within living memory, this would not have been possible. Nor was there any evidence that any man on horseback ever went along it, except occasionally on the margin next to the high road. There was no defined track or footpath on this margin, which varied from two to four feet in width, and was to some extent obstructed by shrubs; but occasionally foot passengers walked on it instead of on the high road. This, however, was not done frequently, though the margin was trodden by foot passengers more often than by men on horseback. On the opposite or eastern side of the high road was a somewhat similar strip, which had recently been inclosed with the consent of the Kent County Council. There was now a formed footpath on the east side of the high road, and foot passengers had apparently at all times been in the habit of walking on the grass margin on the east side rather than on the west, probably because the surface was more level and even on the east than on the west.

The following facts, though disputed at the hearing, were considered by his Lordship to have been proved in evidence: Cattle belonging to the tenants of Bartram Farm used to be turned into the strip to graze, and it was customary to put hurdles all round the boggy places to keep the cattle from getting in, which hurdles were only taken away in the summer. Horses and cattle from the farm used to be turned out to graze on the strip, and horses or cattle passing along the road sometimes strayed, or were turned, into the strip. A cattle dealer named Young was the principal person who did this, and he admitted that he had been ordered off by the tenants, who would not let the cattle stop. Gipsies occasionally stopped there, but were ordered off by the tenants, and not by the road authorities. A Mr. Morgan, who was road surveyor up to about 1878, seeing some cattle straying on the strip, ordered them off, saying that they had no right there without the leave of the owner. On the other hand, some cows were occasionally taken there to graze by occupiers of land in the neighbourhood, though this was not proved to be with the knowledge of the tenants. Grass was occasionally cut by passing strangers and carried away in carts, but such acts were wrongful, whether the strip was or was not part of the highway.

Eve, *K.C.*, and *Wace*, for the plaintiffs. —Any inference of the dedication of this strip to the public has been rebutted by the evidence. It is the duty of the surveyor to maintain the road, but there is nothing in the Highway Act, 1835, which enables him to extend the width of the road, unless he is proceeding, under section 82, upon terms of compensation. The group of sections, 47 to 53 inclusive,

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in the Highway Act, 1864, contains nothing to justify the action of the defendant council. At the most, all that the council can claim is a strip about six feet wide by the margin of the metalled road.

Vernon Smith, K.C., and *C. G. Church*, for the defendant council.—The *prima facie* presumption is that the highway extends from hedge to hedge—*Doe d. Pring* v. *Pearsey* [1827] [1] and *Elwood* v. *Bullock* [1844].[2] It is none the less highway because the local authority has no interest in the herbage—*Curtis* v. *Kesteven County Council* [1890].[3] We rely on the Highway Act, 1862, s. 17, and on the Local Government Act, 1888, s. 11. Whether the land now in question be highway as a whole, or merely a strip of it six feet wide, or whether it be roadside waste, the plaintiffs must equally fail.

Eve, K.C., in reply.—If any presumption of dedication to the public exist, it is liable to be rebutted. The kind of evidence required to rebut is shewn by *Neeld* v. *Hendon Urban Council* [1899].[4] The fence originally was probably put up not to define the highway, but to prevent the beasts in the neighbouring field from getting stogged in wet weather.

Cur. adv. vult.

March 18.—COZENS-HARDY, J., after summarising the evidence as set out above, continued as follows: The result of the evidence as a whole is that, so far as living memory goes, the plaintiffs or their predecessors in title have used and enjoyed this strip in such a manner and to such an extent as the nature of the strip permitted, and have exercised acts of ownership inconsistent with public rights. I refer specially to the hurdles, to the roadways, to the ditch, and, though I do not attach great importance to it, to the cutting of the willows. I do not find a single act done on the strip by the road authorities until the acts complained of in this action. I cannot regard the occasional placing of a heap of stones or road scrapings on the west side of the high road instead of on the east side, where they were usually placed, as of any real importance. There is a conflict of evidence as to the fact; but assuming it to be proved that a heap of stones or scrapings was placed there for a short time, I should hesitate to regard it as an act which the occupier of the strip was bound to protest against. The proper inference would be that it was permissive. Upon the whole, I think the evidence insufficient for the purpose of proving dedication of the strip as a highway by user. There is not a single exercise of highway rights over the strip, except at the narrow margin next the high road.

The defendants, however, assert that there is a presumption of dedication to the public quite up to the ancient fence, and that there is no justification for limiting the dedication to that portion of the high road which is metalled, even though highway rights have not been exercised beyond the metalled roadway. On this point I have derived assistance from the judgments of Mr. Justice Channell and of the Court of Appeal in *Neeld* v. *Hendon Urban Council*.[4] Lord Russell of Killowen says: "It seems to me very difficult to give assent to such a general proposition as this, that, under all conditions where you find a metalled road bordered by unmetalled margins and beyond the margins by hedges, there is an invariable presumption that all the space between the hedges is highway. The question whether such a space is all highway would depend to a great extent, I think, on many other circumstances—such, for instance, as the nature of the district through which the road passes, the width of the margins, the regularity of the line of the hedges, and the levels of the land adjoining the road. These are all circumstances which should be taken into account before any presumption of law can arise as to the width of the highway. It seems to me that it is not safe to say, as a general proposition, without knowing the conditions of each particular case, that in such a case as I have mentioned all the space between the hedges is part of the highway. . . . It is often impossible to discover the exact circum-

(1) 7 B. & C. 304.
(2) 13 L. J. Q.B. 330; 6 Q. B. 383.
(3) 60 L. J. Ch. 103; 45 Ch. D. 504.
(4) 81 L. T. 405.

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BELMORE (COUNTESS) *v.* KENT COUNTY COUNCIL.

stances under which a fence has been erected upon any particular spot. The fence may have been put there because there was already a sort of natural boundary, or it may be in some cases that the person who made the inclosure wished to leave a margin of ground for the use of the public if at any time the road should become foundrous. But even in the latter case I doubt whether it would be right to say that a margin left by the landowner outside a fence for that purpose is necessarily thereby dedicated by him as a highway for all time."

Now, applying the principles here laid down by Lord Russell of Killowen, I think there is no presumption of dedication up to the old fence, or that, if there is any such presumption, it is rebutted by the surrounding circumstances and by the evidence. The only difficulty I have felt is as to the margin. But, upon reflection, I do not see my way to hold that it is part of the highway, unless every highway passing through an uninclosed country must, as matter of law, be deemed to include a certain space on each side of the metalled road. I am satisfied that the margin has been used only occasionally, and by a few persons, and only to such an extent and in such a manner as was inevitable by reason of the absence of any fence or other obstacle. Such use is too indefinite to form the foundation of a public right, or to establish a dedication as part of the highway.

I may add that, even if the public have rights over the margin, but not beyond, the acts of the defendants cannot be justified. I must, therefore, make a declaration and grant an injunction in the terms asked for.

Solicitors—Patersons, Snow, Bloxam & Kinder, for the plaintiffs; Prior, Church & Adams, for the defendant council.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
ROMER, L.J.
1900.
Dec. 14, 17, 18.
1901.
March 25.

GARDNER *v.* HODGSON'S KINGSTON BREWERY CO.

Easement—Right of Way—Parol Licence—Claiming Right—Uninterrupted Enjoyment for Forty Years—Annual Payment—Prescription Act, 1832 (2 & 3 *Will.* 4. *c.* 71), *ss.* 2, 3, 4, *and* 5.

The plaintiff and her predecessors in title had from time immemorial made constant, uninterrupted, and open use of a way over the defendants' yard, that being the only means of access for horses and carts to the plaintiff's premises from the high road. The use of the way was essential for the business carried on upon the plaintiff's premises. The owners for the time being of the plaintiff's premises had also used during the same period the water from a pump on the defendants' premises. Since 1855 *they had made an annual payment of fifteen shillings to the owners of the defendants' premises. They had also by arrangement contributed something to the repair of the pump. The defendants, while admitting the plaintiff's right of access to the pump, denied her right of way over their premises. There was no evidence of the origin of the payment of fifteen shillings, nor was there anything to shew that the user of the way was due to any agreement by deed or in writing, or on what terms the enjoyment of the right of road and other easement had begun. There was only one receipt for a payment of fifteen shillings produced, given on January* 24, 1899, *after the dispute had arisen, which was expressed to be for right of way to September*, 1898:—

Held, *by* VAUGHAN WILLIAMS, L.J., *and* ROMER, L.J. (*dissentiente* RIGBY, L.J.), *that the prima facie inference to be drawn from the annual payment of fifteen shillings was that the enjoyment of the way was not of right, but each payment was for the use of the way by permission during the preceding year, although such permission was not expressly demanded and given in each year, and the plaintiff had not discharged*

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the onus thus thrown upon her of shewing that the user was of right; and that no lost grant could be presumed.

Plasterers Co. *v.* Parish Clerks Co. (20 L. J. Ex. 362; 6 Ex. 630) *and* Bewley *v.* Atkinson (49 L. J. Ch. 153; 13 Ch. D. 283) *distinguished by* VAUGHAN WILLIAMS, L.J.

Held, *by* RIGBY, L.J., *that the user of the way had in fact been as of right in the sense that it was such as a person rightfully entitled would have had, and the mere unexplained payment of the fifteen shillings, which began before the commencement of the period of forty years, was not an interruption—the principle of* Plasterers Co. *v.* Parish Clerks Co. (*supra*) *being applicable to cases within section* 2 *of the Prescription Act*, 1832.

Decision of COZENS-HARDY, J. (69 L. J. Ch. 368; [1900] 1 Ch. 592), *reversed*; (RIGBY, L.J., *dissentiente*).

Appeal from decision of Cozens-Hardy, J. (69 L. J. Ch. 368; [1900] 1 Ch. 592).

The plaintiff was the owner in fee of certain freehold property, No. 203 High Street, Sutton, used for the purposes of a saddler's business, with a yard and stables at the back, used partly as a knacker's yard and partly as livery stables. She and her predecessors in title—namely, her grandfather, father, and mother—had occupied and lived on the premises for upwards of sixty years, and had used them for the purposes of the businesses above mentioned.

The defendants were the owners in fee of adjoining premises, consisting of the Red Lion Inn, facing the High Street, and of a yard and stables at the side and rear thereof. In the defendants' yard was a well and pump. The only access for horses and carts to the plaintiff's yard and stables was through a gateway at the boundary between the two yards, which had stood there so far back as living memory extended; and the plaintiff and her predecessors had, so long as living memory had extended, made constant, uninterrupted, and open use of a road through that gateway and across the Red Lion Yard into the High Street. The use of the road was essential for the purpose of the businesses carried on on the plaintiff's premises. The owners for the time being of the plaintiff's premises had also used during the same period for the purposes of their business the water from the pump in the Red Lion Yard. The plaintiff had, under an arrangement with the owners of the inn, contributed to the repairs of the pump. Since 1855 an annual payment of fifteen shillings had been made by the owners of the plaintiff's premises to the owners of the Red Lion Inn. The only receipt that was produced was one given on January 24, 1899, which was expressed to be for right of way to September, 1898, but it was not expressed to be given for a year's right of way.

On March 31, 1898, the defendants wrote to the plaintiff, inclosing a notice to this effect: "We hereby give you notice that on and after 1st May next we shall require you to give up the use of the yard of the Red Lion, Sutton, and to close the gate, now giving access from your premises to the yard in question. The right of going through the said yard of the Red Lion Inn, Sutton, for which you have paid us an annual rent of 15*s.* shall therefore be abolished as and from the 1st day of May next." On April 19, 1898, the plaintiff wrote to the defendants the following reply: "Referring to your letter of March 31, we are quite unable to agree to the proposal to close the gate, as, independent of the right of way, for which we pay 15*s.* per annum, we have a right of access to, and use of the pump, which has existed for a great number of years, and we do not see how this right could be given up without our interest being affected. There is no other outlet whatever from our premises excepting through the yard. We also wish to point out that, as regards your notice to give up the right of way, we are, as you are aware, yearly tenants, and therefore one year's notice should be given as from September next." On January 23, 1899, the plaintiff sent a cheque value fifteen shillings for right of way through the yard to September 1898, the receipt for which was the one produced. On February 16, 1899, the defendants served a notice "to quit and discontinue the user of the yard on the expiration of the year of your tenancy,

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which shall expire next after the end of one half-year from service of this notice."

The action was brought claiming a declaration that the plaintiff was entitled to a right of way through the gateway to and from the pump, and also a right of way for carts and horses through the gateway, across the defendants' yard to and from the High Street. The plaintiff also claimed an injunction. The defendants by their pleadings admitted the plaintiff's right of access to the pump, but denied her right of way across the yard to and from the High Street. There was no evidence of the origin of the payment of fifteen shillings, nor was there anything to shew that the use of the yard was due to any agreement by deed or in writing. There was evidence that other persons residing in the neighbourhood besides the plaintiff had taken water from the pump.

Cozens-Hardy, J., drew the inference from the facts that a licence to use the way across the yard was given by parol more than forty years before action brought, and that such licence was not gratuitous, but subject to the payment of fifteen shillings a year. He was of opinion that actual uninterrupted enjoyment of a way for forty years was sufficient to establish the easement unless it could be shewn to have been enjoyed under some written consent or agreement; that a parol licence was of no moment unless applied for and granted within the period of forty years; and that the payment in the present case was attributable to the original parol licence more than forty years ago, and was not evidence of a fresh application each year for a fresh licence. He held, therefore, that the plaintiff had acquired a right under the Prescription Act, but said that, if necessary, a lost grant ought to be presumed. He gave judgment for the plaintiff.

The defendants appealed.

Macnaghten, Q.C., and *G. Cave*, for appellants.—*Tickle* v. *Brown* [1836][1] is in our favour. *Beasley* v. *Clarke* [1836][2] was a case where leave was obtained and held to traverse a user as of right. The plaintiff must shew an enjoyment "as of right"—Prescription Act, 1832, ss. 2, 3, 4, and 5. The judgment of Cozens-Hardy, J., ignores that the enjoyment must be "as of right."

[VAUGHAN WILLIAMS, L.J., referred to *Bennison* v. *Cartwright* [1864].[3]]

The true view of the section is shewn by *Beasley* v. *Clarke*,[2] *Dalton* v. *Angus* [1881],[4] and *Plasterers Co.* v. *Parish Clerks Co.* [1851].[5] The true inference from the payment of fifteen shillings is that the licence was revocable on non-payment. In *Chamber Colliery Co.* v. *Hopwood* [1886][6] it was held that a division of a watercourse under the idea that the lease authorised it would not confer a right. That case shews what was meant by Lord Denman in *Tickle* v. *Brown*[1] by "tacit sufferance."

As to a lost grant, all that a jury would be asked to find would be a lost grant of a demise from year to year of this right of way—*Gaved* v. *Martyn* [1865].[7] An enjoyment by consent or licence would destroy the inference of a lost grant—*Bright* v. *Walker* [1834].[8]

[VAUGHAN WILLIAMS, L.J., referred to 2 *Williams' Saunders*, p. 503.]

A licence would not give any interest in the land—*Hill* v. *Tupper* [1863].[9] The payment was an admission by the respondent that she enjoyed by licence. The letter of the respondent of April 19, 1898, is fatal to any claim under the statute. She admits that her claim is as yearly tenant only within one year before action—*Lowe* v. *Carpenter* [1851].[10]

Micklem, Q.C., and *E. S. Ford*, for the respondent.—The letter of April 19 does not estop the respondent. There is no such thing as a legal yearly tenancy of a right of way. The respondent had no idea what her real rights were. A licence is not revocable if acted upon and money spent on the strength of it. An enjoyment of an easement by leave and licence for forty years will confer a right under

(1) 5 L. J. K.B. 119; 4 Ad. & E. 369.
(2) 5 L. J. C.P. 281; 2 Bing. N.C. 705.
(3) 33 L. J. Q.B. 137; 5 B. & S. 1.
(4) 50 L. J. Q.B. 689; 6 App. Cas. 740.
(5) 20 L. J. Ex. 362; 6 Ex. 630.
(6) 55 L. J. Ch. 859; 32 Ch. D. 549.
(7) 34 L. J. C.P. 353; 19 C. B. (N.S.) 732
(8) 3 L. J. Ex. 250; 1 Cr. M. & R. 211.
(9) 32 L. J. Ex. 217; 2 H. & C. 121.
(10) 20 L. J. Ex. 374; 6 Ex. 825.

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the Prescription Act. The rights acquired by twenty and forty years' user are quite different. This enjoyment was not by "tacit sufferance," but by agreement. The agreement, whatever it was, was made more than forty years ago, and not being in writing it cannot be set up—Prescription Act, 1832, s. 2. Under both section 2 and section 3, it is not necessary to shew enjoyment as of right so long as it is uninterrupted. A parol permission extending over the whole period, and not renewed from time to time, is not an interruption even though there is payment—*Tickle* v. *Brown*,[1] *Kinloch* v. *Nevile* [1840],[11] *Bewley* v. *Atkinson* [1879],[12] and *Plasterers Co.* v. *Parish Clerks Co.*[5] *Chamber Colliery Co.* v. *Hopwood*[6] is not against the respondent. It was held by an Irish Appeal Court in *Beggan* v. *M'Donald* [1878][13] that the doctrine of *Bright* v. *Walker*[8] would not apply where the enjoyment of the easement had been for a period of forty years; and Chitty, J., in *Harris* v. *De Pinna* [1886],[14] considered that the Irish Court was right. See, too, *per* FitzGibbon, L.J., in *Hanna* v. *Pollock* [1899].[15] The respondent has now under the circumstances got an indefeasible right. Where there is a grant of an easement, a rentcharge is generally imposed upon the dominant tenement to pay for the easement—2 *Davidson's Precedents in Conveyancing*, part 1 (4th ed.), Precedent 77, pp. 571, 577. The user must be continuous, and unity of possession of the tenements would defeat it —*Onley* v. *Gardiner* [1838].[16]

Macnaghten, Q.C., in reply.—*Plasterers Co.* v. *Parish Clerks Co.*[5] and *Bewley* v. *Atkinson*[12] were both cases under section 3. The interruption in such cases must be some physical obstruction. Cozens-Hardy, J., did not do justice to *Tickle* v. *Brown*.[1] The payment of the fifteen shillings unexplained is fatal to the respondent's case, and her explanation is equally fatal to her.

[VAUGHAN WILLIAMS, L.J., referred to *Bullen and Leake's Precedents in Pleading* (5th ed.), p. 863.]

Unless there is a claim of a right, nothing is acquired under the Prescription Act—*Chamber Colliery Co.* v. *Hopwood*.[6] Lord Blackburn sums up the old cases in *Dalton* v. *Angus*.[17] The possession must be of right, and adverse, and if there is payment it cannot be either one or the other—*Harden* v. *Hesketh* [1859].[18]

Cur. adv. vult.

March 25.—RIGBY, L.J., referred to the facts, and said: The user of the right of way has in fact been as of right, meaning thereby that it has been such as a person rightfully entitled would have had. The only suggestion made by the defendant company has been that by reason of the payment of fifteen shillings yearly the user has not been as of right. It is not denied that the payment is in some way or other connected with the right of way, but different interpretations are put upon the payment by the plaintiff and the defendants respectively. The plaintiff has contended that the payments were made by way of contribution towards the repair of the Red Lion Yard. The defendants have strenuously contended that the fifteen shillings is a rent paid for use of the right of way. Properly speaking, no rent could be payable for an incorporeal hereditament such as a right of way; and the defendants' contention in its ultimate, and legally speaking its most plausible form, if only there were facts to support it, is that the payments were in the nature of consideration for a licence renewable year after year, and valid only for a year at a time, to use the road through the defendants' yard for the purposes of the plaintiff's business. This contention was raised before the Court of Appeal, but was not pleaded, or consistent with the pleading of the defendants. One difficulty in the way of the last-named contention is that the fifteen shillings was not paid in advance, but only after the end of the year in respect of which it purported to be paid. Another is that the sum appears to have been in later years

(11) 10 L. J. Ex. 248; 6 M. & W. 795.
(12) 49 L. J. Ch. 153; 13 Ch. D. 283.
(13) 2 L. R. Ir. 560.
(14) 56 L. J. Ch. 344; 33 Ch. D. 238, 253.
(15) [1900] 2 Ir. R. 664, 677.
(16) 4 M. & W. 496.
(17) 50 L. J. Q.B. 741, 742; 6 App. Cas. 811–814.
(18) 28 L. J. Ex. 137; 4 H. & N. 175.

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insufficient as a consideration, though originally, when Sutton was a much smaller place than it has now grown into, the sum may have been a fair equivalent. A further difficulty in the way of the defendants is that they have always treated the user of the road as being by right and not by licence.

As regards the contention of the plaintiff, it seems clear that her witnesses have no personal knowledge on the matter, though the assumption actually made, having regard to what was done about the pump, was not an unlikely one to be made by them. The truth clearly is that no witness on either side has any personal knowledge about the way in which the user either of the pump or of the right of road originated, or of the way in which, or of the consideration for which, the annual sum of fifteen shillings became payable. No deed or writing dealing with the question has been found, so that there is absolutely nothing to shew on what terms the right of road or other easement began to be enjoyed. It was agreed at the trial that the annual sum of fifteen shillings had been regularly paid at least from 1855, but absolutely nothing more was proved or known about it. The important point to notice is that no agreement with reference to it is now suggested to have been made within the period of forty years. How long before the commencement of that period it began to be paid, or for what purpose it was paid, is left altogether uncertain. No evidence, therefore, exists that it was ever paid within the period either as a consideration for a renewal of a yearly licence, or for a year's user, or indeed for any other advantage given by the owners of the Red Lion Inn to the owners of No. 203. If, indeed, there had been the clearest evidence of an agreement as to the payment of the fifteen shillings as consideration for a licence, or for a year's user of the right of way, it would not have been admissible to control the right of way actually enjoyed during the forty years, since it must have been a verbal agreement before the commencement of that period. As we could not rely upon a verbal agreement entered into before the period of forty years, however proved or however clearly admitted, we cannot of course argue from any conjectural interpretation of the proved facts, however plausible. No conjecture falling short of necessary inference is admissible. In other words, it has to be shewn of a suggested interpretation of the facts, in order to exclude the operation of the Prescription Act, not only that it may, but that it *must* be the only possible interpretation. This certainly cannot be done with regard to a licence revocable at will, or a grant for a year only determinable within the year.

In order to justify the conclusion that the existing state of facts is inconsistent with the acquisition under the Prescription Act by forty years' user of an absolute and indefeasible right of way, it is absolutely necessary to assume that each annual payment of the fifteen shillings has to do at most with the right of way for one year only, so that the successive payments may be taken to involve successive permissions for one year at most. To me it appears that such an assumption, so far from being necessary, is altogether arbitrary and unwarranted. This will be shewn by an examination of the probabilities of the case. Independently of the Prescription Act, the question to be solved is, How did it come about that a business should be carried on in a yard surrounded with buildings on all sides but one, and on that one side making necessary use of a cart and horse way through the adjoining property, and also use of a well of water on such adjoining property? Probably the most natural hypothesis would be that the properties at some remote former time were in one ownership, that the buildings were erected before the severance of ownership, and that on the severance by conveyance the right of road and right to use the well were annexed to the separated property, as the former, at any rate, would be a way of necessity, though not mentioned. This does not account for the annual payment of the fifteen shillings, but that might have been reserved expressly, and, if so reserved, would in all probability be reserved either in perpetuity or until the owner of the dominant tenement ceased to require the right of way. Putting aside the hypo-

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thesis of common ownership, it is highly improbable and almost inconceivable that the owner of the now dominant tenement would have built all round his yard where he had no right of exit, and gone to the expense of preparing for a business requiring a supply of water and access by carriages and horses without securing both rights beforehand. Some such arrangement as the following would be probable: That he, helping to provide and maintain the well and pump, should have in perpetuity, or at least so long as he required it, the right to the water supply and the right of way for his business. The consideration of fifteen shillings a year might at the remote period that we are postulating be a not insufficient consideration for the right of road. The arrangement might be carried out by deed which has been lost, or no deed may have been executed. In the latter case there would be no legal easement either for water or road; but, as Lord Denman pointed out in his judgment in *Tickle* v. *Brown*,[1] the want of such a legal right would in no way prevent the person claiming the easement from claiming as of right. Of course I do not say that such an arrangement as I have indicated can be taken as proved. It is, however, more likely to have taken place than a mere bargain for a right of way for a year. The hypothesis of a mere licence revocable at any time seems the most unlikely of all. There is no way of accounting for the incongruity of bargaining for a perpetual right of water, which is admitted, and neglecting to bargain for the at least equally necessary right of way not determinable at the will of the grantor. That the mere payment of an annual rent is not to be interpreted as involving an interruption of a user as of right is shewn by the case of *Plasterers Co.* v. *Parish Clerks Co.*,[5] where, as is pointed out by Mr. Justice Cresswell, the user of light must necessarily have been as of right. Lord Campbell's judgment makes it clear that the decision that the payment did not cause an interruption in the user was founded on the construction of section 4, and is applicable equally to cases within section 2 and section 3.

The defendant company, however, rely upon what they consider to be an admission of a yearly tenancy as to the right of road which enables them to get rid of the right by a notice to quit, or at least in the alternative entitles them to say that there was an interruption in the enjoyment as of right of the easement for the space of a year during the period of forty years required by the Prescription Act for making the right absolute and indefeasible, and this is the case made out by their pleadings as amended. It is necessary, or at least desirable, to examine this claim. [His Lordship referred to the letters of March 31 and April 19, 1898, calling attention to the fact that before writing the last-named the plaintiff had no professional advice, but only the advice of a friend who was not a lawyer. He continued:] With reference to the notice purporting to be given on behalf of the defendant company, the following observations occur. It is the very first claim on behalf of the owners of the Red Lion to control the use by the plaintiff of the road through their yard. The notice requires the use of the yard to be given up altogether, notwithstanding that the plaintiff is admitted then to have had and now to have the right of access to and the right to draw water from the pump in the yard. It states that for the right of going through the yard an annual rent of fifteen shillings had been paid, but that was altogether inaccurate, since rent is not payable for an easement, and there was no property of which the plaintiff was in possession for which rent could be payable to the defendant company. Notwithstanding this statement as to an annual rent, the notice purports to abolish the right of road as from May 1 (just over a month from the date of the notice), an arbitrary date, the choice of which for the purpose proves the givers of the notice to have been ignorant of any arrangement which could reasonably, even if inaccurately, be treated as a year to year tenancy.

It is easy now to see how the non-legal adviser of the plaintiff, who is proved to have suggested the terms of the letter of April 19, was induced to select those terms. He adopted from the notice (he could get it from no other quarter) the inaccurate statement that the annual payment of fifteen shillings was a payment of an

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annual rent. Being thus misled, and started on the wrong tack, he assumed (naturally enough for a man not a lawyer) that the case resembled, or at any rate was analogous to, a case between landlord and tenant, and therefore said "We are, as you are aware, yearly tenants." This, as above indicated, was altogether a false analogy. It is true that in cases of tenancy at will or on sufferance there arise such inconveniences that the law is ready to seize upon any opportunity of establishing a tenancy of more stable duration, and therefore, where a rent is once proved to be paid for a year, or any aliquot part of a year, the payment is taken, by what originally was perhaps a strained construction, as evidence of an agreement for a tenancy from year to year. But the rule has no application to the case of easements, as to which no rent is payable, and no tenancy can exist. Besides, it was the statement in the notice, and that alone, on which the theory of rent rested, and though it seems proper to explain that by ignorance, and not by any intention to deceive, it would be inequitable for the defendant company to claim the advantage of an admission of a relation impossible in law which so clearly is founded on the statement, also legally inaccurate, put forward on their behalf.

The notice of March 31, 1898, was not persisted in, but in lieu thereof on February 16, 1899, the defendant company caused to be served a notice to quit on September 29, 1899, treating a tenancy down to that time as subsisting. Until some considerable time after the service of this notice the plaintiff did not take legal advice, but about the month of July, 1899, she consulted her solicitors, who on the 28th of that month wrote to the defendant company asking whether they intended to insist upon their notice of February 16, and denying that any tenancy existed. On being informed that the defendant company did intend to insist upon the notice of February 16, the plaintiff on August 11, 1899, commenced this action. Pending the action the sum of fifteen shillings, which became due at Michaelmas 1899, was demanded by the defendant company and paid by the plaintiff.

An interim injunction was granted on November 9, and the action was tried and judgment given in favour of the plaintiff on March 9, 1900. I agree with Mr. Justice Cozens-Hardy in the conclusion at which he arrived, and I do not think it necessary to go through the numerous authorities discussed by him in his judgment or cited before us. As is hereinbefore stated, user of the right of way during the whole period of forty years by persons claiming to use in succession as a matter of right is proved by ample evidence, and the so-called admission of a year to year tenancy not having been established for the reasons above given, there remains only the unexplained payment of the annual sum of fifteen shillings. But that payment began to be made before the period of forty years commenced, and no agreement with reference to it within the forty years has been proved or suggested. This distinguishes the present case from the case as to the admission of evidence of *Tickle* v. *Brown*,[1] where it was proposed to give in evidence a payment originating within the forty years, which would cause, if proved, a discontinuity in the user.

In my judgment, the appeal ought to be dismissed. The judgment makes no provision for the continued payment of the fifteen shillings. I must not be understood as expressing any opinion on that point. It is not necessary to do so since the defendant company expressly repudiated any wish to have it decided in their favour.

VAUGHAN WILLIAMS, L.J., referred to the facts, and continued: It is contended by the defendants that the inference drawn by Mr. Justice Cozens-Hardy is not the right inference to draw, but that the true inference is simply that the enjoyment was by reason of permissions granted during the period of forty years, and not as of right. Now there can be no doubt but that the fact of the payment in each year is evidence *prima facie* that enjoyment was not as of right; it is, to use the words of section 5 of the Prescription Act, evidence of a fact inconsistent with the simple fact of enjoyment as of right. The evidence is not offered by the defendants as evidence of an agreement.

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The defendants are not confessing the enjoyment as of right and avoiding the effect of such enjoyment by setting up the agreement under which the enjoyment was had; on the contrary, it is the plaintiff, the party claiming the prescriptive right, who seeks to set up the agreement and then to say, "You, the defendants, cannot take advantage of this agreement to negative my claim to a prescriptive right because the agreement which I am setting up was not in writing." This agreement, which the plaintiff asks the Court to infer, and which Mr. Justice Cozens-Hardy does infer, is not dependent on the lapse of forty years. It is not a statutory inference, neither is it an inference based upon some recognised legal fiction arising after the lapse of twenty or some other number of years. It is a mere inference of fact based upon the payment of fifteen shillings a year for a long period, the origin of which payment there is no evidence to explain. But it is to be observed that the annual payments are equally consistent, or, at all events, consistent, with a fresh permission in each year. Moreover, the probability that such was the true fact, and the improbability that there was one permission or agreement covering the whole period of forty years, is enhanced by the consideration that a parol licence creates no right or interest in the licensee over the land, but is revocable by the licensor at any moment. Sections 2 and 5 of the Prescription Act are difficult to construe; but I believe that the true meaning of the provision that where a way "shall have been so enjoyed as aforesaid (as of right) for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing," is that an enjoyment which appears to be as of right otherwise than under a right conferred by the consent or agreement of the person owning the land in respect of which the way or other easement is alleged shall not be defeated or lose its effect by evidence that the enjoyment was permissive, unless such permission, consent, or agreement was in writing. If this is the true view it will follow that, wherever the enjoyment does not appear to be of right, the proviso has no application, and that, therefore, if it appears that there were payments for the enjoyment during the forty years the proviso cannot apply, for, the enjoyment *prima facie* not appearing to be as of right, the landowner over whose land the way is claimed has no need or occasion to set up a consent or agreement covering the whole period of forty years. It is sufficient for him that the payments made during the forty years *prima facie* negative the enjoyment having been as of right. It may be it is open to the person claiming the easement to go on and prove that the payments were in fact made under a parol consent or agreement made before the forty years began, and it may be that this would give the claimant an indefeasible right to the easement, but there is no evidence of such a consent or agreement in fact, and I think it would be wrong to infer from the annual payments of fifteen shillings a parol agreement made before the beginning of the forty years and remaining in force for the whole period. The inference from a payment in one year is, I might almost say admittedly, that the enjoyment in that year was not of right, and I cannot see why the inference should be different because the payment is made for a number of years in succession. In each year it seems that the payment is compensation for the past user, and as such an acknowledgment that the past year's user has not been of right. The payment on January 23, 1899, is itself evidence that the plaintiff was not enjoying the easement as of right.

The cases of *Plasterers Co.* v. *Parish Clerks Co.*[5] and *Bewley* v. *Atkinson*[12] to my mind are not in point, because those cases, being light and air cases, were governed by section 3 of the Prescription Act, and as under that section it is not necessary that the enjoyment should be of right, it was impossible to rely on the long-continued payments as admissible in evidence to negative the enjoyment having been as of right. Moreover, in *Plasterers Co.* v. *Parish Clerks Co.*[5] payments were only relied on as admissible to prove an interruption within the meaning of section 4, and the Court held

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that the payments were no evidence of an interruption, because an interruption of a right claimed under section 3 could only be by discontinuance of the enjoyment. Lord Campbell says: "We are not called upon to say whether the payment might not be made use of to shew that this was not such an enjoyment as was contemplated by the statute as capable to confer the right"; and Mr. Justice Maule adds, "Your argument must go to the length, that an enjoyment which is paid for is interrupted; but the third section shews, that there may be an uninterrupted enjoyment granted by an instrument in writing." Thereupon both these learned Judges, having refused to deal with any other question except that raised by the bill of exceptions—namely, whether the ruling of the Lord Chief Baron that the demand of rent for the lights, and payments made in compliance therewith, amounted to an interruption within the meaning of the statute was right—proceeded to hold that the interruption in the 3rd section of the Prescription Act, 1832, must be an actual discontinuance of the enjoyment by reason of an obstruction submitted to or acquiesced in for a year. The case, to say the least of it, leaves untouched the proposition established by *Tickle* v. *Brown*,[1] that in a case of an easement claimed under section 2 a payment within the period of twenty or of forty years may so negative the enjoyment as of right as to prevent a claim under the statute for an easement. This is all I have to say about Mr. Justice Cozens-Hardy's inference that a licence to use this way across the yard was given by parol more than forty years before action brought, excepting that I wish to point out that a succession of annual payments of so-called rent for the enjoyment of an easement for a number of years in succession will not constitute a continuous licence for the whole period. The case is very different from a tenancy of land, in which case the resulting tenancy from year to year would be continuous.

Mr. Justice Cozens-Hardy also, though preferring to base his judgment on the Prescription Act, alternatively bases his judgment on presumption of lost grant. I think there is no room for any such presumption. The enjoyment can be accounted for as a lawful enjoyment without reference to any such grant on the theory of payments made under a licence renewed from year to year, the payments being acknowledgments that the enjoyment of the previous year had not been as of right, and not payments of rent. Moreover, there is this difficulty about the suggested lost grant—that a perpetual lease of an easement subject to an annual payment is a legal impossibility, and I doubt whether there can be a grant of an incorporeal hereditament subject to a perpetual payment in the nature of a fee-farm rent.

In my opinion the judgment of Mr. Justice Cozens-Hardy ought to be reversed and judgment entered for the defendants.

ROMER, L.J.—The question to be decided in this action is whether or not the plaintiff has enjoyed the way over the defendants' premises "as of right" within the meaning of sections 2 and 5 of the Prescription Act. The difficulty which arises is not one of law on the interpretation or meaning of the Act, but one depending on the inference to be drawn from the facts proved. The case of *Tickle* v. *Brown*[1] defined "enjoyment as of right." The words of Lord Chief Justice Denman in delivering judgment in that case have been so often cited that I need not repeat them here. It is clear that if the enjoyment has been by permission granted by the owner of the servient tenement during the forty years, then the enjoyment is not of right. Lord Denman, besides speaking of "permission," used the phrase "by tacit sufferance." I do not quite know what he meant by "tacit sufferance," but I think he was contemplating a case similar to that we have now to deal with. But it cannot now be doubted that if from the facts proved the inference be that the enjoyment during the forty years has been by permission granted during that time, then no right can be acquired under the Act in respect of that enjoyment. Of course, when I speak of the "facts proved" I exclude any attempt to establish by evidence any consent or agreement not in writing given or made prior to the forty years.

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I now proceed to apply the above to the circumstances of this case. Undoubtedly the plaintiff and her predecessors have used the way claimed by her for more than the forty years in a manner which would enable her to claim the benefit of the statute had there been no yearly payment made. But she and her predecessors have at the end of each year during this period made a yearly payment to the defendants and their predecessors in respect of the user of the way during that past year. Now it appears to me that if nothing were known of the circumstances under which, during one particular year of the forty, a certain payment had been made in respect of the user of a way for that year, the proper inference from the mere fact of payment would be that the payment was made for permission asked and granted to use the way for that year, and, indeed, I think that was one of the points decided in *Tickle* v. *Brown*.[1] Nor would it, in my opinion, make any difference that the payment was made at the end, and not at the beginning, of the year. But then comes the difficulty in the present case, about which I have felt great hesitation, especially having regard to the view taken by my brother Rigby. Is the inference that would be drawn, in the case of payment in a single isolated year, one that ought also to be drawn with regard to each payment in circumstances like the present, where the payments have been made for the whole period, and where no express application for permission during that period is shewn, and the yearly payment is a small one? It is only with reluctance that I have come to the conclusion that, even in the circumstances of this case, the proper inference is that each payment was for permission to use the way for the preceding year. In the first place, the fact that the permission was not expressly asked for or given in each year is just what one would expect when the user was continued for several years. So long as the payment was made at the end of each year, and the parties did not wish that the user should cease, they would naturally proceed on the tacit understanding between them as to their relative positions shewn by the payment made each year, and would not go each year through the form of expressly asking for or expressly granting permission for the user for each coming year. The application and grant would be tacitly assumed to have been made. And in the next place, I do not think much importance can be attached to the fact of the payment being small. However valuable the way may be to the plaintiff, I cannot say that the payment is so small, as compared with the inconvenience caused by the user to the defendants or their predecessors, that I ought to assume that they did not sooner withdraw their permission because they had no power to do so. Then, are there any other facts in the case which would prevent me drawing the inference that I have drawn? I think not. The form of the only receipt for the yearly payment which is forthcoming does not appear to me to materially assist either side, except that it shews that the payment was in respect of the right of way for the preceding year. The words "right of way" written across it may well be referred to the right obtained by the permission. Then the inconveniences which will result to the plaintiff in her business if she fail to establish her claim to a right of way, though they account for the reluctance I have felt as previously expressed, are not grounds upon which the Court ought to act in determining this case. No doubt the plaintiff may have reasonably expected, and did expect, that the permission so long given would continue, but this expectation will not support a claim as of right.

[His Lordship then referred to certain matters of pleading in the case, and observed that he did not think that in a case like the present the rights of the parties should be determined by questions of pleading. He continued:] I am fortified in the conclusion I have come to by the following considerations: If the yearly sum was not paid for permission to use the way, on what footing was it paid? Suppose the plaintiff had wished to cease using the way and to stop payment of the yearly sum, and had given notice to the defendants of her intention, and in accordance with her notice had not used the way for a year — could the defendants

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have succeeded in an action brought by them against her to compel payment of the yearly sum for that year? I think not. It appears to me that such an action must have failed, and I think it would have failed because the Court would have held on the facts now before us that the user was by permission, and that the payment was only due when the permission was expressly or impliedly sought for and obtained. The Court could not from the facts proved in this case have inferred in favour of the defendants a lost grant to secure the yearly sum. Indeed it is difficult to see what lost grant they could have suggested. It would have been hopeless to suggest that the yearly sum was in the nature of a rentcharge issuing out of the plaintiff's tenement. And I cannot see what other legal suggestion could have been successfully made by the defendants by which payment of the yearly sum could have been enforced as against the owners or occupiers for the time being of the plaintiff's house and premises.

Lastly, I think the case against the plaintiff may be put in this way. The payment of the yearly sum by the occupiers of her house for the time being was evidence of user by permission. This throws upon her the onus of proving by facts outside and beyond the mere user that the user was "of right" under the statute. This onus she fails to discharge. At any rate, she does not do so to my satisfaction. The view that I have taken, while it prevents the operation of the statute in favour of the plaintiff, also negatives the idea that a lost grant can be inferred to support her claim. For these reasons I think that the appeal ought to succeed, and that the action should be dismissed so far as it seeks a declaration that the plaintiff is entitled to the right of way claimed (not being that claimed in connection with the pump in the pleadings mentioned), and so far as it claims an injunction based on that declaration.

The view I have taken renders it unnecessary for me to consider the further points taken by the defendants, which depend upon the contention at one time put forward by the plaintiff, that she was in the position of a yearly tenant in respect of the user of the way, and upon the payments made by her and received by the defendants before that contention was withdrawn.

Appeal allowed.

Solicitors—Lovell & Broad, for appellants; Spencer, Gibson & Son, for respondent.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

FARWELL, J. 1901. Feb. 26.

BIRD, *In re*; EVANS, *In re*; DODD *v.* EVANS.

Breach of Trust—Loan by Trustee to Himself—Realisation of Security—Loss—Apportionment.

Where a trustee has sold Consols and invested the proceeds, in breach of trust, upon an improper security, the amount of which when realised is insufficient to replace the capital and pay the arrears of interest, the tenant for life (or his estate) must, upon an apportionment of the sum realised between capital and income, bring into account all sums received by him in respect of income on the improper investment beyond what he would have received as dividend on the Consols.

In 1885 a trustee sold out a sum of Consols, which formed part of his trust estate, and reinvested the proceeds upon a mortgage over his own property. He paid the full interest upon this security to the tenant for life. After 1894 the full interest ceased to be paid, but payments were made to the tenant for life until her death in 1900. Upon the death of the trustee insolvent, an action was brought to administer his estate. In that action the investment was declared to be a breach of trust, and directions were given for the realisation of the security.

The security was realised, but the sum produced was insufficient to satisfy the arrears of interest and the amount required to replace the capital. Upon the further consideration of the administration

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BIRD, IN RE.

action the main question was how the sum realised was to be divided.

Butcher, K.C., and *K. G. Metcalfe*, for the plaintiff (the remainderman).—Before the estate of the tenant for life can share in any portion of the sum realised, credit must be given for the income actually received.

Upjohn, K.C., and *Martelli*, for the personal representative of the tenant for life.—The proceeds of sale of the Consols did not produce income, and the payment of interest by the trustee must be regarded as made out of his own pocket. It is not a case of a receipt of trust moneys by the tenant for life, but a payment which the trustee chose to make to her. There is no suggestion that the tenant for life was implicated in the breach of trust. *Moore, In re; Moore* v. *Johnson* [1885],[1] is strictly in point, and should be followed. *Foster, In re; Lloyd* v. *Carr* [1890],[2] is distinguishable, as there was no breach of trust in that case. In *Barker, In re; Barker* v. *Barker* [1897],[3] there was apparently no breach of trust; so, too, in *Lyon* v. *Mitchell* [1899].[4] The tenant for life did not by the mere receipt of income acquiesce in a breach of trust—*Bate* v. *Hooper* [1855].[5]

H. Warlters Horne, for the representative of the deceased trustee.

A reply was not called for.

FARWELL, J., after stating the facts, continued: The authorities are in a somewhat unsatisfactory condition, and I feel considerable difficulty in reconciling the decision of Mr. Justice Pearson in *Moore, In re*,[1] with that of Lord Justice Kay in *Foster, In re*.[2] The principle applicable to cases like the present is expressed in *Cox* v. *Cox* [1869][6]—viz. that neither tenant for life nor remainderman shall obtain an advantage over the other. In the present case the sale of the Consols and the reinvestment have been declared to be a breach of trust; the case must therefore be decided on the footing that there ought to be 10,000*l.* Consols now in settlement. Now if the Consols had never been sold the tenant for life would have had the dividends merely, and not the larger income reserved on the mortgage. There is no default imputed to the tenant for life, and I am not prepared to say that in any case the Court could order repayment of the sums overpaid to her. But I am dealing with a case of adjustment; and so long as there are sums remaining to be dealt with, I ought to adjust this sum so as to make the loss fall proportionately on capital and income. Whether that is the true view where there is no breach of trust is not before me. I simply deal with the matter so as to produce as nearly as I can the *status quo ante*.

(1) 54 L. J. Ch. 432.
(2) 60 L. J. Ch. 175; 45 Ch. D. 629.
(3) 32 L. J. N.C. 569; W. N. (1897), 154.
(4) 34 L. J. N.C. 135; W. N. (1899), 27.
(5) 5 De G. M. & G. 338.
(6) 38 L. J. Ch. 569; L. R. 8 Eq. 343.

Solicitors—Gasquet & Metcalfe; J. E. Mason; Pollock & Co.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

FARWELL, J. 1901. March 21, 22.

WHITBREAD AND CO. *v.* WATT.

Vendor and Purchaser—Sale of Land—Payment of Deposit—Lien—Rescission.

A purchaser of land, upon payment of a deposit, acquires an equitable lien therefor upon the land, and that lien may be made available against a transferee (not being a purchaser for value without notice) from the vendor, as well where the purchaser puts an end to the contract in exercise of a right thereby reserved to him, as where the vendor (or his transferee) is in default.

By a contract in writing dated January 25, 1897, and made between F. Saunders (as vendor) of the one part, and the plaintiffs (as purchasers) of the other part, the vendor agreed to sell and the purchasers to purchase a freehold plot of land, part of a certain building estate known as the Woodhouse estate, and belonging to the vendor, for the sum of

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500*l.*, of which 200*l.* was to be paid by way of deposit on the signing of the contract, and the balance of 300*l.* on the completion of the purchase, with interest as therein mentioned. The contract contained (amongst other) the following clauses:

"3. The purchase is to be completed as soon as three hundred houses shall have been erected on the said estate (but without prejudice to clause 10 hereof) at the office of the vendor's solicitors, and the purchasers are to have possession as from the day of completion, when the balance of purchase-money, with interest as aforesaid, is to be paid. All outgoings up to that time will be cleared by the vendor, his heirs or assigns. 10. If three hundred houses shall not be erected on the said Woodhouse estate within two years from the date of this agreement, the purchasers shall have the right, by giving seven days' notice in writing to the vendor, to rescind and cancel this agreement, and at the expiration of such seven days the agreement shall absolutely cease and determine. 11. In the event of either the vendor or the purchasers cancelling this contract by virtue of any of the powers herein given, no costs, expenses, loss or damage of any kind whatsoever shall be claimed or paid from one to the other, but the deposit without interest shall be returned by the vendor to the purchaser."

The plaintiffs paid the vendor (Saunders) the deposit of 200*l.* on signing this contract. Subsequently Saunders sold and conveyed the Woodhouse estate to one Saxelby, who mortgaged it; and in November, 1900, the mortgagees sold and conveyed the estate to the defendant Watt. All parties, including the defendant Watt, had notice of the contract of January 25, 1897. The three hundred houses had not been built on the estate, nor had Saunders paid or accounted for the deposit to any of his successors in title. On December 3, 1900, the plaintiffs wrote to the defendant rescinding the contract of January 25, 1897, and claiming payment of the deposit (200*l.*), which was refused.

This was an originating summons of the plaintiffs claiming, first, a declaration that under the contract of January 25, 1897, they were entitled to a charge or lien on the hereditaments therein described by way of security for the repayment of the deposit of 200*l.* paid by them to Saunders on signing the said contract; and secondly, enforcement of the said security by foreclosure or sale.

Frank Russell, for the plaintiffs.—Upon payment of the deposit the purchasers acquired a lien on the estate—*Wythes* v. *Lee* [1855][1] and *Rose* v. *Watson* [1864].[2] The defendant is not in the position of a purchaser for value without notice, and he must give effect to the plaintiffs' equitable title.

W. Brinton, for the defendant.—The only remedy to which the plaintiffs are entitled is an action against the original vendor for a return of the deposit. The terms of clause 11 restrict the liability to return the deposit to the vendor without reference to his representatives, whereas in clause 3 the outgoings are to be cleared by the vendor, "his heirs or assigns." A deposit is something given by the purchaser to shew that he intends to go through with his bargain—*Howe* v. *Smith* [1884].[3] Here the purchaser is not ready to go on, and has forfeited his right to have the deposit returned. The remedy for the return of the deposit was at law, and does not depend on equitable principles—*Williams* v. *Edwards* [1827].[4] Where there is no default on the part of the vendor the purchaser cannot obtain a return of his deposit—*Dinn* v. *Grant* [1852].[5]

[FARWELL, J.—That is not a conclusive authority, as it turns on the question of abandonment. The marginal note is clearly misleading.]

Whatever may be the value of *Dinn* v. *Grant*,[5] in subsequent cases the right to recover the deposit has always been rested on the default of the vendor—*Levy* v. *Stogdon* [1898][6] and *Cornwall* v. *Henson*

(1) 25 L. J. Ch. 177; 3 Drew. 396. The case was ultimately compromised—see 25 L. J. Ch. 389.
(2) 33 L. J. Ch. 385; 10 H.L. C. 672.
(3) 53 L. J. Ch. 1055; 27 Ch. D. 89.
(4) 2 Sim. 78.
(5) 5 De G. & Sm. 451.
(6) 67 L. J. Ch. 313; [1898] 1 Ch. 478.

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[1899].[7] But assuming that the purchaser has not forfeited his right to the deposit, he has no lien on the land—*per* Kay, L.J., *Rodger* v. *Harrison* [1892].[8]

A reply was not called for.

FARWELL, J., after reading the material clauses of the contract and stating the devolution of the property, continued: The three hundred houses have not been built, and on December 3, 1900, the plaintiffs gave notice to rescind, and on their behalf it is argued that there is a lien attaching to the estate in the hands of the defendant. On the other hand, it is said that the lien arises only on, and depends upon default. I think counsel for the defendant shrank a little from putting his argument in that bare form, but that is the substance of it. This is inconsistent with the law as settled by the authorities, and well stated in *Robbins on Mortgages*, vol. 2, p. 1576 : "If a purchaser advance all or any part of the money to the vendor, and the contract is broken off, an implied contract arises, by which the purchaser has a lien on the land; and if the purchaser properly declines to complete, he has a lien for the deposit and interest on unpaid purchase money, and for interest on the payments, and also for the costs of a suit by himself or the vendor to compel performance of the contract, and this lien attaches on the deeds. If the purchase goes off through the fault of the purchaser, of course he has no lien for what he has paid." That seems to me to be an accurate statement of the law. Then in *Wythes* v. *Lee* [1] Vice-Chancellor Kindersley contrasts the case of a purchaser and vendor, and his language is quite consistent with the absence of any wrongdoing or default. What he says is this: "This is clear, that the vendor, if he has parted with the estate to the purchaser before he has got his money, has a lien for it upon the estate; that is unquestionable. Now, does the right of the purchaser, if the contract goes off, stand in principle on the same footing as that of the vendor?" Then, after investigating that aspect of the case, he says: "when a contract is made, and then goes off, it appears to me, that, in principle and justice, the equity of the purchaser to a lien on the estate ought to stand on as good a footing as the lien of the vendor after conveyance."

The matter came before the House of Lords in *Rose* v. *Watson*.[2] That case, to my mind, is on all-fours with the present. There was first a contract, then a mortgage with notice, and then default by the vendor; and the House of Lords held that the purchaser who had paid a deposit had a charge for that deposit and interest in priority to the mortgagees. It is put thus by Lord Cranworth : "There can be no doubt, I apprehend, that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase money the vendor had executed a mortgage to him of the estate to that extent." And Lord Westbury, in the same case, had previously pointed out that the money paid in conformity with the contract was part of the purchase-money under the contract, and said : "It was money advanced upon the faith that the land, the subject of the contract, would become the property of the respondent; and being so paid as part of the purchase money under the contract, and being paid in advance, on the faith of the vendor's performance of the contract, I think that your Lordships will have little difficulty in coming to the conclusion that those sums of money thus paid formed principal sums, in respect of which there became a lien from the time of payment of them; in consequence of the subsequent failure of the vendor to perform the contract, and becoming such lien, they bore fruit consequently—that is to say, they entitled the person who is possessed of that lien to claim interest in respect of them." He says expressly they

(7) 68 L. J. Ch. 749; [1899] 2 Ch. 710.
(8) 62 L. J. Q.B. 213; [1895] 1 Q.B. 161.

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became a lien from the time of payment. The cases therefore establish that what creates the lien is the contract under which the money is paid as part payment of the purchase-money, and on the faith that the contract will be carried out. The lien is not created by the default of the vendor; the default gives rise to the necessity for enforcing the lien, but the lien arises from the contract. I see no reason why a condition that if the three hundred houses are not built the purchaser may rescind should be held to differ in any way from the ordinary form of contract, that if the purchaser makes or insists upon any requisition or objection to the title which the vendor is unable or unwilling to comply with, the vendor may rescind. There is no default there; but I venture to think it would not be arguable, and I do not think the counsel for the defendant argued, that the purchaser would not have the same right to recover the deposit as if the purchase went off by reason of want of title on the part of the vendor. It is not default. It is rather misfortune. It seems to me, therefore, that on authority and on principle the purchaser has a lien, both where the contract goes off for want of title and where the contract contains a proviso enabling the purchaser to rescind. The case of the purchaser himself making default is entirely different. If the purchaser makes default in such a way as to deprive himself of any debt at all, it would be a negation in terms to allow him a lien for that which does not exist.

The only authority against the view which I have expressed which the counsel for the defendant has been able to discover is the *dictum* of Lord Justice Kay in *Rodger* v. *Harrison*.[8] If the Lord Justice was right in that expression of opinion, it is no doubt decisive of the present case. The *dictum* was not necessary for the decision of the case, the point in which was the meaning of the word "assurance" in the Yorkshire Registries Act, 1884. What the Lord Justice says is this: "If there be a lien for the purchase money paid, when does that lien come into existence? Certainly not at the date of the contract. It cannot then be assumed that the contract will go off by default of the vendor. The purchaser's right then is to have the land itself." With every respect to the Lord Justice, that is not accurate. It is directly in the teeth of the decision in *Rose* v. *Watson*,[2] in which the lien was anterior to the default, and that case could certainly not have been present to his mind.

Solicitors—Martineau & Reid; H. P. Spottiswood.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

JOYCE, J.
1901.
Feb. 28. March 16.
April 3.

BILHAM, *In re*; BUCHANAN *v.* HILL.

Will — Construction—Settled Shares—"Surviving" Tenants for Life—Stirpital Survivorship.

A testatrix gave a life interest in a one-third share of a money fund to each of her three daughters, M., C., and E., with remainder to the children of each tenant for life surviving their mother and attaining twenty-one, with a gift over on the death of any tenant for life without leaving such children to the "surviving" tenants for life for their lives, and then to the children of the "said surviving" tenants for life in like manner as their original shares were given, with an ultimate gift over on the failure of issue of all the tenants for life.

E. survived her sisters, and died without leaving children. At her death there were living two of M.'s children who had attained twenty-one, but no children of C., although she had left two children surviving her, both of whom had attained twenty-one before their death.

Held, *adopting the reasoning of* LORD SELBORNE *in* Waite *v.* Littlewood (42 L.J. Ch. 216; L. R. 8 Ch. 70), *and of* SIR GEORGE JESSEL, M.R., *and* COTTON, L.J., *in* Lucena *v.* Lucena (47 L. J. Ch. 203; 7 Ch. D. 255), *that the word "surviving" must be construed neither in its strict sense,*

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BILHAM, IN RE.

nor as meaning "others," but as meaning "surviving by issue," and that consequently M.'s children were alone entitled to the accruing share.

O'Brien *v.* O'Brien ([1896] 2 Ir. R. 459) *not followed.*

Adjourned summons.

This was a summons raising a question of stirpital survivorship in respect of a gift over of one of three shares originally settled upon three tenants for life with remainder to their children.

By her will dated November 10, 1853, Frances Bilham, the above-named testatrix, gave to her daughter Mary Harding Hill (wife of Thomas James Hill), one third part of the dividends and interest arising from stock in the public funds and of moneys belonging to her, the testatrix, at the time of her decease, or of which she had power to dispose, to her said daughter during her life for her separate use without power of anticipation, and from and after the decease of her said daughter Mary H. Hill the testatrix gave one third part of such capital, stock, and moneys "unto and amongst all and every the children of my said daughter Mary Harding Hill which she may leave her surviving who may then have attained or may thereafter live to attain the age of twenty-one years equally between them if more than one share and share alike and if but one then to such only child." The testatrix made a similar gift to her daughter Charlotte Bilham and her children, and also to her daughter Emily Hannah Kezia Bilham and her children. The testatrix then directed as follows: "And in case of the decease of any or either of my said three daughters without leaving any lawful issue them or her surviving who have then or may thereafter live to attain the age of twenty-one years then I give the dividends and interest of the share of the said stock and moneys hereby given to my said daughter so dying unto my surviving daughters in like manner as the dividends and interest hereinbefore given to them for their respective lives And after their decease I give the capital stock and moneys aforesaid unto and amongst the children of my said surviving daughters who may then have attained or shall thereafter live to attain the age of twenty-one years such children taking amongst them the share in such stock and moneys only in which their parent had an interest And in case of the decease of all my said daughters without either of them leaving lawful issue who shall have attained or thereafter live to attain the age of twenty-one years then my will is that my brother's children if any of them be then living or otherwise my next of kin shall have and take amongst them in equal shares all my capital stock in the funds and moneys aforesaid." The testatrix then gave the residue of her estate and effects not thereinbefore disposed of unto and between her said three daughters Mary H., Charlotte, and Emily H. K., equally share and share alike, and she appointed her daughters Charlotte and Emily Hannah Kezia executrixes of her will. The testatrix died on December 23, 1857, leaving her three daughters surviving her.

Charlotte Bilham married Peter Maclaurin, and died on January 1, 1888, leaving two children who attained twenty-one—namely, Thomas Henry, who died on August 8, 1895, and Frances Emily (the executrix and sole legatee of her brother Thomas Henry), who died on August 5, 1900, having appointed the defendant Ellen Mary Hind her executrix.

Mary Harding Hill died on October 25, 1899, leaving two children surviving her—namely, the defendants Thomas Bilham Hill and Ellen Mary Purdie (wife of Edwin H. Purdie), both of whom attained twenty-one.

Emily Hannah Kezia Bilham married William Finch Hill, and died on December 9, 1900, having had only one child, Florence Beatrice, who attained twenty-one, but who predeceased her mother on June 13, 1889, intestate. Letters of administration to her estate were taken out by her father and sole next-of-kin, William Finch Hill, who died on March 12, 1892, having appointed as his executors the defendants Joseph Hill, Thomas Rowland Hill, and Edmund Hill. The plaintiff Jane Eliza Buchanan was the executrix of the will of Emily H. K. Hill.

This was a summons taken out by the

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plaintiff as the legal personal representative of the above-named testatrix for the determination (*inter alia*) of the question who were the persons now entitled to the one third share of stock and moneys whereof the dividends and interest were given by the will of the testatrix to her daughter Emily Hannah Kezia for her life.

Borthwick, for the plaintiff and for residuary legatees.—The word "surviving" must be read in its proper sense—*Benn, In re; Benn* v. *Benn* [1885] [1]—and the share in question is undisposed of and falls into residue.

Crossfield, for the defendant Thomas Bilham Hill.—The keynote to this case is the gift over; and having regard to that, Mary's children are entitled, as she was the only sister who survived by her stirps —*Keep's Will, In re* [1863],[2] *Benn, In re*,[1] *Bowman, In re* [1889],[3] *Lucena* v. *Lucena* [1877],[4] and *Waite* v. *Littlewood* [1872].[5]

A. Whitaker, for the legal personal representative of Charlotte's children.—"Surviving" sisters means "other" sisters throughout this will. The whole scheme of the will is that the children of the "other" sisters should take even though they happen to have died long before the death of the children of the tenant for life, whose share goes over—*Waite* v. *Littlewood*,[5] *O'Brien* v. *O'Brien* [1896],[6] *Lucena* v. *Lucena*,[4] and *Wake* v. *Varah* [1876].[7] There are no words saying that the share is only to go to those who survive the period of accruer.

Howard Wright, for the defendant Ellen Mary Purdie.—I support the contention urged on behalf of Thomas Bilham Hill, and rely on the gift over. The words "then or thereafter" when used the second time have the same meaning as when they are first used. They refer to the period when Emily dies without leaving issue who attain twenty-one. Then Emily's share is to go to her sisters' children who "shall then or thereafter have attained the age of twenty-one." Mary's children alone take.

Bovill, for representatives of Emily's children.

Crossfield replied.

Cur. adv. vult.

April 3.—JOYCE, J.—In this case the testatrix gave one-third of the income of a money fund to her daughter Mary for her life, and after her death one-third of the capital to the children of such daughter whom she might leave her surviving and having attained or who should attain twenty-one, share and share alike. The testatrix made a similar gift to her daughter Charlotte and her children, and also to her daughter Emily and her children. There followed a gift over in these terms: [His Lordship read the gift over and also the ultimate gift over as above set out, and continued:] In other words, there is a settlement of a third share upon each of the daughters and her children with a gift over of the share of such of them as may die in a certain contingency—namely, without leaving issue her surviving who attained twenty-one—unto the testatrix's surviving daughters, practically in the same manner as their original shares, with an ultimate gift over to third persons to take effect in the contingency of all the testatrix's said daughters dying without leaving issue who attained twenty-one.

Now, whatever the effect might have been of this will in the absence of the ultimate gift over—see *Benn, In re*[1]—as each share given over is practically directed to be held upon the same trusts as an original share—the case given by Mr. Justice Kay in the concluding paragraph of his judgment in *Bowman, In re*[3]—it is clear, I think, having regard if necessary to the ultimate gift, that the word "surviving" with respect to daughters in the gift over, cannot be read in its literal or natural sense—*Waite* v. *Littlewood*[5] (as explained by Lord Justice Cotton in *Benn, In re*[1]) and *Wake* v. *Varah*.[7] But since the shares are all settled, the actual decision in the Court of Appeal in *Lucena* v. *Lucena*[4] does not apply.

The testatrix's daughter Charlotte died

(1) 29 Ch. D. 839.
(2) 32 Beav. 122.
(3) 41 Ch. D. 525.
(4) 47 L. J. Ch. 203; 7 Ch. D. 255.
(5) 42 L. J. Ch. 216; L. R. 8 Ch. 70.
(6) [1896] 2 Ir. R. 459.
(7) 45 L. J. Ch. 533; 2 Ch D. 348.

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first—namely, in 1888—leaving two children who attained twenty-one, but both of them died before the month of December, 1900, at which date there was no issue living of Charlotte. The testatrix's daughter Mary died in the year 1899, leaving two children, both of whom are still living and are defendants. The testatrix's daughter Emily died last of all in the month of December, 1900, without leaving any issue her surviving, although she had had issue (among other children) a daughter Florence, who attained twenty-one and died a spinster in the year 1889.

The question to be determined is, who upon the death of Emily became entitled to her share. There was no actually surviving daughter of the testatrix at that time, and the only one who survived by her children or issue was Mary. The case is precisely that put by Lord Justice Cotton when, in giving judgment in *Lucena* v. *Lucena*,[4] he says, "The fact of shares being settled, and the fact of the ultimate gift over being only to arise in the event of a failure of all children and issue who are objects of the testator's bounty, are circumstances each of which may properly be relied upon as shewing that 'survivors' is not to receive its strict construction. Each of these circumstances exists in the present case. If, with the gift over standing as it does, there had been no settlement of the daughter's shares, we are of opinion that the word 'surviving' would not have received its strict construction, and must have been construed 'other'; and our opinion is that the circumstances of the shares of some of the children named in the will being settled is not sufficient to give the word 'surviving,' as a matter of construction, the meaning of 'survivors' in person or in issue taking an interest under the will, though that would have been the effect of the gift to survivors if the shares of all the children, and not of some only, had been settled."

Under the circumstances of the present case, it is, I think, immaterial whether the survivorship be by children or issue. Counsel for the representatives of the children of Charlotte who attained twenty-one, in his able argument, claimed that they ought to participate. But the issue of Charlotte did not survive Emily any more than Emily's daughter Florence did; and it would, in my opinion, be a strange result to admit the deceased children of Charlotte while excluding Florence, the child of Emily. The decision of the Irish Court in the case of *O'Brien* v. *O'Brien*[6] was very properly pressed upon me. I have read more than once the voluminous judgments in that case. They contain many passages the reasoning of which I am unable to follow, and with other passages I cannot agree. The truth is that in many cases where the word "surviving" is reported to have been read as "other," all the stocks were in fact surviving; and it was I think really upon that ground that the Court decided as it did. At all events, I prefer the reasoning of Lord Selborne in *Waite* v. *Littlewood*[5] and of the Master of the Rolls and Lord Justice Cotton in *Lucena* v. *Lucena*.[4] And accordingly I decide this case in accordance with the opinion of Lord Justice Cotton, as expressed in the concluding words of the passage which I have quoted from his judgment in that case. This recognises the idea of survivorship in the use by the testatrix of the term "surviving daughters," and does less violence to the words she has used than I should do if I followed *O'Brien* v. *O'Brien*,[6] and read "surviving" merely as "other," without considering whether the other daughters did or did not survive in any sense of the word.

The result is that, in my judgment, the children of Mary are alone entitled to the one-third of which Emily received the income during her life.

Solicitors—Routh, Stacey & Castle, for plaintiffs; C. G. Hobbs, for defendant T. B. Hill; C. W. Hird, for defendant E. M. Hind; Freshfields, for defendant Mrs. Purdie.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

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[IN THE COURT OF APPEAL.]

COLLINS, L.J.
STIRLING, L.J.
1901.
May 10.

BLUNDELL'S TRUSTS, *In re.*

Married Woman—Restraint on Anticipation — Removal — Benefit of Woman — Increase of Income—Money in Court—Change of Investments—Payment out to Trustees of Settlement—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 39.

A married woman was under a will, in the events which had happened, absolutely entitled to a fund in Court, subject only to a restraint on anticipation during the life of her husband. The fund was standing to a separate account. By the settlement made on her marriage she covenanted to settle after-acquired property. Under the settlement she was restrained from anticipation, and her husband took a life interest in the settled funds after her death. There were no children. The settlement allowed a wider range of investment than the Court allowed for the investment of money under its control. The lady wished to increase her income, and also wished that the fund in Court should pass to the trustees of her settlement under her covenant. She applied to the Court for removal of the restraint on anticipation imposed by the will, and for payment of the fund out of Court to her trustees:—Held, *that no case of such predominant benefit to the lady had been made out as to warrant the Court in removing the restraint on anticipation, and the application must be refused.*

Appeal from a decision of Farwell, J., upon a petition to obtain transfer and payment out of Court to the trustees of a settlement dated November 27, 1884, of certain securities and moneys standing to the credit of "In the Matter of the Trusts of the will of James Blundell deceased," to an account entitled "The settled share of Margaret Alice Sturrock wife of David Sturrock."

The petitioner, Mrs. Sturrock, was entitled under the will of James Blundell dated April 11, 1857, to a certain share of his residuary estate, such share being settled by the will upon trust for her for life with a restraint upon anticipation, and after her death upon trust for her issue as therein mentioned. In default of issue the share belonged to her absolutely. The petitioner was now fifty-nine years of age. She had been married sixteen years and had had no children. By the settlement dated November 27, 1884, made on her marriage, she covenanted to settle after-acquired property exceeding 300*l.* in value upon the trusts therein mentioned. Under the settlement the income of the trust funds was to be paid to the petitioner during her life for her separate use without power of anticipation, and after her death to her husband during his life. In default of children of the marriage who should take a vested interest, the trust funds were to be held upon trust, if the petitioner survived her husband, for her absolutely, but if she died in his lifetime upon trust for such persons and purposes as she should by will or codicil appoint. The investment clause in the settlement authorised a fairly wide range of investments, and there was power for the trustees to expend out of the trust funds a sum not exceeding 3,000*l.* in the purchase of a house for the personal residence of the petitioner and her husband, or the survivor of them. The petitioner's husband was still living.

The funds in Court representing the share of the petitioner under the will of James Blundell were invested in preference stocks of the Caledonian and North British Railways, and in Consols, and there was a small sum of cash. The income of the investments was about 600*l.* a year. The petitioner wished to increase her income, and a scheme of investment had been prepared by a firm of stockbrokers, shewing that if the money were paid out of Court and invested in investments authorised by the settlement her income would be improved by about 100*l.* a year. The petitioner took out a summons under section 39 of the Conveyancing and Law of Property Act, 1881, asking that the restraint on anticipation imposed by the will of James Blundell might be removed in order that she might be able to take steps to obtain transfer and payment out of Court of the investments and moneys standing to the credit

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of the account above mentioned to the trustees of her marriage settlement in pursuance of the covenant to settle after-acquired property contained in the settlement. The petition and summons came on together before Farwell, J., on February 19, 1901. He refused the application, being of opinion that it would not be for the benefit of the petitioner to bind her interest in the property so as to enable him to make the order for payment out of Court.

The petitioner appealed. The appeal was by consent heard by two Lords Justices.

Butcher, K.C., and *J. A. Strahan*, for the appeal.—There are three reasons why it would be for the benefit of the petitioner that the order should be made. In the first place she would get an increase of income. Under the settlement the money could be invested in securities which would not be sanctioned for money under the control of the Court, and that without any serious risk to the capital value. Investments of the class in which this fund is invested have during the last few years depreciated to the extent of about 20*l.* per 100*l.* nominal of stock, while the investments proposed by the brokers have not fallen to anything like that extent. That is shewn by the brokers' letter. This is a case of the kind in which the Court would remove a restraint upon anticipation—*Currey, In re; Gibson* v. *Way (No. 2)* [1887],[1] and *Wright's Trusts, In re* [1885].[2] Most of the cases under section 39 of the Act of 1881 have arisen with respect to women who have only a partial interest in the fund. In the present case the lady is, subject to the restraint on anticipation during the life of her husband, absolute owner of the fund. It cannot be said to be so manifestly for the benefit of the lady to have her money invested only in investments approved by the Court for money under its control that the Court will refuse to allow her to go outside them.

In the next place, the fund could be more easily managed if it were paid out of Court. The trustees would possibly have been able to save some of the loss from the recent depreciation if they had been in a position to sell.

Lastly, the petitioner wishes that this fund should become subject to her covenant to settle after-acquired property, and that cannot be until the restraint upon anticipation is removed. She feels a moral obligation to bring it into settlement so that her husband may have an interest in it after her death.

W. Gordon Fellowes, for the present trustees of the will and the trustees of the marriage settlement.—The trustees of the settlement do not claim the fund, but they are willing to receive it if handed to them, and hold it on the trusts of the settlement.

R. J. Parker, for other respondents.

COLLINS, L.J.—This is an appeal from an order of Mr. Justice Farwell, who has refused to remove the restraint on anticipation to which the petitioner is subject in order to enable her to obtain payment of a fund out of Court, and invest it as she may be advised. It seems to us, after carefully considering the arguments that have been addressed to us, that no case has been made out which justifies us in interfering with the order of Mr. Justice Farwell. It is clear that we could not make such an order as is asked for by the petitioner unless we were satisfied that it was for her benefit. She suggests that it is for her benefit in two ways. In the first place, she says that she would get a larger income from the fund if it were paid over to her than if it remained in the custody of the Court. That is a ground often adduced to the Court in such cases. It is a most substantial motive where money is invested in such securities as would be approved by the Court for money under its control, for seeking to increase the income by investing the money at some risk, it may be small or great, to the capital. It is true that in the present case the lady is, subject to the restraint on anticipation, herself the owner of the fund. There is no one to take any interest after her. There is this also put forward as a ground for our making the order, that she wishes when the restraint is removed to give effect to a covenant in her marriage

(1) 56 L. J. Ch. 389.
(2) 15 L. R. Ir. 331.

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settlement to bring money afterwards acquired into settlement. If she did that, the money would become subject to a settlement the powers of investment in which embrace a wider range of securities than this Court would sanction for money under its control.

We must approach this question in view of the long line of authorities which have laid down that it must be taken that the restraint on anticipation was imposed for good and sufficient reason. Is it a sufficient ground for interfering with that restraint, that the lady wishes to change the fund from investments of which the Court does approve to investments of which the Court does not approve for funds under its control, but which we are asked to sanction in the place of those of which the Court does approve, and which we should not be justified in sanctioning? Has the lady made out that that is for her benefit? It seems to me that the benefit of an improvement of income would be bought at the expense of a greater risk to the capital; and I cannot say that the materials before us as to the investments proposed by brokers, though no doubt of high standing and respectability, and even taking their view as to the securities which they mention, afford sufficient evidence to warrant us in saying that a change of investments such as she wishes would be for her benefit.

As to the carrying out of what she considers a moral obligation upon her, I think that is somewhat subordinate to the primary object of getting a larger income. No doubt, if she had these funds, she would bring them into settlement, so that her husband would take an interest in them after her death; but, on the whole, I think that Mr. Justice Farwell was right, and that we cannot interfere with the exercise of his discretion. No case of such predominant benefit to the lady has been made out as to warrant us in removing the restraint from the fund which has been imposed for good reason, and *prima facie* for the advantage of the lady. I think, therefore, that the appeal must be dismissed.

STIRLING, L.J.—I am of the same opinion. The petitioner is absolutely entitled to the fund in Court subject only to the restraint on anticipation during the life of her husband. On her marriage she made a settlement, which contains a covenant by her to settle after-acquired property, and that settlement contains a power of investment that allows a larger range of selection than the Court allows in respect of moneys under its control, and larger even than that given to trustees by the Trustee Act, 1893. The fund is at present invested in preference stocks of the North British and Caledonian Railways, and in Consols, and the investments yield an income of about 600*l*. The petitioner desires that an order should be made under section 39 of the Conveyancing and Law of Property Act, 1881, binding her interest in the fund in such a way that it should for one moment become vested in her absolutely free from the restraint on anticipation, and so become subject to the covenant in her settlement. The result would be that it would again become subject to a restraint on anticipation during the life of her husband. The lady is now fifty-nine, and there are no children who can take any interest under the settlement, and there is no person but herself entitled in remainder.

The question is whether the Court can say that it is for the benefit of this lady within the meaning of section 39 that what she wishes should be done. A good deal has been said—and it is a matter to be regarded—as to the fact that the petitioner is all but mistress of the property in question. Still I apprehend that, however much she might think that it is for her own benefit that the investments should be changed, the Court would not simply hand over the securities to her. That was laid down by Mr. Justice Chitty when speaking of this section in *Currey, In re; Gibson* v. *Way* (*No.* 2),[1] where he says: "The section is in general terms, and the Court must hold, in order to allow her (a married woman) to bind her interest, that it will be for her benefit. If I were simply asked to allow a married woman to convey her property where there is a restraint on anticipation and nothing more, and that were the whole case, I should decline to do it. Each case

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requires careful attention in order to see whether the transaction is one which will be beneficial to the married woman." That is the general principle which we have to apply here. The petitioner does not ask that the fund should be handed over to her, but that it may be vested in her for one moment so that it may be handed over to the trustees of her settlement, in order that they should make use of the wide powers of investment which they have under the settlement. She has consulted a firm of stockbrokers, and a letter from them suggesting a scheme of investment has been put in evidence. They suggest that, notwithstanding the present state of the market, in which there has been considerable depreciation in securities of the kind in question, a change of investment might be made which would increase her income by about 100*l.* a year, and they set out a list of securities in which they propose that the money should be invested. The main object of the scheme is really to secure a larger income; and I can only say that, looking at the proposed scheme and the list of securities set out, I am not satisfied that it would be wise to act upon it, or that it would be for the benefit of the lady. It is for her to make out that it would be for her benefit. It may be for her benefit, but I should not myself act upon the brokers' opinion without further enquiry, and without proper evidence. Without that, I should be unwilling to act upon this scheme; and that being so, I am not satisfied that the conditions have arisen upon which the Court can exercise the power of removing the restraint upon anticipation.

As to the other matter, the obtaining control of the fund so as to give effect to the covenant in the settlement, that seems to be a minor matter, and, in the view which I take, I cannot differ from Mr. Justice Farwell.

Appeal dismissed.

Solicitors—S. F. & H. Noyes, for appellant and trustees; Norris, Allens & Chapman, for other respondents.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

BYRNE, J.
1901.
Jan. 14, 15, 16.
April 23.

DEBENHAM *v.* SAWBRIDGE.

Vendor and Purchaser—Sale by Court—Defect in Title—Condition for Compensation for Misdescription—Mistake—Absence of Fraud—Rescission.

A condition of sale for compensation, "if any error or misstatement shall appear to have been made in the particulars of sale or these conditions," does not apply to a defect in title.

Riches, *Ex parte* (27 S. J. 313), *followed.*

On a sale by the Court a condition provided for compensation for "any error or misstatement" in the particulars or conditions. After conveyance it was discovered that the vendor had had no title to a portion of the property. All parties had acted bona fide, with reasonable ground for believing (subject to a possible doubt in the vendor's mind) that the title was a good one:—Held, *that the purchaser could obtain neither compensation under the condition nor rescission on the ground of common mistake.*

The facts were stated by Byrne, J., as follows:

"On July 9, 1897, certain property was put up for sale by auction under an order of the Court in an action of *Norton* v. *Norton*, which was an ordinary action for partition or sale. It was described in the particulars as 'freehold stabling, situate and being Nos. 21 and 22, on the south side of Mason's Yard, Duke Street, St. James's Square,' and as including (*inter alia*) 'dwelling over No. 21, containing—on the first floor, a sitting room, fitted with range and cupboards in recesses, and a back landing with iron door in party wall, communicating with No. 22, and coal cupboard under stairs. On the second floor, a front room, and a back room or kitchen with range and cupboard, sink and pump.' No question arises as to the rest of the property included in the sale, but the whole of it was described as 'let to Mr. William Rice, trading as Messrs. Smith and Co., jobmasters, by lease, dated May 3, 1897, for a term of 15¼ years, from March 25,

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1897, determinable by lessee at end of the first eight years on giving six months' notice.' At the foot of the particulars it was stated: 'An abstract or copy of the lease will be produced at the sale and may be previously inspected at the office of the vendors' solicitors.' Accompanying and affixed to the particulars and conditions of sale was a plan, upon which was a note as follows: 'Note.—This plan is published to show the position of the property and is believed to be correct but its accuracy is in no way guaranteed.' Upon this plan is shewn No. 21, as consisting of two coach-houses, and across is printed 'first and second floor dwelling over,' with arrows denoting that the first and second floor dwelling extends over the whole width of No. 21. The ninth condition provides that, 'if any error or misstatement shall appear to have been made in the particulars of sale or these conditions, such error or misstatement is not to annul the sale, or entitle the purchaser to be discharged from his purchase, and a compensation is to be made to or by the purchaser, as the case may be, and the amount of such compensation is to be settled by the Judge at Chambers.' The tenth condition provides: 'The property for sale is described in the existing lease, and no question shall be permitted as to the identity or quantity of the premises described therein and in the particulars of sale with the premises described in the previous documents abstracted, although the descriptions are not exactly the same. The property is sold subject to such tenancy, tenant's rights and rights of way, wall, fence, light and water and other easements, if any, and public outgoings as may affect the same, and the purchaser shall be taken to have had notice thereof and of the state of the premises though not expressly mentioned, and any previous tenancy appearing in the title shall be considered at an end.' The eleventh condition provides that, 'the sale being under an order of the Court, no person beneficially or equitably interested shall be required in that character to join in the sale and assurance, neither shall the vendor be bound to produce evidence relating to the dealings of any such party not in the possession or power of the vendor, and the assuring party or parties will be bound to convey only as trustee or trustees, and all facts or matters admitted, proved, stated, or proceeded on in the above mentioned action or certified by the Master, shall be deemed thereby conclusively evidenced. . . .'

"The plaintiff in the present action was the purchaser at the sale for 3,810*l*. On October 21, 1897, a conveyance of the property was duly made to him by the defendant Sawbridge as trustee, without covenants for title, and the purchase-money was paid into Court. The balance of purchase-money in Court to the credit of the action was dealt with by order in accordance with the Master's certificate finding the parties entitled, and the plaintiff signed a consent in writing admitting that he had received a conveyance of the hereditaments mentioned in the particulars and consenting to the distribution or application of the purchase-money which he had paid into Court in any manner the Court might authorise. Under the order made after this consent, the costs of the action were paid out of the purchase-moneys, and the residue, after providing for duty, was actually distributed and dealt with as to three-sixths by payment to the defendants Frances Jane Norton, Jane Ellen Norton, and Rosalie Norton; as to two other equal sixth parts, first, by carrying them over to the separate account of Edward Henry Norton, who shortly afterwards died, and then by paying the same to Elizabeth Norton as his legal personal representative; and as to the remaining sixth, by carrying the same over to the account—'Share of Constance Ellen Hysom, deceased, to which the plaintiff Edward Henry Norton, an infant, is entitled subject to estate by curtesy of defendant James Hysom and subject to duty (if any) payable on his death.' The whole of the purchase-money has, therefore, been dealt with by the Court, which has no longer any control over the fund except as to the one-sixth carried over to a separate account, and over that only for the purpose of dealing with it in accordance with the rights of parties as shewn by the title of the account.

"On November 14, 1898, an action was commenced by Earl Beauchamp against

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Rice, the tenant, to recover possession of the rooms over No. 21, and proceedings were ultimately put an end to by Rice paying six years' arrears of rent to the earl, and by the plaintiff, the purchaser, buying the rooms in question for 300*l.*, he also paying 75*l.* for costs. It is not now in dispute that the rooms in question did not, at the time of the sale, form part of the property the subject of the partition action, but belonged to Earl Beauchamp. It has also, since conveyance, been discovered that there is a cellar underneath No. 21, forming part of a range of cellarage, entered only from a trap-door situate in the mews some distance away from No. 21, and not divided from the rest of the cellarage under the other houses, and, although it is not exactly known to whom the cellarage belongs, it is pretty clear that it does not form part of the property the subject of the action of *Norton* v. *Norton*. The existence of the cellar was unknown to any of the parties to the action and to the purchaser until some time after the conveyance had been executed; and there was no suspicion of its existence in the minds of the Master, the conveyancing counsel to the Court, the solicitors acting in the matter, or any one concerned at any time prior to the completion of the sale. The only entrance to the rooms over No. 21, except through the iron door in the party wall between Nos. 21 and 22, is from a passage, the access to which is obtained by means of a staircase behind No. 17 in the mews, the passage running past the level of the rooms over several sets of stabling from which such rooms are entered. There is no communication between the coach-houses on the ground floor of No. 21 and the rooms above.

"The action is brought to obtain compensation under the 9th condition of sale from the defendant Sawbridge, the trustee, for alleged errors and misstatements in the particulars and conditions in respect of the dwelling-rooms over and the cellar under No. 21; or, alternatively, from the the other defendants as beneficiaries. Alternatively, it is sought to set aside the conveyance on the ground of common mistake.

"It is absolutely clear that there has been no fraud or intentional deception on the part of any one, and that every one concerned in the conduct of the sale and in the preparation of the particulars and conditions has acted with perfect good faith throughout. Every step taken before the Master, and all the instructions put before the conveyancing counsel to the Court, with his opinions, have been carefully examined before me, as also have the abstract, requisitions on title, and answers. It appears to me that all concerned in the sale believed, and had reasonable ground for believing, that a good title could be made to the dwelling-rooms in question, subject to a doubt which might be fairly provided against by condition. The draft particulars of sale, with abstract of title and instructions, were duly laid before the conveyancing counsel. I think these instructions are most clear, and reflect credit upon the gentleman who prepared them. There was a considerable difficulty in identifying the property the subject-matter of the action, so far as regards No. 21, and particularly in reference to the dwelling-rooms over the coach-houses. It would take too long, and would serve no useful purpose, to go through every detail; but I must mention two matters. Mr. William Rice, the tenant, was in occupation, by his manager, of the whole of lots 21 and 22, including all the rooms over. He held also several other tenements in Mason's Yard. He had taken from the trustees of one Smith, in 1890, assignments of several leasehold properties in Mason's Yard, including that comprised in a lease dated August 31, 1870, made between the predecessors in title of the parties to the action of *Norton* v. *Norton* and William Seymour, whereby certain property was demised to Seymour for twenty-one years from June 24, 1870, at the rent of 200*l.* a year. The parcels in this lease expressly include the rooms over No. 22, and make no mention of rooms over No. 21, but they do appear to include part, if not all, of the ground floor of that tenement. There is a small plan on this lease, not, however, incorporated in the description, which appears to include part, but not the whole, of the site of No. 21. The term granted by this lease having come to an end in June, 1891, a

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fresh lease was granted to Rice, dated June 26, 1891, of premises by the same description as in the former lease, for twenty-one years from June 24, 1891, at a rent of 200*l.* a year. There was no plan upon this lease. Rice never paid rent to any person for the rooms over No. 21 (unless the rent of 200*l.* a year included rent for them), and he had so informed the vendor's solicitors. There were other matters, all of which are fully detailed in the instructions before mentioned, for rendering it a matter of serious doubt whether any portion of No. 21, but especially whether the rooms over, were the vendor's property; and, in advising, the conveyancing counsel says: 'Upon the whole, on the above carefully prepared statement, I am of opinion that the coach-house and harness-room in question' (that is No. 21) 'are most probably part of the trust estate, but not the rooms over the same with any certainty, and that an adverse claim might at any time arise to them for some years to come, so the conditions and particulars of sale must be accordingly.' In the particulars as then settled a note appears: 'Note.—The dwelling rooms over the eastern coach-houses, harness room, and way thereto and the five-stall stable, do not certainly form part of this property for sale. . . .' I need not read it, but amongst the conditions as originally settled was one (No. 7) mentioning the fact that there was some doubt as to the exact extent of the property comprised in the title as mentioned in the particulars of sale, and providing that, as to such part of the property as to which there was any such doubt, the purchaser should accept a conveyance from the vendor so far only as he could make the same. Condition 10, as originally settled, provided for a declaration by the tenant that the premises for sale had been held in conformity with the title, as deduced, for twenty years, and precluding any question as to identity or quantity. The matter subsequently came before the Master, when he directed that an endeavour should be made to arrange with Mr. Rice to take a new lease at the old rent of all the property proposed to be included in the sale, and, after this course had been approved in conference with the conveyancing counsel, negotiations were entered into, resulting in an acceptance by the tenant of a new lease, dated May 3, 1897, by a description clearly including the whole of the property. The Master then considered that the grant of the new lease would probably enable counsel to modify condition 7 and the statement in the particulars as to its being uncertain whether parts of the property were included, and he expressed a view that it was desirable they should be modified, if possible. The solicitors to the parties having the conduct of the sale did not see their way to getting the declarations mentioned in condition 10, or in the observation in the margin of the former instructions. The rate-books had been examined by the solicitor to see if Earl Beauchamp was entered as owner of the rooms, but it was discovered that in 1885, a time when the lease of 1870 was running, Earl Beauchamp was entered as owner of No. 18, described as a coach-house, but not as owner of any other premises in the yard. These fresh facts were clearly stated in further instructions laid before the conveyancing counsel, who then resettled particulars and conditions of sale in their present form, and added to his former opinion: 'On my further instructions I am able to withdraw this observation' (an observation that he thought the attention of the chief clerk should be drawn to his very special instructions and his notes thereon, and in accordance with which the particulars and conditions had been settled) 'and have resettled the particulars and conditions in accordance therewith, and as suggested by the Master, in which suggestion I cordially agree, and the sale may proceed upon this.' This opinion is dated May 14, 1897, and the sale then took place in due course. An abstract was furnished and examined, requisitions were made and answered, and the title was accepted, after which the sale was duly completed. The only requisition calling for notice is part of the sixth, which is: 'What was the object of granting this lease' (referring to the lease of 1897) 'for a concurrent term with the then subsisting lease of 1870?' (meaning 1891). To which the reply was: 'The lease was

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granted with the sanction of the Court in the action.' The purchaser was apparently satisfied with this answer. It also appears that a letter was written to Mr. Rice, the tenant, making some enquiry as to his tenancy, but this was never received, or replied to, and a clerk was also sent to enquire of him, but the clerk only saw some person on the property who could give no information, and then this matter also was dropped. It was not until more than a year after the conveyance that proceedings were commenced by Earl Beauchamp, and it was not until some months after that that the existence of the cellar was discovered."

Levett, *K.C.*, and *MacSwinney*, for the plaintiff. — There was a mutual mistake of both vendor and purchaser, without any fraud, and the purchaser is entitled to compensation even after conveyance, under the 9th condition of sale—*Turner and Skelton, In re* [1879][1] (where Sir G. Jessel, M.R., disagreed with the decision of Malins, V.C., in *Manson* v. *Thacker* [1878][2]), and *Palmer* v. *Johnson* [1884].[3] In *Clayton* v. *Leech* [1889],[4] where compensation was not allowed, there was no contract for it. Where the mistake is only unilateral, there must be fraud or misrepresentation amounting to fraud, in order to obtain redress, but not where the mistake is mutual, as here—*May* v. *Platt* [1900].[5]

On the deed itself there is the misstatement that the property which was purported to be conveyed was part of the settled property the subject-matter of the partition action, which in fact it was not; and on the authority of *Bingham* v. *Bingham* [1748],[6] *Cooper* v. *Phibbs* [1867],[7] and *Jones* v. *Clifford* [1876],[8] the purchaser is entitled to rescission.

This was a sale by the Court, and it is the duty of the Court, in selling, to be strictly fair towards purchasers—*Else* v. *Else* [1872][9] and *Banister, In re; Broad* v. *Munton* [1879].[10] It has not done all it ought in this respect.

The purchaser therefore is entitled to relief.

Norton, *K.C.*, and *Austen-Cartmell*, for Sawbridge.—It is not denied that if this were properly a case of misdescription a condition for compensation, such as condition 9, might operate even after conveyance—*Cann* v. *Cann* [1830],[11] and other cases. But a condition of that kind does not apply to a defect of title, which is the present case. Misdescription and defect of title are distinct things. No case is to be found in which, property being properly described but the vendor not having title, the purchaser has recovered compensation. *Thomas* v. *Powell* [1794][12] shews that a question of title has nothing to do with misdescription. For defect of title a purchaser must have recourse for his remedy to his covenants for title, if any.

Rescission after conveyance can only be obtained on the ground of unfair dealing—*per* Farwell, J., in *May* v. *Platt*.[5] No unfair dealing exists here. Where the vendor *bona fide* believes he has the property to sell, it is a case of *caveat emptor* —*Clare* v. *Lamb* [1875],[13] and *per* Lord Selborne, L.C., in *Brownlie* v. *Campbell* [1880].[14] *Soper* v. *Arnold* [1887][15] is a precise authority in the vendor's favour, although, strictly speaking, Cotton, L.J.'s remarks about relief after conveyance are *dicta*, there having been no completion in that case.

[BYRNE, J., referred to *Beyfus and Masters's Contract, In re* [1888].[16]]

That is in the vendor's favour. There is one exception to the rule that the purchaser cannot obtain rescission after conveyance, and that is where there has been a common mistake by which he has bought his own property. In such a case he has an equity to get his money back. That is the only ground on which *Bingham* v.

(1) 49 L. J. Ch. 114; 13 Ch. D. 130.
(2) 47 L. J. Ch. 312; 7 Ch. D. 620.
(3) 53 L. J. Q.B. 348; 13 Q.B. D. 351.
(4) 41 Ch. D. 103.
(5) 69 L. J. Ch. 357; [1900] 1 Ch. 616.
(6) 1 Ves. sen. 126; 3 ib. 81.
(7) L. R. 2 H.L. 149.
(8) 45 L. J. Ch. 809; 3 Ch. D. 779.
(9) 41 L. J. Ch. 213; L. R. 13 Eq. 196.
(10) 48 L. J. Ch. 837; 12 Ch. D. 131.
(11) 3 Sim. 447.
(12) 2 Cox, 394.
(13) 44 L. J. C.P. 177; L. R. 10 C.P. 334.
(14) 5 App. Cas. 925, 936–7.
(15) 57 L. J. Ch. 145; 37 Ch. D. 96.
(16) 39 Ch. D. 110.

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Bingham[6] can be supported—*Cooper* v. *Phibbs*.[7] *Bingham* v. *Bingham*[6] is a case which stands alone and was never liked by Lord St. Leonards, who, in the last edition of his work on *Vendors and Purchasers*, said it might be supported only on the ground of a man buying his own property. Lindley, L.J., in *Huddersfield Banking Co.* v. *Lister* [1895],[17] says the same. So also in *Stewart* v. *Stewart* [1839].[18] *Jones* v. *Clifford*[8] is distinguishable from the present case, as there the contract was not completed, the purchaser was buying his own property, and it was a case of tenure, not title. The *semble* at the end of the headnote of that case only applies where a purchaser is buying his own property.

Manson v. *Thacker*,[2] *Turner and Skelton, In re*,[1] and *Palmer* v. *Johnson*,[3] cited on the other side, are proper cases of misdescription and do not apply.

Conditions for compensation must be construed strictly. Here the conditions provide for the compensation to be settled by the Judge at chambers—namely, in the partition action. The purchaser can get it in no other way. It must be got, if at all, before the money is distributed, while the action is going on. He can get it only *modo et forma*. If there were no condition, he would be excluded altogether—*Clayton* v. *Leech*.[4]

The defendant Sawbridge was merely a bare trustee. He is not a necessary party to an action for setting aside the sale or getting compensation. He signed no contract for sale. He received no part of the purchase-money. He only signed the conveyance by direction of the Master. No repayment can be claimed from him.

As to the duty of the Court to be fair, in *Else* v. *Else*[9] and *Banister, In re*; *Broad* v. *Munton*,[10] there were clearly inaccurate statements made to the purchaser.

[BYRNE, J., referred to *Beioley* v. *Carter* [1869].[19]]

Here the conditions were fair and reasonable. No doubt if a condition is framed to avoid an objection, it must state fairly what the objection is. That was done here.

[BYRNE, J.—All parties thought they had, in all probability, the title to the property, and the Court and the conveyancing counsel and the Master thought in the circumstances the conditions were fair to make.]

And they had reasonable ground for thinking so. Nothing in the particulars or conditions is the least misleading. It must have been obvious from the abstract of title that the only motive for granting the new lease in May, 1897, was to correct any misdescription of parcels. The vendors thought their tenant was obtaining an adverse title against them; they never thought of a title in anybody else.

To sum up—firstly, this action is misconceived for rescission or compensation after conveyance; secondly, condition 9 does not refer to a defect of title; thirdly, if it does apply, the plaintiff is now too late; and lastly, the conditions are fair and above-board in every way.

Rowden, K.C., and *Cann*, for beneficiaries.—The benefit of the arguments adduced on behalf of the defendant Sawbridge is craved on behalf of these defendants. The action is misconceived. This is a case of a completed conveyance, which is a wholly different thing from a contract *in fieri*. After conveyance unfair dealing alone will upset the completed contract. Condition 9 has no reference to a defect in title. Apart from condition, compensation is excluded by *Clayton* v. *Leech*.[4] In *Riches, Ex parte* [1883],[20] referred to in *Webster on Conditions of Sale* (2nd ed.), pp. 94, 275, a condition was almost identical with the present.

[BYRNE, J.—Word for word the same except for "omission."]

And the purchaser could not obtain compensation under it for a defect of title. There is no suggestion in any of the textbooks that such a condition applies to defect of title.

Bingham v. *Bingham*[6] is an exception to a rule, and rests on the fact of a purchaser buying his own property—*Pollock on Contracts* (6th ed.), p. 473. In such a case there is no conveyance to undo, as

(17) 64 L. J. Ch. 523, 526; [1895] 2 Ch. 273, 281.
(18) 6 Cl. & F. 911, 968.
(19) 38 L. J. Ch. 283; L. R. 4 Ch. 230.
(20) 27 S. J. 313.

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nothing has passed; a vendor has got money and given nothing for it. But equity does not regard a mere partial failure of consideration, which is all that exists in the present case. This is a case of common mistake.

[BYRNE, J.—Common mistake relating to substantial subject-matter, though induced innocently by the action of one party, will be sufficient for the Court to set aside even a consent order, which is the strongest, perhaps, of agreement cases—*Wilding* v. *Sanderson* [1897].[21]]

The mistake here was in defect of title, not as to a matter going to the root of the contract; that is not sufficient to entitle the purchaser to succeed—*Clare* v. *Lamb*[13] and *Soper* v. *Arnold*.[15]

There has been absolutely no fraud or impropriety. The plaintiff therefore cannot succeed.

Levett, K.C., in reply.—For the Court to be fair, the purchaser ought to have been told, "Although there has been some question as to the title to the dwelling over the stabling, there shall none be raised now," or "The title shall commence with the new lease—that is, that of May, 1897." Sufficient candour has not been shewn, not such as the Court expects from its own officers, who have not been sufficiently careful to maintain its traditions. The purchaser is not too late. The conditions do not say the amount of compensation is to be fixed "in the action" but merely "by the Judge at chambers." A real defect such as exists here cannot be satisfied by a merely general condition like condition 10. The answer given to requisition 6 was evasive and improper, and not such as the Court can countenance, inasmuch as it pledged the Court's credit. *Soper* v. *Arnold*[15] has nothing to do with a vendor not having title; there the purchaser failed because of his own default in not completing. The present case is a common mistake of fact going to the root of the contract, not a mistake of opinion as to the effect of the title. What Farwell, J., says in *May* v. *Platt*[5] about fraud being necessary in order to set aside a contract after conveyance has reference only to the case of unilateral mistake. Lord Selborne's *dicta* in *Brownlie* v. *Campbell*,[14] which have been referred to, apply merely where the parties with their eyes open have taken the risk. The condition in *Beyfus and Masters's Contract, In re*,[16] pointed clearly to misdescription strictly. *Bingham* v. *Bingham*[6] is not an exception to a rule, but is called "a leading example" by Lindley, L.J., in *Huddersfield Banking Co.* v. *Lister*.[17] Conditions must be construed against the framer of them. It is immaterial whether condition 9 does or does not apply to defect of title; the question here is one of mistake of fact.

Cur. adv. vult.

April 23.—BYRNE, J., after stating the facts: In my opinion the purchaser is not entitled to claim compensation under the ninth condition, inasmuch as it does not, and is not intended to, apply to the case of a defect of title, but only to error or misstatement in the description of the subject-matter of the sale—such, for example, as an error in quantity or nature or tenure or amount of the vendor's interest. In the present case there is no error or misstatement in the description of the property; the real complaint is that no title can be shewn to a part of the property so described. There is a note of a case *Riches, Ex parte*,[20] which does not appear in any of the regular reports, but the note itself appears to be full and careful, and I see no reason to doubt its accuracy. In that case a question arose as to the effect of a condition for compensation contained in a contract for sale of real estate. Property described in particulars of sale as freehold was put up for sale under the order of the Court in an action in the Chancery Division, and the conditions of sale provided that, "If any error, misstatement, or omission shall appear to have been made in or from the above particulars or these conditions, such error, misstatement, or omission is not to annul the sale, nor entitle the purchaser to be discharged from his purchase, but compensation is to be made to or by the purchaser, as the case may be, and the amount of such compensation is to be settled by the Judge at chambers." Before the purchase was completed the vendor, a mortgagor, had filed a liquidation

(21) 66 L. J. Ch. 684; [1897] 2 Ch. 534.

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petition, and the purchase was completed by his trustee, who executed a conveyance to the purchaser, entering into the ordinary trustee's covenants. About two years after the conveyance the vendor died, and it was then discovered that as to part of the property sold he, instead of being owner in fee, had only a life estate. The purchaser claimed compensation under the above condition of sale, and applied, in the first instance, to the Bankruptcy Court, which refused his application, and in the Court of Appeal, affirming this decision, Sir George Jessel, M.R., said "that it was a very hard case, but he could not see his way to assist the applicant. In his opinion, the condition as to compensation did not apply to the case of a defect of title. The representation in the particulars of sale was that the estate was a freehold estate, and so it was if it was only a life estate, though he agreed that both parties understood it to mean an estate in fee-simple. But, taking it that the representation was that it was an estate in fee-simple, still the condition as to compensation did not apply." With this judgment Lord Justice Baggallay and Lord Justice Lindley occurred. This appears to be a clear decision as to the non-applicability of such a condition to a defect in title. See also *Beyfus and Masters's Contract, In re*,[16] where, however, the condition provided for errors "in the description of the property." Apart from condition, compensation cannot be recovered after conveyance in respect of defect of title—see *Clayton* v. *Leech*,[4] a decision of the Court of Appeal approving *Besley* v. *Besley* [1878].[22]

There remains the question whether or not the purchaser is entitled to the alternative relief he asks, of rescission on the ground of mutual mistake. This is relief which may undoubtedly be granted in a proper case even after conveyance, although there has been nothing in the nature of fraud. In *Bingham* v. *Bingham* [6] the bargain and conveyance were nugatory—the defendant had nothing to sell or convey. This case has been repeatedly approved and acted upon—see *per* Lord Cranworth in *Cooper* v. *Phibbs*,[7] and *per* Vice-Chancellor Hall in *Jones* v. *Clifford*.[8] Lord Selborne, in *Brownlie* v. *Campbell*,[14] points out that, where there are errors in the particulars unconnected with fraud, when the conveyance takes place, it is not the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud, or a case of misrepresentation amounting to fraud, by which the purchaser may have been deceived; and, after citing *Bell's Principles as to the Law of Scotland*, to the effect that where there is no warrandice the purchaser has remedy against the deficiency only on one of two grounds—either he must make out a case of misrepresentation and fraud, or he must prove an error *in substantialibus* sufficient to annul the whole contract — Lord Selborne continues: "It appears to me that the cases which have been decided in this country and in Ireland are to the same effect." He also refers to what was said by Lord Cottenham in *Wilde* v. *Gibson* [1848] [23] and to *Legge* v. *Croker* [1811].[24]

Assuming that there has been a common mistake on the part of vendor and purchaser in the present case, and assuming that there need not be a total failure of consideration to justify rescission after conveyance, still I do not consider that the error has been of such a nature as to justify it in the present case. I am not quite sure that the vendor and purchaser both shared in the same mistake. The vendor thought he was entitled, subject to a possible risk, and the purchaser, if he thought in like manner, took the risk. If, however, he absolutely thought the vendor entitled, without any risk, the mistake was not the same on both sides. I do not think the plaintiff can succeed on the ground of mutual mistake, and there are other and serious difficulties in his way. I do not see how he could, under any circumstances, obtain repayment of his purchase-money from the defendant trustee, who has not had it. The purchase-money has been dealt with by the order of the Court, and I think the trustee vendor

(22) 9 Ch. D. 103.

(23) 1 H.L. C. 605, 620.

(24) 1 Ball & B. 506.

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must, under those circumstances, be exonerated from liability.

Upon the whole case I think the plaintiff fails and the action must be dismissed, and with costs, unless the defendants see their way to forego them.

Solicitors—T. G. Bullen, for plaintiff; Church, Rendell, Todd & Co., for defendant Sawbridge; Charles Sawbridge & Son, for some defendants; Alfred E. Copp, for other defendants.

[*Reported by Arthur Lawrence, Esq., Barrister-at-Law.*

STIRLING, J. 1900. May 26. } CHISHOLM'S SETTLEMENT, *In re*; HEMPHILL'S SETTLEMENT, *In re*; HEMPHILL *v.* HEMPHILL.

Power of Appointment—Married Woman Married before 1881—*Restraint on Anticipation of Life Interest—Release of Power—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 52.

A married woman married before the Conveyancing and Law of Property Act, 1881, *may under section* 52 *of that Act by deed unacknowledged release a power of appointment over personal property in which she has a life interest subject to a restraint on anticipation.*

By an indenture of settlement dated July 7, 1866, and made between Eliza Chisholm of the one part and trustees of the other part, certain personal property was settled upon trust for the said Eliza Chisholm for her life for her separate use without power of anticipation, and after her decease upon trust to pay the income, or any part thereof, for the benefit of any husband of hers who might survive her, for his life or for any shorter period, as she might appoint, and subject as aforesaid upon trust for the issue of the said Eliza Chisholm as she should by deed or will appoint, and in default of appointment upon trust for her children, who being sons should attain twenty-one years or die leaving issue surviving, or being daughters should attain that age or marry, in equal shares. The settlement also contained a covenant by Eliza Chisholm for the settlement of after-acquired property, and a power for her with the consent in writing of the trustees to vary or revoke all or any of the trusts or provisions of the same.

By another indenture dated July 9, 1872, being a settlement made in contemplation of the marriage then intended and shortly afterwards solemnised between the said Eliza Chisholm and the defendant Charles William Hemphill, the said Eliza Chisholm appointed that if the said marriage should take effect and the said C. W. Hemphill should survive her, he should have during the residue of his life such interest as therein mentioned in the income of the property comprised in the first above-mentioned settlement, and the said first-mentioned settlement was in exercise of the power vested in the said Eliza Chisholm thereby further varied by providing that the power of appointment by such settlement given to the said Eliza Chisholm among her issue might during the joint lives of the husband and wife be exercised by them jointly by deed, and in default of such appointment by the survivor of them by deed or will, and the said Eliza Chisholm thereby released her power of revocation and new appointment under the first-mentioned settlement.

Eliza Chisholm intermarried with C. W. Hemphill on July 10, 1872. There were issue of the marriage nine children only, all of whom were still living, and the eldest of whom was the plaintiff Charles Percy Chisholm Hemphill, who had attained the age of twenty-one in 1894. No appointment had been made under any power contained in either of the above-mentioned settlements in favour of the issue of the marriage.

By an indenture dated January 31, 1899, and made between the said C. W. Hemphill and Eliza Hemphill of the first part, the plaintiff C. P. C. Hemphill of the second part, and T. G. Hartland and B. Hartland of the third part, after reciting an intended mortgage by the plaintiff of his interest under the said settlements, the said C. W. Hemphill and Eliza Hemphill released all the property subject to the said settlements from every power of appointment given to the releasing

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parties, jointly, or to the survivor of them or to the said Eliza Hemphill, to the intent that the same might be determined and the property subject thereto might be released therefrom and go in default of appointment.

Doubts having arisen as to whether Mrs. Hemphill could validly release her power under the said settlement, the plaintiff took out this originating summons to have the question determined.

R. Rowlands, for the plaintiff.—Mrs. Hemphill, who was married before the Conveyancing and Law of Property Act, 1881, can release her power of appointment, as she is within the terms of section 52 of the Act.[1] That section is simply an extension of the powers given to married women by Malins's Act (20 & 21 Vict. c. 57). There has been no decision on section 52, but in *Farwell on Powers* (2nd ed.), p. 18, the following passage occurs: "It is submitted that it was always competent to her [*i.e.* the married woman] to release her power over personalty vested in possession, and that she may now by deed unacknowledged release her power over any property, whether real or personal, and whether in possession or reversion, and whether she is restrained from anticipation or not, under the provisions of the Conveyancing Act, 1881, s. 52. The word 'person' in the Act includes females as well as males (13 & 14 Vict. c. 21, s. 4); and it appears impossible to say that a married woman is not accurately described as a female person. The Married Women's Property Act, 1882, appears not to touch the question. It is submitted that a restraint on anticipation cannot affect the married woman's capacity to release her power; it is difficult to see why a veto on alienation to a limited extent should prevent the release and extinguishment of the capacity of alienation by power so far as permitted."

(1) The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 52, is as follows:

"(1) A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power:

"(2) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act."

[STIRLING, J., referred to *Wolstenholme on the Conveyancing and Settled Land Acts* (8th ed.), p. 112.]

The doubt there expressed as to whether acknowledgment is not necessary in the case of a release by a married woman of a power coupled with an interest is not well founded. At any rate it has no application here, for the lady has no interest in the property after her death that could be affected by the release.

R. J. Parker, for the trustees of the settlement.—Mrs. Hemphill is restrained from anticipating her life interest. In the Fines and Recoveries Act, 1833 (3 & 4 Will. 4. c. 74), there is no express provision as to incapacity arising from such a restraint. The Irish Fines and Recoveries Act (4 & 5 Will. 4. c. 92), s. 69, does contain such a provision, and it has been held under that Act that a restraint on anticipation of the life interest would not prevent the release of a power—*Heath* v. *Wickham* [1880].[2]

[He also referred to *Baggett* v. *Meux* [1846],[3] *Onslow, In re; Plowden* v. *Gayford* [1888],[4] and *Davenport, In re; Turner* v. *King* [1894].[5]]

Bligh, for Mrs. Hemphill, submitted to the Court.

STIRLING, J.—It seems to me that the present case is within the words of section 52[1] of the Conveyancing and Law of Property Act, 1881, and I can see no sufficient ground for deciding that the Legislature did not mean what it said. If it is necessary for me to add anything more, I can only say that I concur with the reasoning in the passage in *Farwell on Powers* (2nd ed.), p. 18, which was cited to me, without repeating it. I hold that the release is good.

Solicitors—Claude S. Lermitte; Crowders, Vizard & Oldham, agents for Ticehurst & Sons, Cheltenham.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

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(2) 5 L. R. Ir. 285.

(3) 15 L. J. Ch. 262; 1 Ph. 627; affirming 13 L. J. Ch. 228; 1 Coll. 138.

(4) 57 L. J. Ch. 940; 39 Ch. D. 622.

(5) 64 L. J. Ch. 252; [1895] 1 Ch. 361.

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COZENS-HARDY, J. 1901. April 25. } TAYLOR, *In re*; SMART *v.* TAYLOR.

Will—Residue—Contingent Gift—Intermediate Income.

The testator made a residuary gift in trust for all the children of his sister who being sons should attain the age of twenty-one years, or being daughters should attain that age, or marry under that age, in equal shares, and if there should be only one such child, the whole to be in trust for that one child; and in the event of his sister not having any children or child who should attain a vested interest then over. The sister had never had any children who lived more than a few hours, and was forty-six years of age:—Held, *that the gift carried with it the intermediate income, and that the income undisposed of must be accumulated for twenty-one years from the testator's death, or until the fund became divisible.*

Love, *In re*; Green *v.* Tribe (47 L. J. Ch. 783), *dissented from on this point.*

The testator by his will dated April 6, 1900, after appointing the plaintiffs executors and trustees thereof, and giving divers specific and pecuniary bequests, made a residuary devise and bequest to his trustees upon trust for sale and conversion, and after payment thereout, and with and out of his ready money, of his funeral and testamentary expenses and debts, and of certain legacies thereinbefore mentioned, at the discretion of his trustees to invest the residue of the said moneys, with power for his trustees from time to time, at such discretion as aforesaid, to vary such investments, and in the event (which happened) of the testator not leaving any child or children who should attain a vested interest in the residuary trust funds, he directed his trustees to hold the residuary trust funds in trust to pay thereout certain further pecuniary legacies, and to set apart two funds, and made the following provision: "And my trustees shall stand possessed of the remainder of the residuary trust funds, and also of the said appropriated funds (subject as aforesaid), In trust for all the children of my said sister, Mary Ann Smart, who being sons shall attain the age of 21 years, or being daughters shall attain that age, or marry under that age, in equal shares, and if there shall be only one such child the whole to be in trust for that one child; And in the event of my said sister Mary Ann Smart not leaving any children or child who shall attain a vested interest in the remainder of the residuary trust funds as aforesaid, then and in such case I direct my trustees to hold the same funds In trust, as to two third parts or shares thereof, to be equally divided between all the children of the said John Taylor, on their respectively attaining the age of 21, And as to the remaining one-third part or share thereof, for the said Percy Henry Richard Beasley on his attaining the age of 21 years."

The testator died on April 11, 1900, without having revoked or altered his will, which was proved by the plaintiffs on September 26, 1900.

M. A. Smart (who was a defendant) was forty-six years of age. She was married to the first-named plaintiff and had never had any child who lived more than a few hours. At the death of the testator there were four children only of John Taylor. They had all attained the age of twenty-one years, and were also defendants to the summons. P. H. R. Beasley was of about the age of nineteen years, and was also a defendant. The testator's widow was also a defendant.

The defendant M. A. Smart was heiress-at-law and sole next-of-kin of the testator.

The trustees commenced the present proceedings to have the following question determined: Whether during the period which might elapse before the said Mary Ann Smart died, or had a child, or until the expiration of twenty-one years from the death of the testator, the income of so much of the proceeds of sale of the testator's real and personal estate as was not required for providing for the settled and other pecuniary legacies bequeathed by him ought to be accumulated for the benefit of the persons or person who might ultimately become entitled to such proceeds under the trusts of the said will, or whether there was an intestacy as to such income during the period aforesaid,

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or during any other and what period, and in that case whether such income, so far as it arose from the proceeds of sale of real estate belonged to the heir-at-law of the said testator, and so far as it arose from personal estate belonged to the statutory next-of-kin of the said testator.

P. B. Lambert, for the plaintiffs.

W. C. Druce, for the defendants, the testator's widow and M. A. Smart.—There can be no accumulation. There is no ascertained person for whose benefit the accumulation is to be made, and there are two periods during which accumulation may be made, either of which is consistent with the will. The case is concluded by *Love, In re; Green* v. *Tribe* [1878].[1]

[Reference was also made to *Genery* v. *Fitzgerald* [1822],[2] *Hodgson* v. *Bective* (*Lord*) [1863],[3] and *Townsend's Estate, In re; Townsend* v. *Townsend* [1886].[4]]

J. Gatey, for the remaining defendants, was not called upon to argue.

COZENS-HARDY, J.—In this case I think there must be an accumulation for twenty-one years from the testator's death, or until that event happens upon which the fund becomes divisible. I do not understand the principle upon which Mr. Justice Fry in *Love, In re; Green* v. *Tribe*,[1] held, first that there was an acceleration, and next that there was an intestacy. Of course if there was no acceleration the case is perfectly clear. I confess I doubt, from a perusal of the short note in the *Weekly Reporter* which I have of the judgment, whether the reporter correctly caught what the learned Judge intended to convey. Since *Hodgson* v. *Bective* (*Lord*),[3] and I think for a long period before that decision, it has been settled law that a gift of personalty contingently to a class carries with it the intermediate income not disposed of. Originally it carried with it the intermediate income during the whole period allowed for the suspension of vesting, a period which has since been shortened by the Accumulation Act, 1800. All that I can do now is to declare that during the period which may elapse before Mary Ann Smart shall die, or have a child, or until the expiration of twenty-one years from the death of the testator, the income of so much of the proceeds of sale of the testator's real and personal estate as shall not be required for providing for the settled and other pecuniary legacies bequeathed by him ought to be accumulated.

(1) 47 L. J. Ch. 783; 27 W. R. 39; also reported, but not on this point, 9 Ch. D. 231.
(2) Jacob, 468.
(3) 32 L. J. Ch. 489; 1 H. & M. 376. On appeal: 33 L. J. Ch. 601; 10 H.L. C. 656.
(4) 56 L. J. Ch. 227 34 Ch. D. 357.

Solicitors—Huntington & Leaf, agents for Clay & Atkins, Nuneaton, for all parties.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

COLLINS, L.J.
STIRLING, L.J.
1901.
April 23.

BEVAN *v.* WEBB.

Partnership—Books of Account—Right of Partners to Inspection by an Agent—Partnership Act, 1890 (53 & 54 *Vict.* c. 39), *s.* 24, *sub-s.* 9.

The ordinary right of inspection of partnership books conferred on a partner by articles of partnership, or under the Partnership Act, 1890, *s.* 24, *sub-s.* 9, *may be exercised by an agent to whom no personal objection can be made, as well as personally.*

Appeal from Joyce, J.

The plaintiffs and defendants carried on business in partnership as brewers at the Aberberg Brewery, in the county of Monmouth. The articles of partnership were dated July 4, 1893, and the partnership was to continue until July 1, 1903. Under the articles the plaintiffs, who were a clergyman, two doctors, and a married woman, were collectively entitled to one-fourth of the partnership capital and profits of the business. The clergyman was permanently resident in Canada. The defendants were the managing partners of the firm.

The articles contained ample provisions

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as to the powers and duties of the managing partners, and clause 16 was as follows: "Proper books of account shall be kept by the managing partners for the time being, in which all transactions relating to the partnership business shall be duly entered, and such books together with all bills, letters, and other writings which shall from time to time concern the said partnership business shall be kept at the counting-house of the partnership, and each of the partners shall have free access to and liberty to examine and copy or take extracts from any of the books and writings of the partnership at all reasonable times." [1]

In March, 1900, negotiations were entered into between the partners for the purchase of the plaintiffs' interests in the business. The plaintiffs were desirous of appointing a competent man to inspect the partnership books and assets of the firm with a view to advising them as to the value of their share and interest in the business. The man proposed was an accountant, a member of a firm of hotel auctioneers and valuers. The defendants objected to any inspection of the books, &c., except by the partners themselves; but offered to allow the auditors of the firm to make a special inspection of the books and to report the result of that inspection to the plaintiffs, who could then place the report before any valuers they chose for the purpose of being advised as to the value of their interest.

This offer the plaintiffs declined to accept, and commenced this action for the enforcement of their legal rights. They moved in the action for an order to restrain the defendants from preventing or interfering with the examination or investigation by the named valuer of the books of account, bills, and other writings kept by the defendants as the managing partners of the business of brewers carried on at the Aberberg Brewery in the county of Monmouth, under the articles of partnership in the writ mentioned.

(1) The Partnership Act, 1890, s. 24, sub-s. 9, provides: "The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them."

Joyce, J., refused the application, and the plaintiffs appealed.

Younger, *K.C.*, and *Chubb*, for the appellants.—The right of inspection conferred on a partner by clause 16, which is substantially the same as section 24, sub-section 9 of the Partnership Act, 1890,[1] is not limited to personal inspection. It is an unlimited and unqualified right, which may be exercised fairly through any agent to whom no personal objection can be taken. To confine the right to personal inspection would in the present case—as in many others, such as physical incapacity or the like—be to render it nugatory. The point does not appear to be the subject of express decision, but we rely on *Brown* v. *Perkins* [1843] [2] and *Dadswell* v. *Jacobs* [1887].[3] The partnership books are as much the property of one partner as of another—*per* Lord Halsbury, L.C., and Lindley, L.J., and on appeal to the House of Lords *per* Lord Davey, in *Trego* v. *Hunt* [1895].[4] The only authority which can be cited against us is a *dictum* of the President (Lord Colonsay) in the Scotch case of *Cameron* v. *McMurray* [1855],[5] who says, "it is not the privilege of a partner to introduce a stranger to examine the books"; but that observation of the President was not approved by the other members of the Court, and the actual decision is in our favour. It is settled that under the Companies Act, 1862, s. 43, a shareholder may inspect the register of mortgages by an agent—*Credit Co., In re* [1879],[6] and *Nelson* v. *Anglo-American Land Mortgage Agency Co.* [1896] [7]—and it is equally settled that a right to inspect carries with it a right to take copies—*Mutter* v. *Eastern and Midlands Railway* [1888] [8] and *Nelson* v. *Anglo-American Land Co.*[7] The principle of these decisions is that otherwise the right of inspection would not give all that it was intended to give, and the same principle applies here.

(2) 2 Hare, 540.
(3) 56 L. J. Ch. 233; 34 Ch. D. 278.
(4) 64 L. J. Ch. 392, 396; [1895] 1 Ch. 462, 471, 472; 65 L. J. Ch. 1, 11; [1896] A.C. 7, 26.
(5) 17 Ct. of Sess. Cas. (2nd ser.) 1142.
(6) 48 L. J. Ch. 221; 11 Ch. D. 256.
(7) 66 L. J. Ch. 112; [1897] 1 Ch. 130.
(8) 57 L. J. Ch. 615; 38 Ch. D. 92.

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BEVAN *v.* WEBB, App.

Hughes, K.C., and *George Cave*, for the respondents.—Apart from special agreement, no partner has a right to send a stranger to inspect the partnership books, and no such right exists under article 16 of these articles or under section 24, sub-section 9 of the Partnership Act, 1890.[1] The word "partner" in each case means partner, and nothing more, on the principle of *Expressio unius est exclusio alterius*. Section 31 of the Partnership Act, 1890, prohibits an assignee of a partner's share from seeing the books; but if the argument for the appellants is sound, this can always be evaded by appointing the assignee the agent to inspect on the assignor's behalf. There is no direct authority in support of the appellants' contention. The nearest authority is the *dictum* of the President (Lord Colonsay) in *Cameron* v. *McMurray*,[5] which is in our favour; and see *Lindley on Partnership* (6th ed. 1893), p. 794; (5th ed. 1891), Supplement, p. 69. *Brown* v. *Perkins*[2] was a case of litigation, and is therefore distinguishable. We admit that where inspection is sought in an action, as ancillary to other relief claimed in the action, the practice is to allow inspection by an agent; but that is because the Court has control over the agent, and the practice is an exception from the general rule—*Williams* v. *Prince of Wales Life Assurance Co.* [1857][9] and *Dadswell* v. *Jacobs*,[3] where Cotton, L.J., draws the distinction between inspection for the purposes of the action and inspection for any purpose. In the present case the action is brought for inspection only, and the appellants' case must be that they have a right to inspect by an agent outside and independently of any relief claimed in an action. As to *Credit Co., In re*,[6] that was a company case, which is distinguishable from partnership; and in *West Devon Great Consols Mine, In re* [1884],[10] *per* Cotton, L.J., the order of the Court of Appeal appears to have been that under the Stannaries Act a shareholder could only inspect personally. It is suggested on behalf of the appellants that a personal inspection by them would be valueless, but if our argument is right as to the general rule, it is for the partner in such cases to expressly stipulate for a right to employ an agent.

Younger, K.C., in reply.—The agent in this case will sign the Registrar's book embodying the undertaking offered, which removes any objection founded upon the Court having no control over the agent. The observation of Cotton, L.J., in *West Devon Great Consols Mine, In re*,[10] is a *dictum* only, and the point was apparently of no importance in that case.

COLLINS, L.J., read the terms of the notice of motion and article 16 of the articles of partnership and stated the relative positions in which the plaintiffs and defendants stood, and continued: The question arises whether the sleeping partners have a right to claim inspection by some person other than themselves—that person being a person to whom the defendants can have no reasonable objection. Mr. Justice Joyce has held that article 16 of the partnership articles does not give the sleeping partners any right to inspect by any person other than themselves, that it is a personal right not carrying with it any right to name an agent for the purpose of inspection. That article is practically, although not identically, in the terms of sub-section 9 of section 24 of the Partnership Act, 1890. Now Mr. Justice Joyce in his short judgment deals with the matter as one entirely free from authority. He says that there is no authority in favour of the plaintiffs' contention, and he also, I think, says that there is no authority against it. There was one case cited before him in which a *dictum* of the Lord President in a Scotch case was said to be adverse to the plaintiffs' contention, but if that *dictum* is really adverse Mr. Justice Joyce does not appear to have considered it, or certainly not to have treated it as adverse, because he treats the matter as *res integra* so far as authority is concerned, and therefore it is to be approached on principle and dealt with as a question of principle.

That being so, in trying to construe them I think that article 16 of the partnership deed and section 24, sub-section 9 of the Partnership Act, 1890, are practically on all-fours; and I ask myself,

(9) 23 Beav. 338.
(10) 27 Ch. D. 106.

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What is the object with which this right or permission or privilege is given to each of the partners in a partnership? Surely it is to enable the partners to ascertain the position of the partnership. The partnership is their business; the books are their own books, and each partner has a right to the books, though, of course, that right is qualified and regulated by the corresponding rights of the other members of the partnership; but the books which are desired to be inspected, and the books which they have the right to inspect, are their own books. For what purpose, then, is this provision in article 16 made? It must be that the partners may inform themselves of the position of the partnership. Now, it is said that because there is not an express provision either in the articles or in the Act of Parliament enabling the partners in terms to inspect by the agency of somebody else, that amounts to an exclusion of any such right. I ask again, How are we to arrive at the view that there is any such exclusion? What is there upon which to found the presumption that there is an exclusion?—for there is certainly no express exclusion. If it is to be implied, it must be because the word "agent" has not been used. If I were dealing with a matter that was not partnership, I should say that *prima facie* the permission accorded to a particular person is accorded to him or his agents. If the object is to enable him to effectively use the objects secured, and if such effective user involves the use of means to that end—for instance, if he is a near-sighted man the use of spectacles, or if he is a man who cannot see at all, the use of another person's eyes instead of his own, or if he is a man empowered to take copies and he cannot write, having lost his hands, the use of another person's hands—I should say that *prima facie* the permission to do a thing carries with it a right to use the necessary instrument to prevent that right which is conferred from being rendered ineffective according to the nature of the relations of the persons to and against whom it is given; and we are not bound to infer that the right must be limited in any other way. Now, do I find anything to suggest a limitation in the fact that the books that are to be inspected are the books of the partnership? It seems to me that there is nothing whatever in the fact that a man is a partner which would narrow the *prima facie* right to use to the full extent the privilege that is accorded. To hold the other view would be to say that, while all the partners ought to be on an equal footing and that all ought to have equal opportunities of informing themselves from time to time of the partnership affairs, yet if it should happen that some members of that partnership, either from mental infirmity or from want of experience in the particular business or from physical incapacity, were unable to avail themselves of it personally, they shall cease to be on equal terms with the other partners, and be debarred from using the only means by which they could put themselves in a position of equality and gain that information which is absolutely essential that they should possess in order to be in that position. I cannot believe that any Act of Parliament whatever could have been intended to bring about such a result, and I certainly cannot agree that persons could have intended to curtail their rights in such a way. It seems to me that, so far from the presumption being against such a right being intended to be given, the presumption is the other way, and that the burden is on those who deny the right claimed to point to words suggesting such a limitation. That appears to me to be the position, looking at the thing *a priori* from the mere common-sense point of view, without considering the authorities on the subject. There is, of course, a natural and common-sense limitation of such a right of inspection. That which is sought to be inspected is the books and documents in which all are interested, and it cannot be used in such a way as to curtail the rights or prejudice the position of the other partners. They are all entitled to inspect, but one partner cannot assert his right in derogation of the others. But the interests of the others can be abundantly safeguarded by putting a limitation upon the particular agency which the inspecting partners desire to employ. The person

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employed must be a person to whom no reasonable objection can be taken, and the purpose for which he intends to use the inspection must be one consistent with the main purposes and well-being of the whole of the partnership. That is easy of application, and nobody suggests that there is any personal objection whatever to the gentleman named in this case to conduct the inspection, and the parties are willing to accept him, and the Court of course would be ready to impose a fetter upon the user by that person of the information which he gains in that way.

Now having said so much as to the *a priori* position on principle, I desire to consider shortly how far there is authority on the matter. It seems to me that if the case has not been in terms decided, the principle that underlies it has been assumed in more than one case. So far from the point being free from authority, it seems to me that there is real authority in the matter which is all in favour of the position which I have indicated. The first case cited by counsel for the appellants, which seems to me to have a very direct bearing upon the point, is *Brown* v. *Perkins*,[2] decided by Vice-Chancellor Wigram. The facts of that case are very short. Brown and Perkins were solicitors in partnership at Merthyr Tydvil. Brown died, and his representatives filed a bill against the surviving partner for an account; and an answer being put in, the plaintiffs moved for the production of the papers admitted in the answer of the defendant to be in his possession and material to the account. The defendant stated that many of the papers referred to related to the business of the clients of himself and his late partner, and concerned matters in which they had been entrusted in their professional character in secrecy and confidence, and that the disclosure of such matters to the solicitor to the plaintiffs, who practised in the same town and neighbourhood, might be prejudicial to such clients, and would be a breach of duty towards them, and that in several of such matters the solicitor of the plaintiffs was employed adversely in his professional character for other persons. Then the Vice-Chancellor says: "The partners themselves, if they had been both living, and the question of account had arisen between them, would both have been entitled to see the papers which are part of the materials for taking the account; and it must, I think, follow that either of the partners might have employed a competent agent for the purpose of examining the papers on his behalf. If this be not so, no solicitor can employ another person to assist in the settlement of his partnership accounts, without submitting to have such accounts taken in an insufficient manner. In this case, I should think it would be a reasonable course for the papers to be inspected by some disinterested person,—such as a town solicitor, or one not practising in the neighbourhood of these parties: but such an arrangement, if made, must be by consent." Now the comment that has been made on this case is that that was an inspection in litigation, and that it was ancillary to the main purpose of the litigation and not of itself the main purpose, and that that is a sufficient distinction to prevent the authority from having any bearing upon this discussion. I take exception to that on two points. First of all, I say that it is an authority not limited to the rights of the parties in litigation, because it seems to me that the Vice-Chancellor puts it as an *a fortiori* case. He tries the rights of the parties as if there had been no litigation. He stated what would have been the rights of those two parties if they had been alive, and not, as I read it, in a contentious suit for an account, but as if the one demanded an account from the other without litigation. What he says is that they would have been entitled to examine the books, and for that purpose to have employed a competent agent. Therefore it seems to me that it is an expression of opinion of the Vice-Chancellor in a case outside litigation. But secondly, even if it is limited to litigation, I do not myself see that that is a very significant observation in this case. For what is the meaning of granting it in litigation? The Courts have got to make up their minds whether or not it is a case in which the party asking it should have inspection. That is the point to be decided. When we have once arrived at the conclusion that he ought to have

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inspection, then we are in the same position as we are now, unless the partnership deed or the nature of its conditions negative it. We are in the position that the person asking for it has a right of inspection. That is all that is decided in the litigation. Having decided that he has a right to inspection, how is it effectively to be given? There is none the less necessity for its being effective if it is taken under a private agreement than there would be if it is given as the result of litigation. When once you have construed the private agreement and desire to give effective inspection, then you give it exactly on the same principle and by the same standard as in the case of litigation. If it is only effective as the result of litigation by introducing third persons, so equally it is only effective by the same process where it is given under a private agreement. The next authority cited—*Dadswell* v. *Jacobs*[3]—although not decided actually on partnership, seems to me to be an *a fortiori* case. The headnote is this: "A firm of merchants residing abroad brought an action against their agent in this country, claiming production of the documents relating to their business to a person appointed by them for that purpose. The defendant put in a defence stating that the person appointed by the plaintiffs was a clerk in a rival and unfriendly house of business, for which reason he objected to produce the documents to him, but that he was willing to produce them to any proper person. The plaintiffs moved, under Order XXV. rule 4, to strike out the defence:—*Held* (affirming the decision of Chitty, J.), that although a principal had a general right to the production of documents in the hands of his agent to any person appointed by him, he cannot insist on their being produced to an improper person; and therefore the defence disclosed a reasonable answer to the claim." In delivering judgment, Lord Justice Cotton says: "The plaintiffs are abroad, and of course it was the duty of the defendant, as agent, to produce to the principals any accounts that were kept for them; and where the principal is abroad, in my opinion the agent is bound to produce to any properly appointed agent of the principal any books of account kept for the principal." It is said that the present case is one of partners, and that that case was one of agency; but partnership is only one division of the law of agency. A partner is the principal, but he is also an agent, and this is even an *a fortiori* case. If the right to inspection by agents exists in the case between principal and agent it seems to me *a fortiori* that it ought to exist in the case where the relation is not only that of principal and agent, but where each for certain purposes is a principal. Therefore it seems to me that that is an authority that in the absence of any special agreement there arises out of the mere relation of principal and agent the right to inspection, and that inspection can be carried out where the circumstances justify it by means of an agent. In this case one of the parties seeking inspection happens to be abroad; but being abroad is only one particular circumstance shewing that that means of inspection is the only effective means. It does not exhaust all the cases in which inspection may be offered to the inspecting agent. Returning to *Dadswell* v. *Jacobs*,[3] Lord Justice Lindley says, "No doubt the principal is entitled to come and see the books if he likes, and he is entitled to have a copy of them sent by the agent at the principal's expense. There is no controversy about that, and I am not at all prepared to deny his right to have the books inspected by a person whom the Court thinks is a proper person in case of dispute on that point." So that, although the plaintiffs there had no absolute and unqualified right to have the books inspected by any one they liked—a claim which was set up in the action—the Court, by holding that they had not that right, held that they had the qualified right of inspection by somebody else, provided that person was one to whom no reasonable objection could be taken. I should have said earlier that the contention of the respondents in the present case appeared to me to be still more difficult to support in view of the fact that they have to concede that these persons, who in their view are debarred from inspecting by a third person, have the right to sit from day to day in the office of the managing partners and make full copies of all

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the books, and when they have done that to hand them over to the very person to whom the right of inspection is denied. That they have to concede, and conceding that they say they may do in that round-about fashion something that might cause them greater mischief than if it was done in a simple fashion. The principle upon which this right rests has been also discussed in other cases, and it has been distinctly stated where the question has been whether the right to inspect involves the right to take copies. That has been held to be implied in the right to inspect—and why? Because the inspection is not effective in the sense which it was intended to be effective unless it carries with it as a corollary that incidental right. The principle is fully stated in *Nelson* v. *Anglo-American Land Mortgage Agency Co.*,[7] where Lord Justice Stirling refers to the leading case of *Mutter* v. *Eastern and Midlands Railway*.[8] The headnote is: "The right of a creditor or member of a company to inspect the register of mortgages under section 43 of the Companies Act, 1862, includes a right to take copies of the register." The learned Judge says, citing from Lord Justice Lindley in *Mutter* v. *Eastern and Midlands Railway*,[8] "Parliament having conferred the right to inspect, the Court ought not so to construe the statute as to render the right conferred illusory, and if the Court were to hold that in such a case as the present the right to inspect existed but the right to take copies did not, the Court would in effect be rendering the statute of no avail." Now that, I think, is very material upon the point now before the Court. The right conferred by the Act of Parliament, which was limited merely to inspection, was held to carry with it the means to render that inspection effectual. Why is that principle not to be applied in the case before us? It seems to me that on the authority of these cases a similar principle can be and ought to be applied here, unless there is something in the nature of the partnership which negatives the right. Otherwise we are reading into the enabling provisions of the article a disabling exclusion of a particular mode of utilising the right conferred. So also with the decision of Vice-Chancellor Hall in *Credit Co., In re*,[6] where he held that a solicitor was entitled to inspect under section 43 of the Companies Act, 1862, although that right in terms was given by the section only to creditors or members. He says: "As regards the register of mortgages, I am of opinion that there has been a refusal by the company to allow a shareholder to inspect it, though it has been contended that there was no refusal to him but his solicitor. I consider that the refusal was to produce to the applicant, and that there was no ground for that refusal." That again is simply an affirmation of the same principle as that which Lord Justice Stirling followed in the case I have referred to. It is said that these cases have no bearing on the discussion because they are cases of shareholders and cases of statutory enactments, and so forth. It seems to me for the reasons I have given that they are directly in point as to what is to be implied by a permission to inspect, deciding that the permission covers everything necessary to make it effective. That is the principle followed; and the only way those cases can be distinguished is not merely by saying that those are company cases and this is a partnership case, but by pointing to some difference between the two—that is to say, that because this is a partnership case therefore there is an exclusion for which, as I have pointed out, I can find no satisfactory ground.

One other case was very properly called to our attention by counsel for the respondents. That is the case of the *West Devon Great Consols Mine, In re*,[10] in which (without argument and without the point having been discussed or considered by Lord Justice Baggallay, who gave the leading judgment) Lord Justice Cotton did consider that the right of a shareholder under the Stannaries Act to inspection was personal to himself. That was decided without argument, as I have said, and without being referred to in the discussion, because the learned Judge who gave the first judgment does not allude to it, and therefore does not appear to me to be an authority that outweighs those decisions on fact and on principle which I have already referred to. Then it is said

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that there is a *dictum* of the President of the Court in the Scotch case of *Cameron* v. *McMurray*,[5] decided as far back as 1855; but that *dictum*, when read in its context, does not appear to me to be an authority against the defendants at all. I do not know whether it is as exactly and precisely stated in point of language as one could wish, but it seems to me to be merely an affirmation of that limitation which it is conceded must exist upon the right of a partner demanding inspection—that is, that the right of a partner to inspect by anybody else is limited by the obligation of not seeking to inspect by a person to whose intervention reasonable objection can be made. I quite agree that the right of inspection is qualified by that limitation, and I doubt very much whether the learned President in uttering the *dictum* which has been referred to meant anything more than that. The actual decision in the case was that inspection was given, and given by means of an agent in the litigation.

There is one more observation I desire to make, and that is that it has been urged in argument that a different standard is to be applied in litigation as compared with the standard to be applied without litigation. Counsel for the respondents suggested that the principle of that distinction is stated by Lord Justice Cotton in *Dadswell* v. *Jacobs* [3]—namely, that where it is outside litigation the Court can have no control over the person who inspects; and therefore, although the right to inspect by a third party ought not to exist outside litigation, it may well be held to exist in litigation because the Court can exercise control over the actual person inspecting. Be it so. How does that apply to this case? The Court at this moment has got seisin of the whole position, and is in a position to impose terms upon the person inspecting. Clearly it has that power, and it is accepted by the appellants, and they are ready to accept the limitation sought to be put upon them. Therefore, even if this case is to be tried by the standard which the respondents contend for and that standard is somewhat different from what it would be if there were no litigation, we are in the position to give the rights which can only be obtained by litigation, and to impose the limitation which can be imposed only as the result of litigation.

I have gone into the matter at some length because unquestionably it is a case of very considerable importance, and in my opinion it is a case in which we must accept the responsibility of dealing not only with the particular provision in these articles of partnership, but also with the provisions of section 24, sub-section 9 of the Partnership Act, 1890, which are substantially to the same effect. Whether we consider it on principle or on the authorities, I am of opinion that the judgment of the learned Judge cannot be supported, and that this injunction ought to be granted subject to the undertaking which has been offered on behalf of the appellant.

STIRLING, L.J.—I entirely agree with the conclusion at which my learned brother has arrived, and with the reasons which he has given; but as the point is one of considerable importance, and also as we are differing from the judgment given in the Court below, I should like to add a very few words to shew that I have given the matter my serious consideration.

The contention on behalf of the respondents is that the rights of access to and inspection of and the right of copying partnership documents which are conferred by section 24, sub-section 9 of the Partnership Act, 1890, and are also conferred by article 16 of the articles of partnership which we have to deal with in the present case, are exercisable only by the partners personally, and are not exercisable by them through agents. Here I take leave to observe that the general rule of law is that whatever a person who is *sui juris* can do personally, he can also do through his agent. No doubt there are some exceptions. The reason of the rule may be stated in a few words in two sentences which I will read from a well-known treatise on agency—namely, that by Story. The learned author says on page 2 (chap. i. § 2): "In the expanded intercourse of modern society it is easy to perceive, that the exigencies of trade and commerce, the urgent pressure of

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professional, official, and other pursuits, the temporary existence of personal illness or infirmity, the necessity of transacting business at the same time in various and remote places, and the importance of securing accuracy, skill, ability, and speed in the accomplishment of the great concerns of human life, must require the aid and assistance and labours of many persons, in addition to the immediate superintendence of him, whose rights and interests are to be directly affected by the results. Hence the general maxim of our laws, subject only to a few exceptions above hinted at, is, that whatever a man *sui juris* may do of himself, he may do by another." That principle has been adopted by the English Courts in many cases, as a good illustration of which I may refer to the decision of the Court of Appeal in *Whitley Partners, Lim., In re* [1886] [11]; and I refer to it merely as an illustration, because it has no direct bearing upon the present case. I refer to it as an illustration of the way in which the principle has been applied by the English Courts. There the headnote is: "C. verbally authorised O. to sign on his behalf the memorandum of association of a company. O. accordingly signed the name of C. to the memorandum without his own name appearing. The company being in course of winding up C. was put on the list, and applied to have his name removed, on the ground that he had never signed the memorandum nor agreed to take shares:—*Held*, that there being nothing in the Companies Act, 1862, to shew that the Legislature intended anything special as to the mode of signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient." I agree that where the right which is going to be exercised is conferred by some written instrument, either by a statute incorporated in the general partnership contract or by the articles of partnership, it may be inferred upon the true construction of the document from the context that the intention of the parties was that inspection should be personal; but unless you find something of that kind in the document itself, you have no right to say that, although an agent is not specially mentioned, the execution of the right by the agent is excluded.

We come therefore to the consideration of the Partnership Act, 1890, and of the articles of partnership with which we have to deal, with this view in our minds—that *prima facie*, whatever rights are given to the partners are, unless there is something to be found in the Act limiting it, capable of being exercised by agents. If we look at the present deed of partnership, it seems to me that it is one in which the reasons pointed out by Story in that passage which I have read are very applicable indeed. The general scheme of this partnership was that the management of it should be placed in the hands of the defendants in this action as managing partners, who should have the direct control of the whole partnership assets and books. Now the other partners, I see by the description of them which appears in the articles of partnership themselves, are—first, a clergyman, who is resident in Canada; secondly, two gentleman of the name of Bevan, who are surgeons at Monmouth; and the next is a lady described as a spinster; and those persons have conferred upon them under the Act and by virtue of the clause to which reference has been made rights of access to and examination of and the right of taking copies and extracts from any of the books and partnership documents. All the plaintiffs to whom I have referred are, in the strict sense of the word, laymen as regards those matters. The whole control and management of the business is in the hands of the defendants as the managing partners, and I can hardly conceive that, if those rights are meant to be seriously used at all, it is a case in which recourse must not be had to the advice and assistance of experts with a view to the proper and beneficial use of the right conferred. That right was conferred for a purpose—namely, that they might be enabled to make themselves acquainted with the affairs of the partnership, and might be enabled to use the information which they have thus acquired, not of course to the detriment of the partnership or of their fellow partners, but certainly with a view, so long as the rights of the firm in general or the rights

(11) 55 L. J. Ch. 540; 32 Ch. D. 337.

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of the partners are not infringed upon, of making a proper use and having the beneficial use and enjoyment of their own property. But it must be remembered throughout that these books and documents, like the rest of the partnership property, are just as much the books and papers of the plaintiffs as they are the books and papers of the defendants.

Now do we find anything in the Act or in the deed which excludes the right of a partner to avail himself of the assistance of an agent in the examining of the books and taking copies of them? I confess I cannot find anything. If we look at article 16 itself, it begins in this way: "Proper books of account shall be kept by the managing partners for the time being in which all transactions relating to the partnership business shall be duly entered." That throws the duty of keeping the books on the managing partners; but does any one suggest that the managing partners were bound to keep those books themselves—that they were to make entries in them with their own hands? No one supposes anything of the kind. It is quite obvious that the managing partners may rightly and properly employ clerks and other persons to make up the books properly. Then let us proceed to see what is the right which is conferred upon the other partners: "Each of the partners shall have free access to and liberty to examine and copy or take extracts from any of the books and writings of the partnership at all reasonable times." Each partner therefore has a right amongst other things of copying and taking extracts from any of the books and writings of the partnership at all reasonable times. Can it be contended that he who is desirous to avail himself of this right is bound himself to go and sit in the counting-house of the firm and make the copies and extracts which he desires to make with his own hands? I confess to me that seems to be quite unreasonable; and it seems to me that he may for the purposes of making those extracts and copies, just as the managing partners may for the purpose of making the books themselves, employ a proper clerk or other person to do the work. We then come to the question whether the right of access is to be limited to the partner personally, and the right of examination is to be limited to the partner personally. I confess I cannot see why it should be so.

It is said that the idea of a third person being introduced is contrary to the notion of confidence which exists in every partnership relation. That the notion of confidence exists there is no doubt, but I cannot see how that prevents a partner for a proper purpose from acquiring the necessary information in order that he may exercise his own right properly. I cannot see that if a clergyman or a surgeon or other person desires, as he is entitled to, to obtain full information as to the transactions of a large brewery in which he is engaged, he is to be entirely devoid of all assistance; and indeed when the respondents are driven to the last stand they do not so contend, because it is admitted, or at least I have heard no argument to the contrary, that if the partner succeeded in getting from the books the information which he desires to acquire by his agent, he could immediately go to his agent, from whom he wished to get confidential advice, and submit the extracts and copies which he had himself made and get his agent's confidential advice upon them. Now I think that the right which the partner has to employ an agent must no doubt be limited. The case of *Dadswell* v. *Jacobs*,[3] in the Court of Appeal, shews that it does not follow that, because a partner has a right to avail himself of the services of an agent, he may choose as that agent any person he pleases. The agent must be a person to whom no reasonable objection could be taken; and, further, the agent must I think be one who is willing to put himself upon terms not to use the information, which he acquires, otherwise than properly. I conceive that limitation affects the partner himself, as was pointed out in the case of *Trego* v. *Hunt*,[4] I believe by nearly every Judge who dealt with it, but very clearly by Lord Davey in the House of Lords, who says: "The notice of motion asks that the defendant might be restrained from making any copy or extract from the books of the partnership for any purpose other than the business of the

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partnership. In my opinion the relief asked was misconceived. As well under the general law as under the express provision of the articles of partnership, the defendant was entitled during the partnership to have access to the books and to make copies thereof or extracts therefrom. It is conceivable that, if the defendant proposed to use such extracts for purposes injurious or hostile to the interests of the firm, he might be restrained from so doing. But in such case it would not be the obtaining of the information, but the use the partner proposed to make of it when obtained, which would be restrained." Therefore the partner who obtains information is bound to abstain from using it for an improper purpose. Equally the agent whom he employs in order to procure the information is under an obligation to abstain from using it for an improper purpose.

In the present case the appellants have nominated a gentleman to whom no objection is offered on the part of the respondents, and that gentleman is willing to give an undertaking that the knowledge which he acquires shall not be used for any purpose other than giving confidential advice to his employers with regard to their interests. It seems to me that the defendants are protected against the only possible injury which they can suggest in their affidavits by an undertaking given in that form, and under these circumstances it seems to me that upon that undertaking being given there ought to be an injunction in the terms which we are asked for.

Appeal allowed.

Solicitors—Andrew, Wood & Purves, agents for Powell & Hughes, Brynmawr, for appellants; Le Brasseur & Oakley, agents for Le Brasseur & Bowen, Newport, Monmouthshire, for respondents.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

[IN THE HOUSE OF LORDS]

1901. April 26, 29. } KINGSBURY v. WALTER.*

Will—Construction—Gift to a Class—Gift to "A and the children of B" equally.

A gift to "A and the children of B," A and B's children being in the same degree of relationship to the testator, is a gift to a class, and on the death of A in the testator's lifetime A's share does not lapse, but goes to B's children.

Decision of the COURT OF APPEAL (68 L. J. Ch. 598; [1899] 2 Ch. 314) *affirmed.*

Appeal from an order of the Court of Appeal dated July 4, 1899 (reported 68 L. J. Ch. 598; [1899] 2 Ch. 314), reversing an order of North, J., dated December 14, 1898, in an action wherein the appellant and William Edwin Matthews (since deceased) were plaintiffs and the respondents and Emily Walter (widow) were defendants.

The question was whether by reason of the death of Elizabeth Jane Fowler in the lifetime of Walter Moss, the bequest contained in the will of the said Walter Moss of his interest in the *Daily Telegraph* newspaper in favour of the said Elizabeth Jane Fowler and the children of the said Emily Walter who should attain twenty-one, lapsed so far as regards the share of the said Elizabeth Jane Fowler, or whether the said bequest was a gift to a class and consequently there was no lapse.

The testator, who died March 24, 1893, by his will dated November 7, 1876, appointed his wife, Elizabeth Moss, and his niece, the said Elizabeth Jane Fowler, executrixes thereof, and he gave all his share or interest in the *Daily Telegraph* newspaper unto the said Elizabeth Moss and Elizabeth Jane Fowler,

"Upon trust to pay the income thereof to my said wife for her life, and after her decease upon trust for the said Elizabeth Jane Fowler and the child or children of

* *Coram*, The Lord Chancellor (Earl of Halsbury), Lord Macnaghten, Lord Shand, Lord Davey, Lord Brampton, and Lord Robertson.

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my sister Emily Walter who should attain the age of 21 years, equally to be divided between them as tenants in common."

The residue of his estate and effects he devised and bequeathed to his wife.

Elizabeth Jane Fowler died on May 1, 1891.

The Court of Appeal held that Elizabeth Jane Fowler's share did not lapse, but went to the children of Emily Walter.

The surviving representative of the residuary legatee appealed.

Vernon Smith, K.C., and *E. F. Ball*, for the appellant.—This is not a gift to a class—a class being a certain number of persons described as following a defined character whose interest comes into being at the same time. The question is one of intention, and there is nothing here to shew that the benefit was conferred in virtue of the fulfilment of certain common conditions. The principal authorities are: *Drakeford* v. *Drakeford* [1863],[1] *Stanhope's Trusts, In re* [1859],[2] *Jackson, In re; Shiers* v. *Ashworth* [1883],[3] *Shaw* v. *Macmahon* [1843],[4] *Chaplin's Trusts, In re* [1863],[5] *Barber* v. *Barber* [1838],[6] and *Allen, In re; Wilson* v. *Atter* [1881].[7] The cases are considered in *Featherstone's Trusts, In re* [1882].[8]

Swinfen Eady, K.C., *H. Terrell, K.C.*, and *Favcus*, for the respondents, were not heard.

THE LORD CHANCELLOR (EARL OF HALSBURY).—I think the argument we have heard from both the learned counsel has reduced the question to be decided to a very narrow one, and I am not disposed to indulge in general abstract propositions, partly for the reason which was given by Lord Justice Romer below, and partly because I confess I regard with great jealousy, when you are construing a particular will, any unnecessary observations upon questions of abstract propositions which are likely, do what you will in order to apply your observations to the particular will, to be quoted afterwards as applicable to a different will made by a different person using different language under totally different circumstances from those of the will to which you applied them. Rightly or wrongly, certain canons of construction have been acted upon for so long that I think it would be impossible now to disregard them, partly upon the ground that it is to be assumed—whether the assumption is well founded or not I do not stop to enquire—that lawyers draw instruments with reference to the known state of the law, and the known state of the law is supposed to include those canons of construction which from time to time have been adopted by the Courts in the construction of wills. Therefore, I do not propose to pause to enquire into the origin of the distinction between a class gift and a gift to an individual. It is enough to say that it is clearly established, I think, that where the question is between, on the one hand, lapse, and, on the other hand, the division of a particular property between different members of a class, there must in the latter case be something which the Court upon construction determines to be a "class," and the question is, how is that to be ascertained?

Now, applying myself to this will, it is of course legitimate to consider the circumstances, because one has to place oneself in the position filled by the testator at the time of making his will. Applying myself to those circumstances, and considering the language used, I find that the testator gives this particular property which he designates (to use Lord Justice Romer's phrase, "property X") to a niece who was approaching twenty-one years of age, and to the children of another sister who should attain twenty-one, and who also would fulfil the condition of being nieces. It is said that this was not a class; but it is admitted that if he had said, "To all my nephews and nieces," that would have been a class. It would have indicated the reason why he had selected that particular body of persons among

(1) 33 Beav. 43.
(2) 27 Beav. 201.
(3) 53 L. J. Ch. 180; 25 Ch. D. 162.
(4) 4 Dr. & W. 431.
(5) 33 L. J. Ch. 183.
(6) 8 L. J. Ch. 36; 3 Myl. & Cr. 688.
(7) 44 L. T. 240; 29 W. R. 480.
(8) 52 L. J. Ch. 75; 22 Ch. D. 111.

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whom he intended the property X to be divided. But it is argued that it is not a class here because, although he has described persons who in fact are a class, yet he has not said that they are a class, nor has he used the word "class," or words shewing that, as lawyers would say, they fulfilled the conditions of a class. I confess that would be, to my mind, frittering away the substance of the gift by looking merely at the exact words in which it is conveyed. The person in respect of whom the question arises, Elizabeth Jane Fowler, who died before the testator died, was a niece. He had so described her in the earlier part of the will, and if I were to speculate what his intentions were, I should say his intentions were that his nephews and nieces were to be the objects of his bounty as regards this particular property. It is not denied that if those words "nephews and nieces" had been used—if instead of using language expressing the gift to the individual and those who formed the rest of the body he had described them as what they in fact were—his "nieces"—it would have been a class gift. The sole question upon this instrument—and I am confining myself to what this instrument discloses—is whether, because he has not used one phrase rather than another, you are to alter the substance of the gift. I decline to do that. I think that, construing Lord Justice Romer's language as I do construe it, what he meant to convey was reconcilable with the decided cases. Unfortunately, the cases have been "complicated" and confused, or likely to be confused—I do not say absolutely confused after what my noble and learned friend Lord Davey has said; but it is certainly a misfortune, in such a matter as the construction of wills, to do anything which may add to any confusion which may exist. If I rightly construe what Lord Justice Romer says, what he meant was that there is a class properly so called, although it is not so described in words. You may take the situation of the family, the condition of things which in fact existed at the time when the testator composed his will, as being equivalent to that which would be the description of a class; and it is not denied that if it was a description of a class the result which the respondents contend for would be arrived at.

For these reasons I am of opinion that this appeal ought to be dismissed, and the judgment of the Court of Appeal affirmed.

LORD MACNAGHTEN.—I am of the same opinion. There may be, perhaps, some difficulty in reconciling all the cases, although I do not think that they are so much in conflict as the learned Judges in the Court of Appeal seem to have thought. I do not think it is to be wondered at that there is a sort of conflict between them, because many of those cases lie so near the line that they might have been decided either way without violating any principle; and I cannot help thinking that in some cases the Judges who had to interpret the will concerned themselves more about the definition of "a class," about what is or what is not a "class," than about actually considering the language of the testator.

In my opinion the principle is clear enough. When there is a gift to a number of persons who are united or connected by some common tie, and you can see that the testator was regarding the body rather than the individuals constituting the body, and you can also see that the testator intended that if one of that body died in his lifetime the survivors should take, there is nothing to prevent your giving effect to that intention.

I think this is a gift to a class. I do not think there is anything in the circumstances attached to the gift to the children of Emily Walter which is not attached to the gift to the niece whom the testator first mentions, because evidently he treated her as a person who had grown up—he made her a trustee and executrix. I do not think there is anything in that difficulty whatever. I think it is pretty plain in this case that he made one class of all his nephews and nieces, and he intended that if any of them died in his lifetime the survivors should take.

LORD SHAND.—I am of the same opinion.

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KINGSBURY *v.* WALTER, H.L.

LORD DAVEY.—I am of the same opinion, but, while agreeing with the conclusion of the Court of Appeal, I cannot say that I regard the reasons given by the learned Judges in that Court as altogether satisfactory. The then Master of the Rolls expressed himself to the effect that if he had been deciding this case in the first instance he would have given the same decision as Mr. Justice North, but that he had been convinced by the arguments which had been used by Lord Justice Romer. I shall have a word to say presently as to the propositions laid down by Lord Justice Romer, which, I think, are not consistent either with established authorities or with established principle.

I am not prepared to agree with the learned Judges in the Court below that the cases are in such inextricable confusion, or so contradictory or "complicated," as they seem to have thought, and I am of opinion that this case may be decided without infringing the authority of any of the cases to which counsel for the appellant have drawn our attention.

The question, I agree, is whether a gift in this case to "Elizabeth Jane Fowler and the children of my sister Mrs. Emily Walter" is what is called, by an expression well known in our law, a class gift. *Prima facie* a class gift is a gift to a class consisting of persons who are included and comprehended under some general description, and bear a certain relation to the testator. That definition is in accordance with that given by Lord Selborne in the case referred to in Mr. Justice North's judgment—*Pearks* v. *Moseley* [1880][9]—and by Lord Hatherley, then Vice-Chancellor Wood, in a case which has also been referred to at the Bar—*Chaplin's Trusts, In re*.[5] But it may be none the less a class because some of the individuals of the class are named. For example, if a gift is made "to all of my nephews and nieces including A," or if a gift is made "to C and all other my nephews nnd nieces," each of those would be a class gift. Of another class of cases *Stanhope's Case*[2] is an example. There the gift was to four named daughters "and all my after-born daughters," and that was rightly, as I think, held to be a class gift. To the same effect is a case before Mr. Justice Chitty —*Jackson, In re; Shiers* v. *Ashworth*[3]— where the testator gave his residue to five named individuals and his other child or children who should attain the age of twenty-one years or marry. Mr. Justice Chitty held that that was a class gift, although the condition of attaining the age of twenty-one years was imposed upon the other children and not upon those who were named. He came to this conclusion upon the ground that it appeared from the evidence, which was admissible evidence, that those who were named had already attained the age of twenty-one years. That case seems to me to have a considerable bearing upon the case now before the House.

There may also be a composite class, such as, for instance, children of A and children of B. That would be a good class. A gift to A and all the children of B is, in my opinion, *prima facie* a class gift; and I think that has been so decided, and rightly decided, in the case of *Chaplin's Trusts, In re*,[5] which I have already referred to, and also in a case before Sir George Jessel of *Allen, In re; Wilson* v. *Atter*.[7] There was a direction to divide "equally amongst all the children of R. W., the child of W. W. and L. his wife, and A. W., the widow of H. S. W., share and share alike." It was held that this was not a gift to a class and that the share lapsed. I need not read the learned Judge's judgment, because it was read in the course of the argument, and it is present to your Lordships' minds.

I think those cases were rightly decided, and I do not agree with the proposition which I understand to be laid down by Lord Justice Romer, who says: "In my opinion it is correct to say that a gift by will to a class properly so called and a named individual such as A. equally, so that the testator contemplates A. taking the same share that each member of the class will take, is *prima facie* a gift to a class." I think that that is contrary to the established authorities, and also, in my opinion, to the principles applicable to this branch of the law.

(9) 50 L. J. Ch. 57, 61; 5 App. Cas. 714, 723.

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But it is perfectly plain that a gift in the form which I have mentioned, such as the form we have before us, may be a class gift, if there is to be found in the will a context which will shew that the testator intended it to be a class gift. I think the same result may be arrived at if from the state of the family which is proved, the circumstances under which the testator wrote his will, which may properly be admitted in evidence, the Court, putting itself into the same position as the testator occupied, with the same knowledge as the testator had when he was writing his will, comes to the conclusion that the gift, although expressed in that form as a gift to an individual and the children of A, was intended to operate as a class gift. There is abundant authority for that proposition, of which I can only mention the case of *Aspinall* v *Duckworth* [1866],[10] before Lord Romilly, which appears to me to be exactly this case. I cannot distinguish the terms of it from those of this will. It was a gift unto and equally amongst the testator's nephew A and the children of his sister B as tenants in common. Lord Romilly held that that was a gift to a class. It differs from this case only in one particular, which I will presently mention.

Another principle which is, I think, established in this branch of the law is that all the interests of members of the class must vest in interest at the same time. For instance, if there is a gift to A for life and afterwards to B and the children of C, the class must vest in interest at the death of the testator, although it is capable of enlargement by the birth of subsequent children of C during the lifetime of the tenant for life. It is, I conceive, on that ground that *Drakeford* v. *Drakeford* [1] was decided. The learned Judge (Lord Romilly) there said that a gift in the form which he had before him in that case was not a class gift. It was in this form—a gift to A for life, and at his death to be equally divided between his surviving children and his niece Rosamond Willows. There only those children who survived the tenant for life would have taken, whereas Rosamond Willows' interest would have become vested at the testator's death. On that ground Lord Romilly held that it was not a class. He says: "I have no doubt that if there be a gift to the children of A., and to my niece Rosamond, and to my niece Mary, and so on, that may be a class. But to make this one class it must be to this effect:—'I leave the whole of my funded property to my brother for his life, and at his death the property to be equally divided amongst his children and my niece Rosamond Willows, or such of them as shall survive the tenant for life'" —making them all vested interests at the same time. "In all these cases,' he says, "the class would be ascertained at a particular period, and if one died there would be no lapse. But here Rosamond Willows is to take her share at all events; it is given absolutely to her, and the only persons to be ascertained are the children of the brother, and they are to be ascertained at his death"—not at the testator's death. That appears to me to have been the *ratio decidendi* of that case, and being so it does not appear to me to be in conflict with the other decisions of that learned Judge.

Now, the peculiarity of this case is that it is a gift to Elizabeth Jane Fowler and the children of Mrs. Walter who shall attain the age of twenty-one years as tenants in common. It may be said, therefore, that in this case the gift to Elizabeth Jane Fowler was absolute whether she had attained the age of twenty-one years at the testator's death or not, whereas the gift to the children of Mrs. Walter would not vest in them until they attained the age of twenty-one. If it stood upon that bare fact alone, I should have been of opinion that Mr. Justice North's decision was right. But we have to look at the context, the whole of the will; and, reading the whole of the will, I find that although Elizabeth Jane Fowler is not described as a niece in the gift itself, still in the previous part of the will the testator had appointed his "niece Elizabeth Jane Fowler," together with his wife, executrixes of his will; and he afterwards describes her as his "niece," and gives to her after his wife's death a messuage or tenement under the descrip-

(10) 35 Beav. 307.

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tion of "my niece Elizabeth Jane Fowler." He also appoints her trustee of his will for various purposes. Then comes the gift in question, in which, indeed, he does not describe her again as his "niece," but he calls her "the said Elizabeth Jane Fowler," and goes on to speak of "the child or children of my sister Emily Walter."

I do not at all deny that the case is very near the line; but I think there is enough in this will itself to shew that the testator gave the property to her as a niece, and that he makes a special class of nieces consisting of the only child of Mrs. Fowler and the children of his sister Mrs. Walter, and that it was intended to be a class gift to that special class, the nieces. But I also think that we are entitled, as I have already said, to put ourselves in the same position as the testator was in as to the knowledge of his family when he wrote his will; and we find that at that time his sister Mrs. Fowler was a widow of forty-five years of age or so, and that she had an only daughter, and therefore Elizabeth Jane Fowler was his only niece of that family, and there were no other branches of his family from whom there might be other nephews and nieces besides Mrs. Walter's family. Therefore I think that as they were all the nieces then in existence we might, quite independently of what I have said, come to the conclusion that this was a class gift to his nephews and nieces, including Elizabeth Jane Fowler, and I should so construe the will.

LORD BRAMPTON.—I am entirely of the same opinion.

LORD ROBERTSON.—I agree, holding that the just construction of this bequest, when read in the light of the facts as to the state of the family, is that it was intended as a gift to the nephews and nieces of the testator.

Appeal dismissed.

Solicitors—Tilleards, for appellant; V. I. Chamberlain, for respondents.

[*Reported by J. Eyre Thompson, Esq., Barrister-at-Law.*

COZENS-HARDY, J.
1901
March 2, 16.
April 27.

HARRISON v. HARRISON.

Will—Construction—Life Gifts to A, B, and C—Remainders to Respective Children—Referential Gifts to Survivors and Respective Issue—Intestacy.

A testator bequeathed three shares in his property to his three sons respectively for their respective lives, and after the death of any of them the testator directed that the share of the one so dying should go to such of his children as should attain the age of twenty-one years or (being females) marry, with a proviso that, in case any of his said sons should die without leaving issue who should acquire a vested interest in the share of their father, then the share of such son should go to the surviving sons and their respective issue "upon such and the like trusts and to and for such and the like intents and purposes . . . as are herein declared with respect to their respective original" shares. There was no general gift over on the death of all three sons without issue. A and B predeceased C, each of them leaving issue. C died without ever having had issue:—Held, *that, on the true construction of the will, there was an intestacy as to the share of C on his death.*

The third rule of construction laid down by KAY, J., *in* Bowman, *In re*; Lay, *In re*; Whytehead *v.* Boulton (41 Ch. D. 525), *examined and dissented from.*

Hodge *v.* Foot (34 Beav. 349), Arnold's Estate, *In re* (39 L. J. Ch. 875; L. R. 10 Eq. 252), *and* Walker's Estate, *In re*; Church *v.* Tyacke (48 L. J. Ch. 598; 12 Ch. D. 205), *not followed.*

By his will dated March 5, 1859, the late Benson Harrison, of Scalehow, in the county of Westmorland (hereinafter called the testator), gave and bequeathed the eight and a-half shares to which he was entitled in the business of Harrison, Ainslie & Co. (or the Newland and Lorne Furnace Co.) to certain trustees therein named, to hold upon the trusts thereinafter mentioned. And the testator thereby declared and directed that from and after January 1, 1864, his said trustees should stand possessed of the said eight and

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a-half shares upon trust as to the net proceeds arising from three and a-half of the said shares (after payment thereout of the annual sum of 250*l.* for certain specified charitable purposes) to pay half-yearly to his son Matthew Benson Harrison the whole or such part of such net proceeds as his trustees should in their absolute discretion think fit during his life, and any accumulation of such net proceeds during his life. And the testator declared that after the decease of the said Matthew Benson Harrison the whole of such proceeds should be from time to time invested in or upon any of the stocks, funds, or securities thereinafter mentioned with respect to the investment of his residuary personal estate. And the testator declared that the said net proceeds, and the resulting income thereof, and the stocks, funds, or securities on which the same should for the time being be invested, and also the last-mentioned three and a-half shares, should be held by his trustees in trust for all or such one or more exclusively of the others or other of the children or remoter issue of his said son Matthew Benson Harrison (such issue to be born in his lifetime), upon such conditions, with such restrictions, and in such manner as his said son Matthew Benson Harrison should by deed or will appoint. And in default of and until such appointment in trust for all or any of the children of his said son Matthew Benson Harrison who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, and if more than one in equal shares. And the testator thereby further directed that his trustees should stand possessed of the net proceeds arising from two and a-half others of the aforesaid eight and a-half shares (after payment thereout of the annual sum of 150*l.* for certain specified charitable purposes) upon trust to pay half-yearly to his son Wordsworth Harrison the whole or such parts of the said net proceeds as his trustees should in their absolute discretion think fit during his life. And after the decease of the said Wordsworth Harrison (subject to the contingent payment of a certain annuity to his widow) the testator directed that any accumulation of the said net proceeds during the life of the said Wordsworth Harrison, and after his decease the whole of such net proceeds, and also the said two and a-half shares, should be held by his trustees upon such and the like trusts, and to and for such and the like intents and purposes, and with, under, and subject to such and the like powers, provisoes, and declarations for the benefit of his said son Wordsworth Harrison and his issue as were thereinbefore expressed and declared with respect to the shares thereby settled upon his son Matthew Benson Harrison and his issue, as fully and effectually as if the same were there repeated. And the testator thereby further directed that his trustees should stand possessed of the net proceeds arising from two and a-half others of the aforesaid eight and a-half shares (after payment thereout of the annual sum of 100*l.* for certain specified charitable purposes) upon trust to pay half-yearly to his son Benson Harrison the whole or such parts of the said net proceeds as his trustees should in their absolute discretion think fit during his life. And after the decease of the said Benson Harrison the testator directed that any accumulation of the said net proceeds during the life of the said Benson Harrison and, after his decease, the whole of such net proceeds, and also the said two and a-half shares, should be held by his trustees upon such and the like trusts, and to and for such and the like intents and purposes, and with, under, and subject to such and the like powers, provisoes, and declarations for the benefit of his said son Benson Harrison and his issue as were thereinbefore expressed and declared in favour of his said son Matthew Benson Harrison and his issue with respect to the shares thereby settled upon him and them as fully and effectually as if the same were there repeated. And the will proceeded in the following terms:

"And in case any of them, the said Matthew Benson Harrison, Wordsworth Harrison, and Benson Harrison respectively, shall die, and no child or other issue of such of them so dying shall acquire a vested interest in the shares hereby settled upon them respectively under the trusts or powers aforesaid, I direct that the respective shares of such of my said sons as shall so die or so much

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thereof as shall not have been applied under the powers herein contained, and the annual income thereof, shall be held for the benefit of the survivors or survivor of them my said sons and their and his respective issue in equal shares Upon such and the like trusts and to and for such and the like intents and purposes and with under and subject to such and the like powers provisoes and declarations as are herein declared with respect to their respective original share or shares. . . . And I direct my said trustees . . . on the first day of January, 1864, to stand possessed of the sum of 66,000*l.* part of the residue of my personal estate Upon the trusts following, that is to say, as to 20,000*l.* part of such sum and also as to one third part of the ultimate residue of my personal estate Upon the like trusts and for the like intents and purposes and with the like powers in favour of or for the benefit of my said son, Matthew Benson Harrison, and his children and other issue (such issue to be born in his lifetime) and with the like discretionary powers as to the payment of the interest or other annual produce thereof to my said son, Matthew Benson Harrison, during his life as are hereinbefore declared with respect to the shares in my said partnership business hereby settled upon him and them and in case no child or issue of my said son, Matthew Benson Harrison, shall acquire a vested interest in the said sum of 20,000*l.* and his said share of my residuary personal estate under the trusts or powers hereinbefore contained or referred to, I direct that the same or so much thereof as shall not have been applied under the said powers and the annual income thereof shall be held in trust for my surviving sons in equal proportions Upon the like trusts and for the like intents and purposes with the like powers in favour of them and their children or other issue and with the like discretionary powers as to the payment of the interest or other annual produce thereof to them during their respective lives as are hereinbefore declared with respect to his original share in the said sum of 66,000*l.* and in the ultimate residue of my personal estate. And as to the sum of 20,000*l.* other part of the said sum of 66,000*l.*, and also as to one other third part of the ultimate residue of my said personal estate I direct my said trustees . . . . to stand possessed thereof Upon the like trusts and for the like intents and purposes and with the like powers in favour or for the benefit of my said son, Wordsworth Harrison, and his children and other issue (such issue to be born in his lifetime) and with the like discretionary powers as to the payment of the interest or other annual produce thereof to my said son, Wordsworth Harrison, during his life as are hereinbefore declared with respect to the shares in my said partnership business hereby settled upon him and them and in case no child or other issue of my said son, Wordsworth Harrison, shall acquire a vested interest in the said sum of 20,000*l.* and his said share in my residuary personal estate under the trusts or powers hereinbefore contained or referred to, I direct that the same or so much thereof as shall not have been applied under the said powers and the annual income thereof shall be held in trust for my surviving sons in equal proportions Upon the like trusts and for the like intents and purposes with the like powers in favour of them and their children and other issue and with the like discretionary powers as to the payment of the interest or other annual produce thereof to them during their respective lives as are hereinbefore declared with respect to their respective original shares in the said sum of 66,000*l.* and the ultimate residue of my said personal estate And as to the sum of 26,000*l.* the remaining part of the said sum of 66,000*l.*, and also as to one other third part of the ultimate residue of my said personal estate I direct my said trustees . . . . to stand possessed thereof Upon the like trusts and for the like intents and purposes and with the like powers in favour or for the benefit of my said son, Benson Harrison, and his children and other issue (such issue to be born in his lifetime) and with the like discretionary powers as to the payment of the interest or other annual produce thereof to my said son, Benson Harrison, during his life as are hereinbefore declared

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with respect to the shares in my said partnership business hereby settled upon him and them and in case no child or other issue of my said son, Benson Harrison, shall acquire a vested interest in the said sum of 26,000*l.* and his said share in my residuary personal estate under the trusts or powers thereinbefore contained or referred to I direct that the same or so much thereof as shall not have been applied under the said powers and the annual income thereof shall be held in trust for my surviving sons in equal proportions Upon the like trusts and for the like intents and purposes with the like powers in favour of my said sons and their children and other issue and with the like discretionary powers as to the payment of the interest or other annual produce thereof to them during their respective lives as are hereinbefore declared with respect to their respective original shares in the said sum of 66,000*l.* and in the residue of my said personal estate."

The testator executed in all seven codicils to his said will, of which only the first and fifth are material.

By the first codicil dated June 1, 1860, the testator directed his trustees to stand possessed of three of his eight and a-half shares in his partnership business for his son Benson "and his children and more remote issue . . . with such limitations over as aforesaid." And after reciting that he had by his said will directed his trustees on January 1, 1864, to stand possessed of the sum of 26,000*l.* upon certain trusts in favour or for the benefit of his son Benson Harrison and his children and other issue, as already set out above, the testator proceeded as follows: "And I also direct my said trustees . . . to stand possessed of the sum of 23,000*l.* . . . instead of the said sum of 26,000*l.* Upon the like trusts in favour of or for the benefit of my said son, Benson Harrison, and his issue and also in case no child or other issue of my said son, Benson Harrison, shall acquire a vested interest in the said sum of 23,000*l.* and the investments thereof as are in the said will mentioned and declared with respect to the said sum of 26,000*l.*"

By the fifth codicil dated December 22, 1862, the testator directed as follows:

"I hereby revoke the division (contained in my will and the codicils thereto) of 66,000*l.* to my three sons, and declare it to be my wish and intention that whatever accumulation there may be of my personal estate at Candlemas, 1864, beyond 60,000*l.* (already bequeathed to my two daughters) shall be equally divided between my three sons Matthew Benson, Wordsworth, and Benson."

The testator died on November 25, 1863, and the will and codicils were duly proved on March 14, 1864, in the District Probate Registry at Carlisle.

Matthew Benson Harrison died on January 22, 1879, leaving three children him surviving.

Wordsworth Harrison died on June 14, 1889, leaving five children him surviving.

Benson Harrison died on November 1, 1900, without ever having had any children.

A petition was now presented to the Court by one of the trustees for the time being of the testator's will in the suit of *Harrison* v. *Harrison* (instituted on August 30, 1872), asking (*inter alia*) that it might be declared who, upon the proper construction of the will and codicils of the testator, were now entitled, and in what shares and proportions, and in what capacities, to certain ordinary and preference shares in Harrison, Ainslie & Co., Lim., and to certain funds in Court, and to certain personal estate of the testator, now representing the three shares in the partnership business of Harrison, Ainslie & Co. (or the Newland and Lorne Furnace Co.), and the one-third share of the accumulations of the testator's personal estate at Candlemas, 1864, beyond the sum of 60,000*l.*, and the one-third share of the testator's ultimate personal estate, to which the said Benson Harrison had been entitled for a life interest under the will and codicils of the testator already set out above.

Vernon Smith, *K.C.*, and *H. Fellows*, for the trustee of the testator's will.

Macnaghten, *K.C.*, and *Warlters Horne*, for the children of Wordsworth Harrison.

—On the true construction of this will

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there is an independent gift to the children of Wordsworth on the death of Benson, and there is no necessity to read "survivors" as "others." The words "for the benefit of the survivors or survivor of them my said sons and their and his respective issue," constitute independent gifts to the sons and their issue. It is not a gift to the sons and a settlement of their shares, as in most cases.

But if we have to rely upon reading "survivors" as "others," this is a case where that ought to be done. There is no absolute rule that "survivor" can be read as "other" only where there is a gift over on failure of all the children. The present case is within the third rule laid down by Kay, J., in *Bowman, In re; Lay, In re; Whytehead* v. *Boulton* [1889] [1] In *Robson, In re; Howden* v. *Robson* [1899],[2] some doubt was expressed as to that rule; but the gift in that case was only to the survivors, without the words "and their children," so it was not within the third rule in *Bowman, In re.*[1] *Beckwith* v. *Beckwith* [1876] [3] is distinguishable on the same ground. The rule is supported by *Hodge* v *Foot* [1865] [4] and *Hawkins* v. *Hamerton* [1848],[5] and by the reasoning of the judgment in *Corbett's Will, In re* [1860].[6]

Haldane, K.C., and *Sheldon*, for other parties in the same interest.—Where the whole will shews, as this will does, an intention that the property should be settled upon the different *stirpes*, the word "survivors" will be construed to mean survivorship in the person of descendants—see the judgment of the Privy Council in *King* v. *Frost* [1890],[7] and Lord Selborne's judgment in *Waite* v. *Littlewood* [1872].[8] In *Wake* v. *Varah* [1876] [9] there was a gift over on failure of all the issue; but the decision was not based on that ground. *Benn, In re; Benn* v. *Benn* [1885],[10] is distinguishable, because there were no words there to connect the gift to survivors with the trusts of their original share.

Swinfen Eady, K.C., and *Bryan Farrer*, for other parties in the same interest.—The case of *Benn, In re; Benn* v. *Benn*,[10] came before the Court of Appeal in *Blantern, In re; Lowe* v. *Cooke* [1891],[11] where the Court said that Stirling, J., had been misled by it.

Eve, K.C., and *Martelli*, for other parties in the same interest.

Theobald, K.C., and *G. Cave*, for the testator's next-of-kin.—The third rule laid down in *Bowman, In re*,[1] is not good law. On the contrary, it is distinctly opposed to the decisions in *Milsom* v. *Awdry* [1800] [12] and *Usticke, In re* [1866].[13] The conclusion arrived at by Cozens-Hardy, J., in *Robson, In re; Howden* v. *Robson*,[2] is really irresistible. The crucial words in this case are nearer those in *Robson, In re; Howden* v. *Robson*,[2] than those in *Bowman, In re.*[1] *Hawkins* v. *Hamerton* [5] and *Corbett's Will, In re*,[6] are unlike the present case, and have no real bearing on it. There is, in fact, no case that really bears upon or need embarrass the Court in construing the present will. That being so, the obvious result of these limitations, under the circumstances that have arisen, is to constitute an intestacy.

Macnaghten, K.C., replied.

Haldane, K.C., in reply, referred to *Lucena* v. *Lucena* [1877].[14]

Swinfen Eady, K.C., replied.

Cur. adv. vult.

April 27.—COZENS-HARDY, J.—This petition involves the construction of the will and codicils of Benson Harrison, and the question that arises is, who are entitled to a share in the testator's business which the son Benson enjoyed during his life, and also who are entitled to a share in the residue which he likewise enjoyed for life. [His Lordship read the material portions of the will and codicils.] It will be observed that there is no gift over on death of all three sons without

(1) 41 Ch. D. 525.
(2) 34 L. J. N.C. 718; W. N. (1899), 260.
(3) 46 L. J. Ch. 97.
(4) 34 Beav. 349.
(5) 16 Sim. 410.
(6) 29 L. J. Ch. 458; Johnson, 591.
(7) 60 L. J. P.C. 15; 15 App. Cas. 548.
(8) L. R. 8 Ch. 70.
(9) 45 L. J. Ch. 533; 2 Ch. D. 348.
(10) 29 Ch D. 839.
(11) W. N. (1891), 54.
(12) 5 Ves. 465.
(13) 35 Beav. 338.
(14) 47 L. J. Ch. 203; 7 Ch D 255.

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issue, either as to the business or as to the residue.

On behalf of the children of Matthew Benson and Wordsworth, it has been argued that they take, although their parents did not survive Benson. This contention is based (*a*) on the ground that there is sufficient in this will to justify the Court in reading "surviving" as meaning "other"; or (*b*) on the ground that "surviving" has the meaning of "stirpital" survivorship; or (*c*) on the ground that, as a matter of construction, the gifts are to the surviving sons for life, and to the children, or issue, of the sons, whether such sons survive or not. On behalf of the next-of-kin it has been argued (*a*) that there is no justification for departing from the plain meaning of the language used, and that there is no gift except to the children, or issue, of sons who survived.

Reading the will without reference to authorities, I think it is reasonably clear that the only children, or issue, who can take Benson's share are children, or issue, of such of his two brothers as might survive him, and that as neither of the two brothers survived him there are no children, or issue, who can take. It is not for me to guess whether this is what the testator would have desired. My duty is to construe the language he has used.

But in a will of this nature it is not possible wholly to disregard prior decisions so far as they lay down principles, and my attention has been called, and properly called, to a great many authorities. I do not propose to discuss them at length, more particularly as the wit of man cannot reconcile them all. It is sufficient for me to say that I cannot adopt the view that "surviving" means "other," or means "surviving in person or in descendants," without running counter to *Beckwith* v. *Beckwith*,[3] *Lucena* v. *Lucena*,[14] *Horner's Estate, In re*; *Pomfret* v. *Graham* [1881],[15] and *Benn, In re*; *Benn* v. *Benn*,[10] three of which are decisions of the Court of Appeal. I cannot, however, pass over so lightly that which I have called the third argument on the part of the children. It is supported by, if not based upon, the considered judgment of Mr. Justice Kay in *Bowman, In re*.[1] After dealing with the particular will before him, the learned Judge lays down three propositions as correctly summing up the law in cases of this nature: "It seems to me that the decisions establish the following propositions: Where the gift is to A., B., and C. equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over. If to similar words there is added a limitation over if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent. They also participate, although there is no general gift over, where the limitations are to A., B., and C. equally for their respective lives, and after the death of any to his children, and if any die without children to the surviving tenants for life and their respective children, in the same manner as their original shares." Of these three propositions, the first and the second seem to be well established, and I adopt them without hesitation. The third proposition, which covers the present case, has caused me considerable difficulty. Mr. Justice Kay has stated this proposition as the result of the authorities, and it is necessary to consider how far the authorities cited bear out this view, and how far those authorities have been overruled. They are *Hodge* v. *Foot*,[4] *Arnold's Estate, In re* [1870],[16] and *Walker's Estate, In re*; *Church* v. *Tyacke* [1879].[17] Now in *Hodge* v. *Foot*[4] Sir John Romilly proceeded partly upon the "scope and object" of the will, and the circumstance that an intestacy would result unless "surviving" was read as "other." It must, I think, be admitted that those reasons cannot now be accepted—see the observation of Lord Justice Fry in *Benn, In re*; *Benn* v. *Benn*.[10] Sir John Romilly also relied upon *Harman* v. *Dickenson* [1781] [18]—where, however, there

(15) 51 L. J. Ch. 43; 19 Ch. D. 186.

(16) 39 L. J. Ch. 875; L. R. 10 Eq. 252.
(17) 48 L. J. Ch. 598; 12 Ch. D. 205.
(18) 1 Bro. C.C. 91.

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was a general gift over such as would bring the case within Mr. Justice Kay's second proposition—and upon *Hawkins* v. *Hamerton*.[5] In that case Vice-Chancellor Shadwell did not lay down any general principle. There was an express direction that "after the decease of my said son and daughters, then I will and direct that the whole of such residue . . . shall be paid and divided amongst all and every the children of my said son and daughters, in equal parts." The class was not limited to children of such of the son and daughters as should survive the wife. And the subsequent, and apparently unnecessary, clause that, in case any of the son and daughters should die without leaving issue, then the share given to him, her, or them so dying should go and be divided "amongst the survivor or survivors of my said children and their issue, in the like equal parts, shares and proportions," was construed so as to make it consistent with the former gift. This is the view taken of that case by Vice-Chancellor Wood in *Corbett's Will, In re*.[6] In *Arnold's Estate, In re*,[16] Vice-Chancellor Malins proceeded upon a view which has since been distinctly repudiated by the Court of Appeal. I may refer to *Wake* v. *Varah*.[9] I think *Arnold's Estate, In re*,[16] cannot be regarded as a binding authority—see the observation of Lord Justice Lindley in *Benn, In re; Benn* v. *Benn*.[10] *Walker's Estate, In re; Church* v. *Tyacke*,[17] was a decision of Vice-Chancellor Hall; but in the subsequent case of *Horner's Estate, In re; Pomfret* v. *Graham*,[15] the Vice-Chancellor in effect said that his earlier decision could not be supported, having regard to *Beckwith* v. *Beckwith*.[3] It is, I think, not incorrect to say that not one of the three decisions relied upon by Mr. Justice Kay as warranting his third proposition can now be regarded as satisfactory, or as laying down any principle which a Judge of co-ordinate jurisdiction ought to follow.

Against these decisions there is a considerable body of authority. I refer especially to *Milsom* v. *Awdry*.[12] In that case there was a residuary bequest to the testator's nephews and nieces equally *per stirpes* for their lives, and, after the death of either of his said nephews and nieces, his or her share to be paid equally unto and among his or her children, and if any of his said nephews and nieces should die without leaving any child then the share or shares of him, her, or them so dying "should go to and among the survivors or survivor of them in manner aforesaid." The Master of the Rolls held that the words "in manner aforesaid" meant in the same manner as the original share—that is, for life only—and that the share of each, both original and accruing, went to the children, if any. This seems to be precisely the case contemplated by Mr. Justice Kay's third proposition. But the Master of the Rolls held that on the death of the last nephew without issue there would be an intestacy, although there were children of deceased nephews and nieces. *Milsom* v. *Awdry*[12] was approved by Vice-Chancellor Wood in *Corbett's Will, In re*,[6] which is indeed a strong decision in the same sense. It is true that Vice-Chancellor Malins in *Arnold's Estate, In re*,[16] said that he was satisfied that *Milsom* v. *Awdry*[12] was "contrary to a long line of subsequent authorities, and that it is no longer a binding authority." But, for the reasons above stated, and having regard to the judgments of the Court of Appeal, I am not able to accept this view. *Milsom* v. *Awdry*[12] must, I think, be considered as good law.

It follows that, in my opinion, the third proposition in *Bowman, In re*,[1] is not warranted by the authorities, and I must decline to follow it. In my view it makes no difference whether the gift of an accruing share is to the survivors for life with remainder to their children expressly, or is to the survivors and their children by reference to the limitations of the original shares. I must therefore declare that, on the death of Benson without issue, his share in the business fell into residue, and that there is an intestacy as to his share of residue thus augmented.

Solicitors—Dowson, Ainslie & Martineau; A. H. Arnould & Son; Goodale & Hobson.

[*Reported by Joseph E. Morris, Esq., Barrister-at-Law.*

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COZENS-HARDY, J. 1901. March 21, 22. April 27.

UNION LIGHTERAGE CO. *v.* LONDON GRAVING DOCK CO.

Easement—Right of Support—Acquisition by Prescription—Enjoyment—Nature of Enjoyment.

In order to establish a right to an easement by long enjoyment, the enjoyment must be of such a nature that the servient owner's attention ought reasonably to have been drawn to the existence of the easement. It is not enough that something has been visible from which an expert might have inferred the existence of the easement. The word "clam," as applied to the enjoyment by which an easement may be acquired, does not mean surreptitiously or fraudulently, but only in such a manner as could not reasonably be expected to attract the notice of the servient owner.

In 1860, Messrs. Green were the owners in fee simple of property on the bank of the Thames at Blackwall. The eastern part of this was in their own occupation, the western part was let to tenants who used it as a wharf and shipbuilding yard. In that year Messrs. Green employed a contractor to construct a graving dock on their own premises. It was constructed with timber sides supported by rods or ties carried underground to piles driven into the ground. These piles were in the first instance placed on the eastern side of the boundary fence between the two portions of the property, the dock wall being about 17 or 18 feet to the east of the boundary fence. Signs of weakness soon shewed themselves in the sides of the dock, and in or about 1861 Messrs. Green, by arrangement with their tenant, carried rods or ties under the tenant's wharf, and beyond the fence, to a distance of about 15 ft. 6 in. to the west of the fence, and fixed them by means of nuts to piles driven in there.

In 1877, both parts of the property being in hand, Messrs. Green conveyed the eastern part of the premises to the plaintiffs, who had ever since occupied and used it as a wharf. In 1886 Messrs. Green sold the dock premises to a company, who subsequently sold them to the defendants. The defendants had carried on business there ever since. Both the conveyances from Messrs. Green were in common form, and contained no reservation or grant of any right to support.

In 1892 the defendants concreted the bottom and a small part of the side of their dock, but with this exception the timber walls remained supported by the ties put down in 1861 until the trial of the action. In 1900 the plaintiffs, in the course of excavations made by them with a view of improving their property, discovered for the first time the rods or ties placed there by Messrs. Green in 1861.

After some correspondence the plaintiffs brought this action for a declaration that the defendants were not entitled to prevent their removing the ties.

The ties or rods were underground and invisible, and there was evidence that the plaintiffs did not, in fact, know of their existence. Certain nuts were visible upon the western side of a pile upon the plaintiff's land, which, in fact, held the rods or ties in place. There was some conflict of evidence as to whether the existence of these nuts, and the fact that a dock constructed with timber sides, as that of the defendants was, must be supported by ties, ought not to have given the plaintiffs notice of the existence of the ties under their land. The result of this evidence sufficiently appears from the judgment.

Macnaghten, K.C., and *Bryan Farrer*, for the plaintiffs.—The defendants can only claim to maintain these piles and ties in the plaintiffs' land either on the ground of a reservation by Messrs. Green when the land was conveyed to the plaintiffs, or as an easement acquired by twenty years' enjoyment. There is no express reservation; and a reservation of an easement can only be implied where the easement is of necessity and so obviously necessary that the purchaser must be assumed to have known of its existence—*Suffield* v. *Brown* [1864][1] and *Wheeldon* v. *Burrows* [1879].[2] The judgment of Thesiger, L.J., in the latter case sums up all the previous cases, and *Pyer* v.

(1) 33 L. J. Ch. 249; 4 De G. J. & S. 185.
(2) 48 L. J. Ch. 853; 12 Ch. D. 31.

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Carter [1857][3] must be taken to be overruled. The burden of proof of a reservation is on the grantor—*Broomfield* v. *Williams* [1897].[4]

As to the plaintiffs' long enjoyment, an easement can only be acquired by enjoyment which is continuous, peaceable, and open—*Dalton* v. *Angus* [1881].[5] There is no question as to the first two requisites; but "open" means an enjoyment which would be obvious to the ordinary man—*Solomon* v. *Vintners' Co.* [1859][6] Here there was no such open enjoyment. The defendants never knew of the existence of the easement, and there is nothing to shew that they ought to have known.

Eve, K.C., and *A. F. Peterson*, for the defendants.—A reservation will be implied of any right which arises of necessity out of the condition of the property. When it is said that the easement reserved must be apparent, it is only meant that it must be apparent from its necessity. Here there was a timber dock at a distance at which it was common knowledge that it could not be supported except by ties under the plaintiffs' land. That is sufficient to imply a reservation—*Wheeldon* v. *Burrows*.[2]

The defendants have enjoyed the support for more than twenty years, and have undoubtedly acquired an easement, unless it can be shewn that their enjoyment has been *clam*. The enjoyment was not secret or surreptitious. It is stated that the directors of the company did not know of the existence of the ties; but their servants, who were daily employed about the wharf, must have known, and no evidence has been called to shew they did not. It is not necessary to prove actual knowledge on the part of the servient owner—*Gray* v. *Bond* [1821].[7]

Macnaghten, K.C., replied.

Cur. adv. vult.

April 27.—COZENS-HARDY, J. (after stating the facts as above set out).—The question I have to decide is whether the defendants are entitled, as against the plaintiffs, to have the support of these rods and ties, and to prevent the plaintiffs from interfering with them as may seem requisite for the purpose of their business. Evidence has been adduced which satisfies me on several points. First, for a timber dock of this nature it was reasonably necessary to have underground rods and ties extending beyond the division fence between the two properties. This was proved by actual experience in 1860, and Mr. Jeffery, whose testimony was in no way shaken, states that the proper distance for safety, though it might vary slightly, having regard to the nature of the soil, is for a dock of this depth 33 ft. from the side, and this is about the distance adoped in 1861. Secondly, if instead of a timber side a concrete wall had been placed on the western side of the dock, it would not have been necessary to go beyond the boundary fence. Thirdly, the plaintiffs, when they purchased in 1877, in fact had no knowledge of the existence of the rods or ties under their land, and they were not aware of their existence until 1900. In saying this, I refer to the directors and managers of the plaintiff company. Fourthly, there are now visible on the western side of the camp sheathing which holds up the side of the wharf, and a few inches above the slip, two nuts on the outside of piles. These are nuts and piles placed there in 1861. These nuts are not always visible, and are not of such a nature as to attract attention. In fact, the directors and the present manager had not noticed them until 1900. Fifthly, although a skilled expert informed of the nature of the dock might have concluded that these nuts had to do with the support of the dock, no ordinary person conversant with riverside property would necessarily have arrived at this conclusion, for they might very probably have served to support the camp sheathing and the wharf behind it. Sixthly, if the plaintiffs remove the ties it is probable that the dock side will give way.

Under these circumstances the defendants contend—first, that on the conveyance of 1877 to the plaintiffs there was an implied reservation of a right to the then existing support to the dock; and secondly, that even if there was no such implied reservation the defendants

(3) 26 L. J. Ex. 258; 1 H. & N. 916.
(4) 66 L. J. Ch. 305; [1897] 1 Ch. 602.
(5) 50 L. J. Q.B. 689; 6 App. Cas. 740.
(6) 28 L. J. Ex. 370; 4 H. & N. 585.
(7) 2 Br. & B. 667.

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have acquired a right to the easement of support by reason of actual enjoyment for more than twenty years since 1877. The plaintiffs deny that there was any implied reservation, and they deny that any easement can have been acquired, because the enjoyment has not been of such a nature as to entitle the defendants to an easement either under the Prescription Act or under the presumption of a lost grant. On the first point, I am clearly of opinion that there was no implied reservation in favour of the vendors when the wharf was conveyed to the plaintiffs in 1877.

The judgment of Lord Westbury in *Suffield* v. *Brown*,[1] followed by the judgment of Lord Chelmsford in *Crossley* v. *Lightowler* [1867],[8] has been distinctly adopted by the Court of Appeal in the leading case of *Wheeldon* v. *Burrows*.[2] It seems to me that, in a case like this, the vendors must expressly reserve any such right, and that the purchaser is, in the absence of express reservation, entitled to rely upon the plain effect of the conveyance executed by the vendors.

The second point, however, involves much more difficulty. There has been a continuance for upwards of twenty years of these rods and ties under the plaintiffs' land, and I think a right has been acquired, either under the Prescription Act or under the common-law doctrine of a lost grant, unless it can be held that the easement has been enjoyed, not openly, but *clam*. By *clam* I do not understand fraudulently or surreptitiously. It is sufficient that the easement has not come to the knowledge of the plaintiffs, and is not of such a nature that their attention ought reasonably to have been drawn to it. The authorities bearing on the point are not numerous, and it will be convenient to refer to them shortly. In *Solomon* v. *Vintners' Co.*[6] a right of support was claimed by the plaintiff as owner of a house against the owner, not of the adjacent house, but of the house against which the adjacent house leaned, and by which it and the plaintiff's house were, in fact, supported. Baron Bramwell said: "Supposing it does exist it must be either as a matter of absolute right, or as a matter of prescription, or under the Prescription Act, or as founded on some supposed lost grant. In any of these cases it can only exist if the benefit was one that was enjoyed as of right, which cannot be unless it was openly and visibly enjoyed. An enjoyment must be neither *vi*, *precario* nor *clam*, it must be open. Now when one house visibly leans towards another, a person may make a tolerably shrewd guess that it is partly supported by the other; but it will only be a conjecture. No one can say but that both may have slipped and both stand. I think the expression is, 'upon the square,' self-supporting. But it may turn out to be the fact, that the house which leans towards the other, affords as much support to that other by their mutual cohesion as the other affords to it. In fact it is impossible to say which house is being supported. It is true that in this case when the defendant's house was removed the plaintiff's house fell in; but probably nobody who saw the block of buildings would have guessed that such a result would have followed. If any one had done so it would have been but a matter of conjecture. Therefore, supposing that the plaintiff, for more than twenty years, had an enjoyment which he says now ought to continue, it was an enjoyment *clam*, not open, and consequently not as of right." This judgment plainly interprets *clam* in the sense which I have adoped. "Consent or acquiescence," said Lord Justice Thesiger, in delivering the judgment of the Court of Appeal in *Sturges* v. *Bridgman* [1879],[9] "of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses." This seems to adopt the same view. In the leading case of *Dalton* v. *Angus*[5] there was a remarkable difference of opinion among the Judges

(8) 36 L. J. Ch. 584; L. R. 2 Ch. 478.

(9) 48 L. J. Ch. 785; 11 Ch. D. 852.

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who attended the House of Lords, and also among the law Lords, as to the nature and legal origin and limits of the right of support. Lord Selborne says: "The inquiry on this part of the case is, as to the nature and extent of the knowledge or means of knowledge which a man ought to be shewn to possess, against whom a right of support for another man's building is claimed. He cannot resist or interrupt that of which he is wholly ignorant. But there are some things of which all men ought to be presumed to have knowledge, and among them (I think) is the fact, that, according to the laws of nature, a building cannot stand without vertical or (ordinarily) without lateral support. When a new building is openly erected on one side of the dividing line between two properties, its general nature and character, its exterior and much of its interior structure, must be visible and ascertainable by the adjoining proprietor during the course of its erection. When (as in the present case) a private dwelling-house is pulled down, and a building of an entirely different character, such as a coach or carriage factory, with a large and massive brick pillar and chimney stack, is erected instead of it, the adjoining proprietor must have imputed to him knowledge that a new and enlarged easement of support (whatever may be its extent) is going to be acquired against him, unless he interrupts or prevents it. The case is, in my opinion, substantially the same as if a new factory had been erected, where no building stood before. Having this knowledge, it is, in my judgment, by no means necessary that he should have particular information as to those details of the internal structure of the building on which the amount or incidence of its weight may more or less depend. If he thought it material, he might inquire into those particulars, and then if information were improperly withheld from him, or if he received false or misleading information, or if anything could be shewn to have been done secretly or surreptitiously, in order to keep material facts from his knowledge, the case would be different. But here there was no evidence from which a jury could have been entitled to infer any of these things. Everything was honestly and (as far as it could be) openly done, without any deception or concealment. The interior construction of the building was, indeed, such as to require lateral support, beyond what might have been necessary if it had been otherwise constructed. But this must always be liable to happen, whenever a building has to be adapted to a particular use. The knowledge that it may or may not happen is in my opinion enough, if the adjoining proprietor makes no inquiry. I think, therefore, that in this case the kind and degree of knowledge which the adjoining proprietor must necessarily have had was sufficient; that nothing was done *clam*, and that the evidence did not raise any question on this point which ought to have been submitted to the jury." These observations of Lord Selborne indicate the great difficulty of applying the word *clam* to the circumstances of any particular case. Lord Blackburn says: "The edict of the Prætor that possession must must not be *vi vel clam*, as I think, is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open" This is not so clear an expression of opinion as that of Baron Bramwell, but I do not think it really differs from Baron Bramwell's view.

The question for my decision, therefore, seems to be this: Was the dock a structure of such a nature that the plaintiffs ought to have assumed that it must have had artificial supports extending under their wharf? Or, in other words, can the plaintiffs be heard to say in truth they did not know of the existence of these artificial supports? Now, no doubt the plaintiffs knew there was a dock on the east side of their high boundary fence, not coming quite up to that fence, but some 17 ft. or 18 ft. distant from it. They did not know of the artificial supports to the dock which extended under their land. I cannot hold that they ought to have known that the dock must have been thus supported. Messrs. Green and their contractor in 1860 apparently thought that adequate support would be obtained

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by means of ties not extending beyond the boundary fence, and it does not seem reasonable to attribute to the plaintiffs such special knowledge as an expert might possess, but which an ordinary man of business would not possess. Nor do I think that the two nuts which are visible on the plaintiffs' premises, even if observed, suffice to give notice of the existence of the ties. They are 15 ft. 6 in. from the boundary fence, and a few inches above the surface of the slip. So far as I can judge from a photograph, they would naturally be regarded only as connected with the camp sheathing on the side of the plaintiffs' wharf. They would not suggest, except possibly to a skilled expert, that they were connected with two of a series of iron ties under the plaintiffs' wharf supporting the distant dock. In the present case there has been nothing surreptitious, no active concealment; but, on the other hand, there has been no open and visible enjoyment of the easement claimed. This special and unusual support, by means of iron ties beneath the surface of the plaintiffs' land is not, in my opinion, such as can be claimed merely by twenty years' enjoyment without the knowledge of the plaintiffs.

The result is that I must declare that the defendants are not entitled to retain any of the rods, ties, or supports in or under the plaintiffs' land for the purpose of upholding or supporting the defendants' dry dock, and are not entitled to interfere with the removal by the plaintiffs of all or any of such rods, ties, or supports.

Solicitors—Renshaw, Kekewich & Smith, for plaintiffs; Drake, Son & Parton, for defendants.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

COZENS-HARDY, J.
1901.
May 15, 17, 23.

HARROLD *v.* PLENTY.

Mortgage—Choses in Action—Shares in Limited Company—Remedy—Foreclosure or Sale.

The deposit of a certificate of shares to secure the repayment of money amounts to an agreement to transfer the shares by way of mortgage, and the depositee is entitled to a decree for foreclosure, and is not restricted to a remedy by sale.

Carter *v.* Wake (46 L. J. Ch. 841; 4 Ch. D. 605) *distinguished.*

In March, 1897, the defendant deposited with the plaintiff a certificate for shares as security for the repayment to the plaintiff of a debt of 150*l* then owing to the plaintiff from the defendant with interest thereon at the rate of 6 per cent. per annum. The defendant made default, and the plaintiff commenced the present action to enforce his security by foreclosure or sale.

The statement of claim set out the transaction in the terms above mentioned, and the plaintiff now moved for judgment in default of the defendant's appearance; and the only question argued was whether the plaintiff was entitled to foreclosure or whether his only remedy was by a sale.

Dighton Pollock, for the plaintiff.—The deposit of the share certificates constituted a valid equitable mortgage, and not a pledge. The remedy of a mortgagee is foreclosure, and not sale, as in the case of a pledge.

[The following cases and text-books were referred to: *General Credit and Discount Co.* v. *Glegg* [1883],[1] *London and Midland Bank* v. *Mitchell* [1899],[2] *France* v. *Clark* [1883],[3] *Carter* v. *Wake* [1877],[4] *James* v. *James* [1873],[5] *Owen, In re* [1894],[6] *Sadler* v. *Worley* [1894],[7] *Shea* v. *Moore* [1892],[8] *Richardson, In re*; *Shillito*

(1) 52 L. J. Ch. 297; 22 Ch. D. 549.
(2) 68 L. J. Ch. 568; [1899] 2 Ch. 161.
(3) 52 L. J. Ch. 362; 22 Ch. D. 830. In C. A.: 53 L. J. Ch. 585; 26 Ch. D. 257.
(4) 46 L. J. Ch. 841; 4 Ch. D. 605.
(5) 42 L. J. Ch. 386; L. R. 16 Eq. 153.
(6) 63 L. J. Ch. 749; [1894] 3 Ch. 220.
(7) 63 L. J. Ch. 551; [1894] 2 Ch. 170.
(8) [1894] 1 Ir. R. 158.

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v. *Hobson* [1885],[9] *Tahiti Cotton and Coffee Plantation Co., In re; Sargent, ex parte* [1874],[10] *Ryall* v. *Rowles* [1750],[11] *Gorgier* v. *Mieville* [1824],[12] *Colonial Bank* v. *Whinney* [1886],[13] *Stewart, Ex parte; Shelley, in re* [1864],[14] *Moss, Ex parte; Davies, in re* [1849],[15] *Donald* v. *Suckling* [1866],[16] *Halliday* v *Holgate* [1868],[17] *Robbins on Mortgages*, pp. 280, 1,459, and 1,465; *Story's Bailments*, s. 290; and *Seton's Judgments* (5th ed.), p. 1,695.]

Danckwerts, K.C. (*amicus Curiæ*).—The question of the relative rights of mortgagee and pledgee was considered in *Burdick* v. *Sewell* [1883],[18] when the case was before Field, J.

The defendant did not appear.

Cur. adv. vult.

COZENS-HARDY, J.—This action raises a question whether a person with whom certificates of shares in a limited company have been deposited by way of security is entitled to foreclosure, or whether his only remedy is sale. The defendant does not appear, but counsel who appears for the plaintiff has put before me all the authorities which might help the defendant in resisting foreclosure. The only material allegation in the statement of claim is that in March, 1897, the defendant deposited with Harrold a certificate for shares as security for the repayment to Harrold of the sum of 150*l.* then owing to him from the defendant, with interest thereon at the rate of 6 per cent. per annum. Now it is plain that a pledgee is in a very different position from an ordinary mortgagee. He has only a special property in the thing pledged. He may obtain a sale, but he cannot obtain a foreclosure. I do not think that this is properly a case of pledge. A share is a *chose in action*. The certificates are merely evidence of title, and whatever may be the result of the deposit of a bearer bond, such as that which Sir G. Jessel dealt with in *Carter* v. *Wake*,[4] I think I cannot treat the plaintiff as a mere pledgee. The deposit of the certificate by way of security for the debt which is admitted seems to me to amount to an equitable mortgage, or, in other words, to an agreement to execute a transfer of the shares by way of mortgage. The result is that the plaintiff is entitled to a judgment substantially in the form which would be given if, instead of certificates of shares, the documents had been title-deeds of real estate or a policy of assurance—*Seton on Judgments* (5th ed.), p. 1,701.

(9) 55 L. J. Ch. 741; 30 Ch. D. 396.
(10) 43 L. J. Ch. 425; L. R 17 Eq. 273.
(11) 1 Ves. sen. 348; 1 Atk. 165; 1 Wh. & Tu. L.C. Eq. (7th ed.) 96.
(12) 2 L. J. (o.s.) K.B 206; 3 B. & C. 45.
(13) 56 L. J. Ch. 43; 11 App. Cas. 426.
(14) 34 L. J. Bk. 6; 4 De G. J. & S. 543.
(15) 18 L. J. Bk. 17; 3 De G. & Sm. 599.
(16) 35 L. J. Q.B. 232; 7 B. & S. 783; L. R. 1 Q.B. 585.
(17) 37 L. J. Ex. 174; L. R. 3 Ex. 299.
(18) 52 L. J. Q.B. 428; 10 Q.B. D. 363. In C.A.: 53 L. J. Q.B. 399; 13 Q.B. D. 159. In H.L.: 54 L. J. Q.B. 156; 10 App. Cas. 74.

Solicitors—Maude & Tunnicliffe, agents for S. J. Knight, Newbury, for plaintiff.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

JOYCE, J. 1901. April 3, 29. } PARSON, *In re*; PARSON *v.* PARSON.

Costs—Taxation—Party and Party—Leading Counsel—Special Fee—Disallowance.

In a proceeding in the Chancery Division, a special fee of fifty guineas, in addition to an ordinary fee upon the brief, paid to a leading counsel practising within the Bar but not usually in that Court where the proceeding takes place, cannot under ordinary circumstances be allowed on a taxation of costs between party and party.

Semble, *such a fee cannot be allowed under any circumstances.*

Summons to review a taxation of costs under an order made in an administration action.

In the action a mortgagee had claimed to prove against the estate for a large sum. The question of his right to prove was decided by Kekewich, J., on a

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summons, and the claim was very considerably reduced. There were many interests represented by counsel, and all the leading counsel practising in that Court had been retained by other interests. The claimant, desiring to have a leading counsel, endeavoured to brief several counsel ordinarily practising in other Courts, but without success, and in the end, on the eve of the hearing, was obliged to brief a leading counsel, who declined to go into that Court without a special fee of fifty guineas in addition to the ordinary fee on his brief.

The claimant's costs were ordered to be taxed, and included in them was an item of 66*l.* 2*s.* 6*d.*, fee to leading counsel. Objection being taken to this item, the Taxing Master reduced it by ten guineas, allowing a sum of 55*l.* 12*s.* 6*d.* only for counsel's fee.

This summons was then taken out to vary the Taxing Master's certificate.

Hughes, *K.C.*, and *Henry Fellows*, for the summons.—If in this item is included a special fee of fifty guineas, then there was no necessity to brief a leading counsel who required a special fee, and it is a luxury for which the client must pay. Inasmuch as all the leading counsel practising in that Court were already briefed for other parties, that amounts to a special circumstance; but the Taxing Master did not treat it as a special fee at all, and did not exercise his discretion at all. He must either have allowed or disallowed the whole of it, but not have reduced it by ten guineas; the junior's fee was five guineas, so that the leader's fee could not be an ordinary fee. In *The Warkworth* [1885][1] a special fee in party-and-party taxation was disallowed, and there is no case where a special fee has been allowed, and the cost of it thrown on the unsuccessful party. The nearest is *Harrison*, *In re* [1886],[2] but that dealt with refreshers and not with the original fee.

Whether this is an ordinary fee or a special fee, the Taxing Master has gone on the wrong principle as to *quantum*, and there is no precedent for giving a leader a fee so wholly disproportionate to that of his junior.

Younger, *K.C.*, and *W. E. Vernon*, for the claimant.—The parties who objected to the Taxing Master's certificate are bound by the objections they raise, and there is no objection raised on the ground of special fee. The Taxing Master in his discretion says the fee is not excessive, the leader having no cognisance of the case beforehand. The Taxing Master's decision as to the amount of counsel's fees will not be interfered with unless there has been a gross mistake, and there has been none here—*Brown* v. *Sewell* [1880].[3] A special fee was expressly allowed by Kekewich, J., in *Welby* v. *Still*,[4] on a motion for attachment. The principle of *Smith* v. *Effingham* (*Earl*) [1847][5] applies here; it was not through caprice that special counsel was briefed, but because all the ordinary leaders practising in that Court were already retained. We admit that unless special circumstances can be shewn a special fee is not allowed on party-and-party taxation; but here dire necessity created special circumstances—*Nichols* v. *Haslam* [1845].[6]

Hughes, *K.C.*, in reply.—*Nichols* v. *Haslam*[6] must be wrongly reported; it is impossible to object to any counsel appearing for an adversary, and the objection could not be made at the time. The theory and justification of a special fee are that an ordinary fee is a proper and reasonable fee for the work, and the Taxing Master is bound to insist that such ordinary fee only is paid.

Cur. adv. vult.

April 29.—JOYCE, J.—This is an application to review a taxation under an order in an administration action which has been going on for many years, and in which I was counsel for one of the parties. Under the circumstances I more than once declined to hear this application, but being informally urged to do so because of certain inconveniences which would otherwise have been occasioned, I consented to take it; but I find it difficult to divest my-

(1) 1 Times L. R. 659.
(2) 55 L. J. Ch. 768; 33 Ch. D. 52.
(3) 16 Ch. D. 517.
(4) Unreported.
(5) 16 L. J. Ch. 297; 10 Beav. 378.
(6) 15 Sim. 49.

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self of the knowledge which I have of the proceedings and of the particular application upon which the order was made under which the taxation has taken place.

The taxation is not one between solicitor and client, and the sole question in dispute is as to the fees of a leading counsel within the Bar upon the hearing of a summons which was adjourned into Court. It was not like a trial with witnesses, in the examination and cross-examination of whom great experience or discretion might have been required, but all the evidence was by affidavit or documentary.

The fee in question is sixty guineas, made up, as clearly appears by the indorsement upon the brief produced before me, of ten guineas, the fee on the brief, and fifty guineas special fee, the leading counsel instructed being one of those who do not accept a brief in any Court without an additional special fee of fifty guineas. The Taxing Master's answer to the objections is in the following terms: "The claimant was obliged to brief a leader from another Court, all the leaders in Mr. Justice Kekewich's Court having been retained by other parties in these proceedings. He had, therefore, to pay a larger fee to such counsel than would otherwise have been necessary. This fee I have reduced by the sum of ten guineas. I consider in my discretion that under these circumstances the fee allowed is reasonable and proper."

This, in my opinion, was not an admissible course for the Taxing Master to adopt under the circumstances; but even if it were, the proper fee to be allowed would be seven guineas and no more—the fee paid to the junior counsel being only five guineas. I consider that in the present case a fee of fifty guineas upon the brief of the leading counsel, whether practising within or without the Bar, would be grossly exorbitant and unjustifiable. The only question really is whether his special fee of fifty guineas is to be allowed upon such a taxation. And it is, I think, enough for me to say that, even if such a special fee could ever be allowed (and as at present advised I think it could not), there were not, in my opinion, any special circumstances sufficient to warrant the allowance in the present case. Consequently I decline to allow this special fee, and the fees charged must be reduced by the amount—namely, fifty guineas.

Solicitors—Burchell, Wilde & Co., for the summons; Burchells & Co., for the claimant.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

KEKEWICH, J. 1901. May 9. } MANNESMAN TUBE CO., *In re*; VON SIEMENS *v.* MANNESMAN TUBE CO.

Company — Winding-up — Preferential Payments—Receiver in Possession—Poor Rate—District Rate—Rate for Water Supplied by Meter—Apportionment—Preferential Payments in Bankruptcy Act, 1888 (51 & 52 *Vict. c.* 62), *s.* 1, *sub-s.* 1 (*a*)—*Preferential Payments in Bankruptcy Amendment Act*, 1897 (60 & 61 *Vict. c.* 19), *ss.* 2 *and* 3.

A poor rate and district and water rates were made respectively on October 15, 1898 *and October* 4, 1898, *and were payable by the defendant company. A receiver was appointed on behalf of debenture-holders on November* 9, 1898, *who went into possession on the same day; and on December* 1, 1898, *the company went into voluntary liquidation. The receiver paid the rates in full in January*, 1899, *and claimed to be recouped by the liquidators of the company out of the assets available for payment of the general creditors*:—Held, *that the poor and district rates were preferential payments within the Preferential Payments in Bankruptcy Act*, 1888, *and the amending Act of* 1897, *and that the receiver must be recouped by the liquidators the whole of the amount, and not merely an apportioned part down to the date of his going into possession. But the water being supplied and paid for by meter, the water rate must be apportioned, and only that part of the rate which represented the quantity consumed down to the date of the receiver going into possession was a preferential payment.*

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MANNESMAN TUBE CO., IN RE.

Summons by the plaintiffs for directions that the whole or some, and if so what, part of the sum of 2,430*l.* 6*s.* 11*d.* paid by the receiver to creditors of the company should be claimed under the Preferential Payments in Bankruptcy Act, 1888, and the Preferential Payments in Bankruptcy Amendment Act, 1897, by the receiver from the liquidators of the company.

The action, which was brought by debenture-holders, was commenced on November 9, 1898, and on the same day a receiver was appointed to act at once without security. On December 1, 1898, the company passed a resolution for voluntary winding-up, and a liquidator was appointed. On March 11, 1899, Wright, J., made an order directing the voluntary winding-up to be continued under the supervision of the Court, and an additional liquidator was appointed to act with the voluntary liquidator.

Amongst the claims received by the liquidators in answer to advertisements for creditors were the following: "J. Jordan, Poor Rate, made October 15, 1898, 191*l.* 10*s.*; Swansea Corporation District Rates and Water Rates, October 4, 1898, 206*l.* 2*s.* 8*d.*" These sums had been respectively paid by the receiver on January 14 and 23, 1899, and he now claimed to be recouped by the liquidators.

The debentures created a floating charge on the undertaking of the company and all its property, both present and future.

Leigh Clare, for the summons.—The company could have been sued for the poor rate before the action was brought and before the receiver was appointed, so that it clearly comes within the provisions of section 1 of the Preferential Payments in Bankruptcy Act, 1888.[1] The receiver was appointed after the rate was made. *Thomas, In re; Ystradyfodwg Local Board, ex parte* [1887],[2] decided that a bankrupt was liable for the whole rate—see also *Wearmouth Crown Glass Co., In re* [1882].[3] The receiver is liable for the whole rate, and in order to avoid depreciating his security is entitled to ask to be recouped by the liquidators who have assets in their hands. The property of the company in the hands of the receiver is not protected from distress for rates, and there has been no change of occupation so as to render necessary an apportionment—*Marriage, Neave & Co., In re; North of England Debenture and Assets Corporation* v. *Marriage, Neave & Co.* [1896][4] Priority is given over the debenture-holders by section 2[5] of the Act of 1897, and such debts as are mentioned in section 1 of the Act of 1888 are

(1) Preferential Payments in Bankruptcy Act, 1888, s. 1: "(1) In the distribution of the property of a bankrupt, and in the distribution of the assets of any company being wound up under the Companies Act, 1862, and the Acts amending the same, there shall be paid in priority to all other debts—(*a*) All parochial or other local rates due from the bankrupt or the company at the date of the receiving order or, as the case may be, the commencement of the winding-up, and having become due and payable within 12 months next before that time."

(2) 57 L. J. Q.B. 39.

(3) 19 Ch. D. 640.

(4) 65 L. J. Ch. 839; [1896] 2 Ch. 663.

(5) Preferential Payments in Bankruptcy Amendment Act, 1897, s. 2: "In the winding-up of any company under the Companies Act, 1862, and the Acts amending the same, the debts mentioned in section one of the Preferential Payments in Bankruptcy Act, 1888, shall, so far as the assets of the company available for payment of general creditors may be insufficient to meet them, have priority over the claims of holders of debentures or debenture stock under any floating charge created by such company, and shall be paid accordingly out of any property comprised in or subject to such charge.

"3. In case a receiver is appointed on behalf of the holders of any debentures or debenture stock of a company secured by a floating charge, or in case possession is taken by or on behalf of such debenture-holders of any property comprised in or subject to such charge, then and in either of such cases, if the company is not at the time in course of being wound up, the debts mentioned in section one of the said Preferential Payments Act shall be paid forthwith out of any assets coming to the hands of the receiver, or other person taking possession as aforesaid, in priority to any claim for principal or interest in respect of such debentures or debenture stock. And the periods of time mentioned in the said Act shall be reckoned from the date of the appointment of the receiver or possession being taken as aforesaid, as the case may be. But any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors."

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payable forthwith by the receiver out of assets in his hands, subject to being recouped out of assets available for payment of general creditors (section 3).

Sims, for the liquidators.—The possession of the receiver is different from that of the liquidator; the company are merely mortgagors, and the receiver carries on the business not for the company but for the mortgagees, and sells it as a going concern. It is admitted that the liquidators are liable for the rates down to the date of the appointment of the receiver, but not after that date; and there ought to be an apportionment. The receiver must prove for the balance in the ordinary way, and his claim must be admitted.

KEKEWICH, J.—All that I have to consider is what are the provisions of the Acts; and now that the matter has been threshed out, I do not see any difficulty at all. The Act of 1888 does not deal with debenture-holders. It deals only with the priority of debts in the distribution of the property of a bankrupt, and in the distribution of the assets of a company being wound up. I have to deal with a winding-up and am asked to make an order with regard to a rate due from the company at the date of the commencement of the winding-up. Counsel admitted that he could not argue that the rate was not due from the company at the date of the winding-up. It is, therefore, a preferential rate under the statute. Then comes the Act of 1897, which deals with questions arising between the company and the debenture-holders, between whom there is often a conflict by reason of the debenture-holders having a claim in priority over the assets. Section 2 of that Act only provides that preferential claims are to have priority as against the debenture-holders, and the receiver must pay them out of the assets subject to the debentures; and the settled form of order directs the receiver to pay preferential debts out of the assets in his hands. The Act, however, goes on to say that that is not to disturb the relative positions of the parties as mortgagor and mortgagee. The mortgagees not being in possession, the rate is made against the mortgagors, the company, and the company must pay it so far as they can. If they cannot pay, then the debenture-holders must suffer; but any payments made by the receiver on this account are to be recouped out of the general assets of the company.

The result is that the whole of this rate ought to be paid as a preferential payment on the ground that it was due from the company at the date of the commencement of the winding-up. I can see no reason for apportionment. There is no question of the occupation of the company or the occupation of the receiver. The question is as between mortgagor and mortgagee. The mortgagors being liable to pay, the mortgagees are to be recouped what they have paid on behalf of the mortgagors, the company.

I hold that the liquidators must pay the whole of the poor rate.

Leigh Clare.—As regards the second item, the district rate is in the same position as the poor rate.

Sims.—I do not dispute that.

Leigh Clare.—The water rate is in a different position. The rent of the meter is payable in advance, so that rent and the rate for water used before the winding-up must be paid by the liquidators, as they are mere debts due at the date of the commencement of the winding-up. The rate for the water supplied afterwards was not a debt due at that time, and cannot be claimed as a preferential payment.

KEKEWICH, J.—That is so. The payment for water is not due until the water is supplied. Only an apportioned part of the water rate is payable by the liquidators.

Solicitors—Budd, Johnsons & Jecks, for summons; H. G. Campion & Co., for liquidators.

[*Reported by W. S. Goddard, Esq., Barrister at-Law.*

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JOYCE, J.
1901.
March 28, 30.

HEWLINGS *v.* GRAHAM.

Infant — Necessaries — Action for Account—Certificate—Summons to Vary—Decision of Judge in Chambers—Practice.

Upon a summons to vary the certificate of a Master in respect of an item which the Judge in chambers has adjudicated upon, it is open to the Judge before whom the summons comes, in open Court, to reconsider and reverse the previous decision in chambers.

In the case of an infant, who was entitled to an income of between 7l. and 8l. a week during his minority, such things as (a) cartridges; (b) champagne; and (c) jewellery presented to a lady, to whom the infant was engaged without the consent of his guardian, but who did not become his bride, will not be allowed as "necessaries."

This was a summons by the defendant, William Graham, to vary the certificate of a Master made in the action. The action was commenced on April 14, 1900, by the plaintiff, Herbert Isaac Hewlings, who claimed an account against the defendant of all moneys received, and of all payments made by the defendant, for and on account of the plaintiff, and payment of the balance so found due. The defendant was the proprietor of a restaurant at Westminster, where the plaintiff boarded at a charge of 3*l.* a week. On May 4, 1900, an order was made by Kekewich, J., for an account of all moneys received and payments made by the defendant on account of the plaintiff, and an account of all sums due from the plaintiff to the defendant. The defendant put in an account "A," which he considered a settled account, and also a further account "B," shewing payments made by the defendant for the plaintiff after the alleged settlement. The Master held that there was no settled account, and Kekewich, J., in chambers, confirmed this. In account "B" the Master by his certificate disallowed an item of 30*l.* for three supper parties given by the defendant's wife for the plaintiff after he came of age, which was on February 12, 1899; and this was also confirmed by Kekewich, J., in chambers. The Master also disallowed various items on account "A," including the following: (No. 2) "paid for cartridge-case and 200 cartridges, 12*s.* 8*d.*"; (Nos. 8 and 9) "gold bracelet and chain 3*l.* 15*s.*"; (No. 48) "cash wired to plaintiff by defendant, and telegram, 1*l.* 0*s.* 11½*d.*"; (No. 51) "gold diamond sapphire ring 20*l.*"; and four items (Nos. 59 to 62) "for champagne ordered by the plaintiff on February 11, 1899, 7*l.* 13*s.*" Part of this champagne was sent by the plaintiff to the lady to whom he was engaged to be married so that she might drink his health on his coming of age; and the gold diamond ring and the bracelet and chain were also presented to her. The Master found an ultimate balance of 68*l.* 18*s.* 1*d.* to be due from the defendant.

On February 11, 1901, the defendant took out a summons to vary the Master's certificate as to the above-mentioned items. From the affidavits it appeared that the plaintiff, during his minority, was under the guardianship of his uncle, Francis Charles Edwards, and that the items in account "A," prior to February 12, 1899, were incurred whilst the plaintiff was under age. On February 13, 1899, the defendant received from the plaintiff's guardian a sum of 301*l.* 11*s.* in respect of accumulated income due to the plaintiff, and the defendant gave the plaintiff a cheque for 100*l.*, saying that he would retain the rest to meet his account, but would hand over to him the balance when ascertained. The lady to whom the plaintiff had been engaged made an affidavit stating that the plaintiff confided all his affairs to her, and that his guardian allowed him 3*l.* a week pocket-money, he having an accumulative income of between 7*l.* and 8*l.* a week until he became of age. The engagement was broken off shortly after the plaintiff came of age, and there was no evidence that his guardian had consented to it. The summons to vary now came on together with the further consideration of the action.

Hughes, K.C., and *R. J. Parker*, for the defendant.—The law as to what are necessaries for an infant is laid down in *Simpson on Infants* (2nd ed.), p. 87. In *Peters* v.

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HEWLINGS *v.* GRAHAM.

Fleming [1840][1] it was held that necessaries included such things as were suitable to the state and condition in life of the infant, and not merely necessaries in the ordinary sense. In *Jenner* v. *Walker* [1868][2] the headnote contains this statement: "*Semble*, presents to a bride, who eventually becomes the defendant's wife, may be necessaries." The main question there discussed was whether the Judge or the jury were to find what were necessaries; and the case of *Ryder* v. *Wombwell* [1868][3] was much commented on, as in that case it was decided that the Judge was to direct the jury as to what were necessaries. In the present case, where the income of the infant amounts to about 400*l.* year, these items are suitable for his station, and should be allowed.

P. S. Stokes, for the plaintiff.—The item for cash 1*l.* 0*s.* 11½*d.* is really a loan, which is void under the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1.

With regard to the item of 30*l.* in account "B," which was adjudicated upon by Kekewich, J., in chambers, that decision cannot be now reviewed or questioned—*York and North Midland Railway* v. *Hudson* [1853].[4]

The same question cannot be discussed upon the same evidence in open Court when it has been disposed of by the Judge in chambers. The proper way is to go to the Court of Appeal.

[JOYCE, J.—It is surely open to the Judge to reconsider or alter his own decision—*Upton* v. *Brown* [1882].[5]]

Hughes, *K.C.*, replied.

Cur. adv. vult.

March 30.—JOYCE, J.—This is an action by Mr. Hewlings, who has recently come of age, against Mr. Graham—first, for an account of all moneys received by him, and of all payments made by him for and on account of the plaintiff; and secondly, for payment of the balance found due upon taking the account. The account having been taken, there is a summons to vary the certificate of the Master with reference to the result of the account. It is sought to vary it as to the sum of 30*l.*, which appears in account "B," for supper parties; also in respect of some items for champagne, and for jewellery, in account "A." Objection was also taken to an item for money wired, which it is contended was a loan, and improper, and also to the "cartridge-case and 200 cartridges."

With reference to the general practice upon a summons to vary a certificate, it was urged before me that, inasmuch as the question with reference to the 30*l.* in account "B" had come before Mr. Justice Kekewich for his decision in chambers, under Order LV. rule 69, before the making of the certificate, and the evidence being the same now as it was before Mr. Justice Kekewich, it was not open to me, as the Judge before whom the summons to vary comes, to consider or reverse the decision there given. All I can say is that I am of opinion, and Mr. Justice Kekewich, whom I have consulted, is also of opinion, that it is open to the Judge, on a summons to vary, to reconsider what he has done, and he may arrive at a different decision as much as if a motion were made to vary or discharge an order made by a Judge in chambers, upon an ordinary summons. I consider that I have ample power to reconsider and reverse that decision. But I see no reason for differing from the decision of Mr. Justice Kekewich as to that 30*l.*

Now, with regard to the other items, the simple question is whether the articles in respect of which the claims were made by the defendant were or were not necessaries. Various cases were cited to me. The first was that of *Peters* v. *Fleming*.[1] That was a case in which Fleming was an undergraduate of Cambridge, and while under age he became indebted to a tradesman of the town, Mr. Peters, for rings, a gold watchchain, and various other articles supplied on credit. When he came of age he denied his liability, and the tradesman consequently brought an action against him and recovered what he claimed. In that case the true rule was laid down by Baron Parke. He says: "The true rule I take to be this—that all

(1) 9 L. J. Ex. 81; 6 M. & W. 42.
(2) 19 L. T. 398.
(3) 38 L. J. Ex. 8; L. R. 4 Ex. 32.
(4) 18 Beav. 70.
(5) 20 Ch. D. 731.

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such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters, therefore, an infant cannot be made responsible. But if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved; if they were, for such articles the infant may be responsible." Then there was the case of *Ryder* v. *Wombwell*.[3] There it was a question whether a pair of fine crystal and ruby and diamond solitaires, charged at 25*l*., and a silver-gilt antique chased goblet, charged at fifteen guineas, were necessaries for an infant. The solitaires were bought for the infant's own use, and the goblet was bought as a present to the Marquis of Hastings. It was held in the Exchequer Chamber that there was no evidence of either article being a necessary. Then there was the case of *Jenner* v. *Walker*,[1] in the headnote of which reference is made to *Ryder* v. *Wombwell*.[3] In addition to the statement that "betting books are not necessaries" for an infant, there is this: "*Semble*, presents to a bride, who eventually becomes the defendant's wife, may be necessaries." Here I have no evidence as to the degree, state, or station in life in which the plaintiff moved. With reference, then, to the cartridge-case and cartridges, and also to the item for money wired to the plaintiff, there is no evidence at all as to these. On the materials which are before me, therefore, I see no reason to differ from the decision of the Master as to these items. As to the jewels, the gold bracelet and chain, 3*l*. 15*s*., and the gold diamond sapphire ring, 20*l*, these are said to have been purchased and presented to the lady to whom the plaintiff is stated to have been engaged. It is difficult to see how anything could be necessary that was only wanted for the purpose of being given to somebody else. He is no doubt said to have been engaged, but nothing is shewn to me, or appears from the evidence, as to the position of the lady to whom the plaintiff was engaged, or as to whether it was a proper engagement or not; and I have never heard that the guardian of this young man had consented to this engagement. The young lady has made an affidavit stating that the plaintiff confided to her all his affairs, and she apparently feels no scruples about divulging what was so imparted to her. She has made this affidavit, which strengthens the case for the liability of the plaintiff. There could be no marriage without the consent of the guardian having been first obtained, and there could be no binding engagement of marriage while he was an infant. But whatever may be the case with reference to jewellery for a present bride, put forward in the case of *Jenner* v. *Walker*,[1] I do not feel much hesitation in holding that jewellery purchased and bought with the object of being presented to a young lady to whom the infant was engaged during his infancy without the consent of his guardian, and who does not become his bride, is not a necessary. Therefore I hold that this jewellery was not a necessary. With regard to the champagne for celebrating his coming-of-age, I think that it ought not to have been ordered at all until the day before his birthday, in which case he would have been liable to pay for it, but I must hold that it is not a necessary. That, I think, disposes of everything. I shall not make the defendant pay the costs of this summons to vary. The objections to the account strike me as rather shabby.

[His Lordship then dealt with the case on further consideration and the question of the costs.]

Solicitors—G. F. Clark, for plaintiff; Burchell, Wilde & Co., for defendant.

[*Reported by G. Macan, Esq. Barrister-at-Law.*

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FARWELL, J.
1901.
Feb. 28. March 1.

STEVENS *v.* CHOWN.
STEVENS *v.* CLARK.

Market — Statutory Regulation — Disturbance — Statutory Remedy — Common Law Action — Injunction.

Where an ancient market is regulated by an Act of Parliament, an action at law will lie for disturbance of the market, notwithstanding provisions giving a summary remedy before a special tribunal.

But the remedy formerly administered by the Court of Chancery by injunction was more extensive than any common law remedy, and may be invoked to prevent an invasion of proprietary rights, whether newly created or merely confirmed by statute, unless the statute expressly or by a necessary implication excludes that remedy, and the Court will not infer this intention from a provision for the purpose of protecting the right.

These were two actions, each brought to restrain the defendants by injunction from disturbing the plaintiff's rights as owner of the market at Sidmouth, Devon.

The market was an ancient market, and had been regulated by two statutes. The first was entitled "An Act for maintaining and regulating the market in the parish of Sidmouth, in the county of Devon" (2 & 3 Vict. c. lxxxi.), which recited that a market for the sale of corn, butchers' meat, fresh fish, poultry, eggs, butter, vegetables, and other commodities, articles, and things, had long been held within the parish of Sidmouth; and that E. H. B. Hughes, Esq., claimed to be lord of the manor of Sidmouth, to be entitled to certain customs, tolls, and duties of and arising from the markets held within the same, and purposed to erect, at his own expense, a commodious market-house in the said parish, and to improve the said market-house there; and that it would be of great advantage to the inhabitants of the said parish and the neighbourhood thereof and to the frequenters of the said market, if the same were put upon a permanent footing with proper regulations and rules for conducting and managing the same. By section 1 it empowered the owner for the time being of the market to substitute a new market house and improve the market-place, and provided that when and so soon as such new and improved market-house, shambles, stalls, and other conveniences should have been built and opened, the market house and building so to be erected, and the market-place so to be provided, should be the only place within which the market for the sale of corn (except corn sold by samples), butchers' meat, fresh fish, poultry, eggs, butter, vegetables, and other commodities usually sold in public markets, should for the future be held and kept; and that it should not be lawful for any person to erect or hold any other market within the said parish of Sidmouth, or to sell, or offer or expose to sale, any corn, butchers' meat, fresh fish, poultry, eggs, butter, vegetables, fruit, earthenware, or any other articles, commodities, or things which were usually sold in public markets, in any other place whatsoever except in such new or improved market, except as authorised or excepted by the Act; and if any person should sell or expose to sale any corn, butchers' meat, fresh fish, poultry, eggs, butter, vegetables, fruit, earthenware, or any other articles or commodities usually sold in public markets, in any shop, building, or place, or in any of the streets, lanes, entries or other public passages or places, other than the place which might be appointed by the lord of the manor as aforesaid, or the owner of the said market for the time being (except as thereinafter authorised or excepted), every such person should, on conviction before any Justice of the peace for the said county of Devon, for every such offence forfeit and pay any sum not exceeding 5*l.*, which penalty should be payable to the lord of the said manor or the owner of the said market for the time being. The exceptions were contained in section 2, but are not material to be stated. Section 6 (so far as material to be stated) enacted that if any person selling or offering or exposing to sale any butchers' meat or any other goods, commodities, articles, or things within the said parish of Sidmouth, should, upon demand thereof made by the agent, collector, or other person authorised to

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receive the said several tolls, duties, rents, and stallages aforesaid, neglect or refuse to pay, or should evade the payment of the same, or any or either of them, or any part thereof, then and in such case and so often as it should happen it should be lawful for the agent, collector, or other agent so authorised to receive the same to levy the same by distress and sale of all or any of the goods, articles, and things so offered or exposed to sale, and the distress so taken to sell, rendering the overplus (if any there be) upon demand, after deducting the expenses of such distress and sale, to the person or persons whose property such goods, articles, or things were at the time of every such distress, or otherwise to summon the party so neglecting, refusing, or evading such payment before some Justice of the peace for the county of Devon, who was thereby authorised and directed to hear and determine such case in a summary way, and to order and enforce such payment, with the costs of such proceedings, as provided by the Act. Section 10 enacted that in case any dispute should arise concerning such distress or sale for recovery of tolls, as authorised by the Act, such dispute should be settled and determined by any Justice of the peace having jurisdiction within the limits of the Act, who should, by warrant under his hand, summon the parties to appear before him, and hear and determine the matter of every such complaint upon oath, and make such order therein and award such costs to either party as to him should appear reasonable, and, by warrant under his hand and seal, cause the money to be awarded and the costs of such warrant to be levied by distress and sale of the goods of the party liable to pay the same, including the reasonable charges of every such distress. Section 17 empowered the lord of the manor or the owner for the time being of the market to make by-laws for the holding, good order, and government of the said market and of the several persons resorting thereto, under penalties recoverable before a Justice of the peace. Section 20 enacted that "all fines, penalties, and forfeitures inflicted or imposed by this Act, or by virtue of any bye-law, rule, order, or regulation made in pursuance thereof, the manner of levying and recovering whereof is not herein otherwise particularly directed, may, in case of non-payment thereof, be recovered in a summary way by the order and adjudication of some Justice of the peace for the County of Devon, on complaint for that purpose made, and afterwards be levied, as well as the costs and expenses (if any) of such proceedings on non-payment, by distress and sale of the goods and chattels of the offender or person liable to pay the same, by warrant under the hand and seal of such Justice, . . . and the overplus (if any) of the money so raised or recovered, after discharging such fine, penalty, or forfeiture, the costs of such distress and sale, and other the costs and expenses aforesaid, shall be returned, on demand, to the party whose goods and chattels shall be distrained; all which fines, penalties, and forfeitures, not directed to be otherwise applied, shall be paid, one moiety to the informer, and the remainder to the said lord of the manor or the owner for the time being of the said market; and in case such fines, penalties, and forfeitures shall not be forthwith paid, it shall be lawful for such Justice, and he is hereby required, to order the offender so convicted to be detained in safe custody until return can conveniently be made to such warrant of distress, unless such offender shall give sufficient security to the satisfaction of such Justice for his appearance at such time as shall be appointed for the return of such warrant of distress, such time not being more than eight days from the taking such security, and which security any such Justice is hereby empowered to take by way of recognizance or otherwise; but if upon the return of any such warrant it shall appear that no sufficient distress could be had whereupon to levy the said fines, penalties, or forfeitures, and such costs and expenses as aforesaid, and the same shall not be forthwith paid, or in case it shall appear to the satisfaction of such Justice, upon the confession of the offender or otherwise, that he has not sufficient goods and chattels whereupon such fines, penalties, forfeitures, costs, and expenses could be levied if a warrant of distress should be issued, such Justice shall not be required to issue such

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warrant of distress, but may, by warrant under his hand and seal, commit such offender to any common gaol or house of correction in the said county, there to remain for any time not exceeding three calendar months, or until such fine, penalty, or forfeiture shall be paid and satisfied, together with all costs and charges attending such distress, sale, and other proceedings as aforesaid, to be ascertained by such Justice, or until such offender shall otherwise be discharged by due course of law." The Act then made provision for the proof of by-laws (section 21), the summoning of offenders and service of process (section 22), compelling the attendance of witnesses (section 23), the arrest and detention of offenders whose name and address was not known (section 24), the form of conviction (section 25), and contained a provision protecting persons from the effect of irregularities in levying a distress (section 26). By section 28 a person "aggrieved by any rule, by-law, or regulation" made under the provisions of the Act, "or by any determination or judgment" made or given in pursuance thereof or of the Act, or by any other matter or thing to be made, given, or done by virtue or in pursuance of the Act, might appeal to quarter sessions. By section 29 it was enacted that "no proceeding to be had touching the conviction of any offender against this Act, or any order made, or any other matter or thing done or transacted, in or relative to the execution of this Act, shall be vacated or quashed for want of form, or be removed or removable by *certiorari* or any other writ or process whatsoever into any of Her Majesty's Courts of Record at Westminster; any law, statute, or usage to the contrary in anywise notwithstanding." By section 31 it was enacted: "nothing in this Act contained shall extend or be construed to extend to prejudice, injure, abridge, make void, destroy, lessen, or defeat any right, interest, title, property, power, privilege, franchise, emolument, or authority of the lord of the manor of Sidmouth aforesaid, (except as far as are expressly hereinbefore provided for,) but that every lord of the said manor for the time being shall and may at all times hereafter enjoy all such rights and privileges (except as aforesaid) in as full, large, and beneficial a manner, in all respects whatsoever, as he could have done in case this Act had not been made, and that at all times hereafter the lord of the said manor for the time being, and every person who has or claims to have any right or interest in any of the markets or fairs holden within the limits of this Act, shall respectively continue to enjoy all right of holding such fairs and markets in like manner as they were heretofore accustomed to do, and of collecting and receiving the usual toll and other profits belonging to such markets and fairs, in like manner as they could or might have done in case this Act had not been passed." And by section 32 the Act was to be judicially noticed as a public Act.

By the amending statute 9 Vict. c. xlviii. s. 4, it was provided: "And for preventing fraudulent evasions of payment of the tolls or duties imposed by the said recited Act or this Act, be it enacted, that if any person shall deliver or cause to be delivered any commodities, articles, or things for the time being authorised to be sold in the said market to, for, or at the residence of any person within the said parish of Sidmouth, upon any false allegation or pretence, then or thereafter made, that the same commodities, articles, or things were sold by antecedent contract, made or perfected out of the said parish, and that the delivery of the same within the said parish was only in pursuance of such antecedent contract, he shall be deemed to offend against the said recited Act and this Act, and shall for every such offence forfeit and pay any penalty not exceeding forty shillings; and in every proceeding for the recovery of such penalty it shall be sufficient for the party proceeding to recover the same to prove the delivery of the commodities, articles, or things in respect of which such penalty is sought to be recovered; and the contract shall be considered as made and perfected within the said parish of Sidmouth in every case in which the price and quantity of such commodities, articles, or things shall not have been fixed and agreed on out of the said parish, and also in

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every case in which the agreement, order, or authority in pursuance of which such commodities, articles, or things are delivered shall have been made or given within the said parish; and the burden of proving that the same were delivered in pursuance of an antecedent contract wholly made and perfected out of the said parish shall rest upon the person alleging the same." Section 5 enacted: "the delivery of any goods, commodities, articles, or things hereby or by the said recited Act made liable to the payment of any toll or duty upon the sale thereof, shall in all cases be *prima facie* evidence of the sale thereof." And by section 12 the Act was to be judicially noticed as a public Act.

The defendants took out a summons in each action, raising the question in effect whether the plaintiff was not restricted to the remedies pointed out by the statute. The two summonses were adjourned into Court for argument, and were now called on together.

R. B. Phillpotts, for the defendants.—Where an Act of Parliament has been passed to regulate an ancient market, the statutory right is substituted for the ancient franchise—*Manchester Corporation* v. *Lyons* [1882].[1] The claim is based on the statute, and the plaintiff is restricted to his statutory remedy before the magistrates—*Wolverhampton New Waterworks Co.* v. *Hawkesford* [1859].[2] The principle is of general application—*Barraclough* v. *Brown* [1897],[3] and the *dictum* of Lord Herschell in *Institute of Patent Agents* v. *Lockwood* [1894].[4] In *Fripp* v. *Chard Railway* [1853][5] the remedies which a mortgagee might have at law or in equity were preserved by the statute. The case which presses most strongly against the defendants is *Cooper* v. *Whittingham* [1880].[6] That case was decided on a different statute, and the injunction there granted was an ancillary remedy—see *North London Railway* v. *Great Northern Railway* [1883][7] and *Hayward* v. *East London Waterworks Co.* [1884].[8]

[He also referred to *Atkinson* v. *Newcastle and Gateshead Water Co.* [1877][9] and *Abergavenny Improvement Commissioners* v. *Straker* [1889].[10]]

Macmorran, K.C., and *P. F. Wheeler*, for the plaintiffs.—The market is an ancient market, and the rights of the owner of the market are kept alive by section 31 of the Act. There is an inherent jurisdiction to restrain interference with market rights—*Goldsmid* v. *Great Eastern Railway* [1883][11] and *Elwes* v. *Payne* [1879].[12] The plaintiff could bring an action at common law—*Shaftesbury (Earl)* v. *Russell* [1823][13] or is entitled to an injunction—*Cooper* v. *Whittingham*.[6] It is no answer that the market is a statutory market—*Birmingham Corporation* v. *Foster* [1894].[14] The existence of a particular remedy pointed out by an Act of Parliament does not prevent other remedies being invoked—*Reg.* v *Buchanan* [1846][15] and *Att.-Gen.* v. *Aspinall* [1837].[16]

R. B. Phillpotts replied.

FARWELL, J., after stating the facts and the substance of the two Acts of Parliament, continued: The plaintiff claims through Mr. Hughes, who provided the new market-place, and the tolls which he claims extend to and include the old tolls—that is to say, the tolls fixed by the Act are not new tolls in the sense of being payable for the first time, but are the maximum tolls allowed by the Act, and include the old tolls which are expressly kept alive by section 31, subject only to the provision that the tolls must be exhibited on a board These Acts are by way of confirmation of the old franchise, with regulations incident thereto for the benefit of the lord of the

(1) 22 Ch. D. 287.
(2) 28 L. J. C.P. 242; 6 C. B. (N.S.) 336.
(3) 66 L. J. Q.B. 672; [1897] A.C. 615.
(4) [1894] A.C. 347, 361.
(5) 22 L. J. Ch. 1084; 11 Hare 241.
(6) 49 L. J. Ch. 752; 15 Ch. D. 501.
(7) 52 L. J. Q.B. 380; 11 Q.B. D. 30.
(8) 54 L. J. Ch. 523; 28 Ch. D. 138.
(9) 46 L. J. Ex. 775; 2 Ex. D. 441.
(10) 58 L. J. Ch. 717; 42 Ch. D. 83.
(11) 53 L. J. Ch. 371; 25 Ch. D. 511.
(12) 48 L. J. Ch. 831; 12 Ch. D. 468.
(13) 1 L. J. (O.S.) K.B. 202; 1 B. & C. 666
(14) 70 L. T. 371.
(15) 15 L. J. Q.B. 227; 8 Q.B. 883.
(16) 7 L. J. Ch. 51; 2 Myl. & Cr. 613.

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manor, as owner of the market, and individuals using the market.

It has been argued that this is not a case in which an action at law would lie for disturbance of the market, because it is a new market with special statutory provisions for the recovery of the tolls; and it is said that this brings the present within the third class of cases enumerated by Mr. Justice Willes in *Wolverhampton New Waterworks Co.* v. *Hawkesford*.[2] "There are three classes of cases," says the learned Judge, "in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common-law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. . . . The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class." The present case is, in my opinion, within the first of the three classes enumerated. As I read the statutes, they have merely given legislative sanction to the levying in the new market of the old tolls; or, in other words, that the new tolls include those formerly leviable. It is not a case where the Act creates a statutory right which did not exist at the common law, because there was an old market subject to certain rights and incidents. The statutes merely confirm and regulate those ancient rights and incidents. The case of *Reg.* v. *Buchanan* [15] is a good illustration of this, shewing that where, as here, the Act contains an express provision forbidding any person doing a particular act, it is an offence apart from the particular liability created by the Act, and is illegal apart from the particular penalty imposed by the Act.

But even if that were not so, it seems to me that the remedy by injunction administered in the Court of Chancery is more extensive than any common law remedy. There was nothing to prevent the Court of Chancery from granting an injunction to restrain the infringement of a newly created statutory right of such a nature as to fall within the ordinary cognisance of the Court, unless the statute provided that the statutory remedy should be the only remedy It was argued that unless an action at law would lie, the Court of Chancery would not have granted an injunction. I dissent from that view, and I refer to the judgment of Lord Justice Turner, in the well-known case of *Austria* (*Emperor*) v. *Day* [1861].[17] That was a case in which it was sought to restrain the defendants from printing notes purporting to be notes of the Hungarian State, and for delivery up of notes already printed, and the plates used in their manufacture. What Lord Justice Turner says with reference to the jurisdiction is this: "it is said that the acts proposed to be done are not the subject of equitable jurisdiction, or that if they are, the jurisdiction ought not to be exercised until a trial at law shall have been had. To neither of these propositions can I give my assent. I agree that the jurisdiction of this Court in a case of this nature rests upon injury to property actual or prospective, and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property, but I think there are here rights of property quite sufficient to found jurisdiction in this Court. I do not agree to the proposition, that there is no remedy in this Court if there be no remedy at law, and still less do I agree to the proposition that this Court is bound to send a matter of this description to be tried at law. The highest authority upon the jurisdiction of this Court, Lord Redesdale, in his *Treatise on Pleading*, in enumerating the cases to which the

(17) 30 L. J. Ch. 690, 712; 3 De G. F. & J 217, 253.

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jurisdiction of the Court extends, mentions cases of this class.—'Where the principles of law by which the ordinary Courts are guided give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent.' It is plain therefore, that, in the opinion of Lord Redesdale, who was pre-eminently distinguished for his knowledge of the principles of this Court, the jurisdiction of the Court is not limited to cases in which there is a right at law. There is, indeed, a familiar instance in which the jurisdiction is not so limited—the cases of waste. In some cases of waste there was no right and no remedy at law, but this Court did not on that ground refuse its interference. I do not refer to the case of equitable waste, which, however, is another instance, but to the cases in which there was an intervening legal estate. To say that the jurisdiction of this Court is limited only by the principles of universal justice would no doubt be going too far, and I must not be understood so to construe what Lord Redesdale has said. I take the passage to refer to cases in which there is what the law in principle acknowledges to be a wrong, but as to which it gives no remedy, as in the case of waste." Then towards the end of the judgment he says, "if the jurisdiction exists, the extent of it cannot be limited by the instances in which it has been applied." Now if I find that the statute enacts either by way of new creation, or by way of confirmation of an ancient right, a right of property, that at once gives rise to the jurisdiction of this Court to prevent an invasion of that right. If the Act goes on to make express provision for the purpose of protecting that right, it does not exclude the remedy in this Court, unless the Act so provides expressly or by necessary implication. That is borne out by *Att.-Gen.* v. *Aspinall*.[16] That was a demurrer to an information for misappropriation of corporate funds, and it was argued that the only remedy available was that appointed by the Municipal Corporations Act, 1835. In reference to this argument Lord Cottenham said: "The argument assumes that the machinery provided by the 97th section applies to the case in question, and is not confined to alienations of lands, tenements, and hereditaments for valuable consideration; for, if it be so confined, then the whole foundation of the argument fails. Supposing, however, that the new council had, under this clause, the power of bringing the case in question before a jury, it would be indeed a new remedy; but the right cannot be said to consist in the remedy, inasmuch as the creation of the trust of itself subjected the property to all the other remedies applicable to trusts; and, if this 97th section had not been in the Act at all, the jurisdiction of the Court could not have been disputed; a circumstance which proves that the right does not exist only in the remedy, but that the remedy, if applicable to this case, is afforded merely as another and additional means of enforcing the right. The jurisdiction of this Court cannot be taken away by another jurisdiction having cognizance given to it of the same matter. The case of *Beckford* v. *Hood* [1798][18] was well cited in support of this proposition." That reasoning applies to the present case. Supposing the statutes had contained none of these provisions respecting the recovery of penalties by proceedings before the magistrates, it is clear that in those circumstances this Court would have had jurisdiction. The fixing of a penalty does not preclude the owner of the market from appealing to the equitable jurisdiction to protect him in the enjoyment of his right of property. That is well established, and is borne out by the decision in *Cooper* v. *Whittingham*,[6] although exception may perhaps be taken to some of the language of Sir George Jessel; but I am not prepared to accept the criticism that was put forward on behalf of the defendants that the case of *Hayward* v. *East London Waterworks Co.*[8] has restricted the operation of *Cooper* v. *Whittingham*[6] to a merely ancillary remedy. That seems to me to proceed on a misapprehension of the decision. Mr. Justice Chitty was dealing with a case in which there would have been the necessity of proceeding before another tribunal, so that the Court of Chancery (or Chancery Division) had not the final power of dis-

(18) 7 Term Rep. 620.

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posing of the matter, but could only act *ad interim*. Mr. Justice Chitty, in the opening passage of his judgment, says: "A *bona fide* dispute has arisen and still subsists between the plaintiff and the defendant company as to the basis on which the rate ought to be calculated. It is admitted on both sides that the effect of the statutes bearing on the question is that the only tribunal by which such a dispute can be settled is that mentioned in the 68th section of the general Act." He accordingly refused to grant an injunction to restrain a water company from cutting off the supply of water where the only dispute between the parties was the amount to be paid, upon the ground that the section to which he refers provides that the amount of the water rate shall be fixed by reference to the annual value, which, if any dispute arose, was to be determined by two Justices. Now the Chancery Division exercises all the jurisdiction of both divisions of the High Court. There is no question of sending the matter to be tried at law, or to a statutory tribunal such as existed in *Hayward* v. *East London Water Works Co.*,[8] and pending the determination of the question to keep matters *in statu quo*. They are all to be determined by the lord of the manor, as owner of the market, subject only to such limitations as are contained in the Act of Parliament. The only matter which is referred to the jurisdiction created by the Act is the dispute concerning the levying and sale of a distress. There is nothing to prevent the Court determining the final rights between the parties.

I shall only add a word respecting the *dictum* of Lord Herschell in *Institute of Patent Agents* v. *Lockwood*.[4] It will be observed that Lord Herschell was referring to the creation of a new offence, and not to property at all. The question in dispute was the liability of a person, who acted as a patent agent without being registered, to a penalty which was recoverable before magistrates. So far as I can see, such a case would never have been within the jurisdiction of the Court of Chancery, and Lord Herschell's observations must be read in reference to that state of facts.

The result is that the present application fails; and I dismiss the summonses, with costs to the plaintiff in any event.[19]

Solicitors—Steavenson & Couldwell; Dunn, Baker & Baker, agents for Dunn & Baker, Exeter.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

KEKEWICH, J. 1901. May 15. } ELLIMAN, SONS AND CO. v. CARRINGTON AND SON.

Contract—Restraint of Trade—Public Policy—Validity.

An agreement made by a trader with a purchaser of his commodities not to sell them below certain prices set out in the agreement, and that if he sells them again to the trade he will procure a similar signed agreement from every retailer that he supplies, is valid, and cannot be impeached as being in restraint of trade or against public policy.

The plaintiffs had for many years manufactured an embrocation for horses and cattle, and also for human use.

These embrocations were sold by them in bottles wholesale to druggists and other wholesale and retail dealers, and in order to prevent the embrocations from being sold below the usual fixed market prices for the same the plaintiffs required every trade purchaser to sign and procure to be signed agreements in the following form:

(19) Where the High Court has undoubted jurisdiction, the Court may, if it has a discretion to grant or refuse the application, and it appears to have been the intention of the Legislature that a particular question should primarily be determined by a particular tribunal, refuse to exercise its jurisdiction—*Munday* v. *Thames Ironworks and Shipbuilding Co.*, 52 L. J. Q.B. 119; 10 Q.B. D. 59 (certiorari), *Grand Junction Water Works Co.* v. *Hampton Urban Council*, 67 L. J. Ch. 603; [1898] 2 Ch. 331 (injunction).

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ELLIMAN, SONS & Co. *v.* CARRINGTON & SON.

"Minimum price 11*d.* nett for 1/- size Royal.

"Elliman's Embrocations.

"Home Trade.

"September 25th, 1889.

"Messrs. Elliman, Sons & Co., finding the indirect Buyer to be the block in the way of the success of their scheme, now require us to procure a signed agreement not to undersell the prices given below.

"Signing the annexed agreement will bind you not to sell *retail* at less than

1/9 for 2/ size nett.
2/2 for 2/6 " "
3/ for 3/6 " "
1/ for 1/1½ " "
2/4 for 2/9 " "

(Full Prices may of course be charged as heretofore where practicable.)

"If you sell any of Elliman's Embrocations to the Trade it will further bind you to procure a similar signed agreement from every retailer that you supply. It will be necessary for you to send in this Agreement, signed at the time of, or before sending your next order for Elliman's Embrocations, or we shall be unable to execute it.

"AGREEMENT

"We the undersigned, pledge ourselves not to sell Elliman's Embrocations under the Prices named above, and to faithfully comply with the conditions therein enumerated.

"Signed

"Address

"Date ."

In September, 1898, the plaintiffs sold to the third defendant, Luke Crabtree, trading under the name of W. Walker & Co., a number of bottles of the embrocation, and a form of the above agreement was signed by that defendant. He, however, sold part of this consignment to the second defendants, J. J. Thompson & Co., Lim., without procuring the signature by them of any similar or other agreement, and J. J. Thompson & Co. then sold by retail certain bottles of the embrocation below the selling prices fixed by the agreement. In February, 1900, the plaintiffs sold and consigned to the first defendants C. Carrington & Son, Lim., a quantity of bottles of the embrocation, and a form of agreement was signed by these defendants. Part of this last mentioned consignment was sold by Carrington & Sons to J. J. Thompson & Co., without procuring the signature of any agreement, and J. J. Thompson & Co. then sold bottles below the fixed prices.

The plaintiffs alleged that by this action of the various defendants their embrocations had become depreciated in value, and they claimed an injunction to restrain them from selling or offering for sale, or authorising or permitting to be sold or offered for sale, the plaintiffs' embrocations under the prices fixed by the agreements. The plaintiffs also claimed damages. The several defendants denied the breaches of the agreements, and submitted that the alleged agreements were unenforceable, as being in restraint of trade and without consideration.

Renshaw, K.C., and *E. Ford*, for the plaintiffs.—The agreement in question is perfectly valid at law. There has been a breach of it by the first and third defendants in not obtaining a similar agreement from their purchasers. The second defendants, J. J. Thompson & Co., had also notice of the arrangement, and their dealing with the other defendants was only a contrivance to enable them to obtain the goods and sell at a lower price. Such an agreement as this can be protected by injunction, the damages in this case being but nominal.

Warrington, K.C., and *Austen-Cartmell*, for the defendants.—This agreement is in restraint of trade, and injurious to the public. The object is to keep up the price of the embrocation to a higher point than the law of demand and supply would require. The law on this subject is laid down in the cases of *Hilton* v. *Eckersley* [1856] [1] and *Urmston* v. *Whitelegg Brothers* [1890].[2] The question is whether the contract is lawful in the sense that it is one of which the Court will take cognisance and enforce. A combination to raise prices is not enforceable in the Courts of law.

In *Mogul Steamship Co.* v. *M'Gregor*,

(1) 25 L. J. Q.B. 199; 6 E. & B. 47.
(2) 63 L. T. 455.

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Gow & Co. [1891][3] Lord Halsbury refers to the two senses in which the word "unlawful" is used—namely, as applied to those contracts to which the law will not give effect, although in point of form the parties have agreed; and secondly, as applied to contracts which are contrary to law. There are exceptions to the rule that contracts in restraint of trade are invalid, and they can be supported if it is shewn that the contract is necessary for the reasonable protection of the person entering into it, and that it is not too wide. In the present case the protection is not necessary at all, and the contract does not come within any of the exceptions. The onus is upon the plaintiff—*Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* [1894].[4]

KEKEWICH, J.—The point made by the defendants is that the written contract into which they have entered must be treated as waste-paper in a Court of law—that is to say, that no action can be brought upon it; and that conclusion of law, they say, follows from the fact which they allege to be true—namely, that this contract is in restraint of trade. In one sense, no doubt, that is perfectly true. One of the contracting parties is not at liberty under that contract to do as he pleases with that which he has purchased.

The plaintiffs are the manufacturers of Elliman's Royal Embrocation and universal embrocation, one being for horses and cattle, and the other for human beings. They are not bound to sell that embrocation at all, or to manufacture it. They are quite at liberty to do as they please when they have manufactured it, and to determine whether they will sell it, and at what price. That is entirely a matter for their own consideration. Then Messrs. Carrington & Son, Lim., are minded to buy Elliman's Embrocation with a view of selling it again. They buy wholesale in order to re-sell to others retail, or at any rate to pass on their contract. Messrs. Elliman make a bargain with them that they shall not sell below certain prices set out in the agreement. That part of the bargain has not been broken. The agreement goes on further to say that if Carrington & Son sell it to others they shall insist and procure that those others shall enter into an agreement not to sell below a certain price. That part of the agreement has been broken. Why should not Messrs. Elliman be at liberty to fix the price in that way, when they could fix it in their direct agreement with Carrington & Son? Nobody has argued that they are not at liberty to fix the price in the first sale to Carrington & Son. Why are they not, then, to be at liberty to make the further bargain with Carrington & Son that they (Carrington & Son) will not sell it below a certain fixed price, and will take care, so far as they can, that nobody else shall do so? It is said that is in restraint of trade; in one sense it is, but it is just about as much in restraint of trade as Messrs. Elliman determining, as they are at liberty to do, that henceforth they will neither manufacture at all, nor sell at all.

The cases which have been cited are all well-known cases, and deal with the great principle and shew what exceptions to the principle are recognised; but this present case seems to me not to come within any principle or exception. I do not think it is touched by the authorities at all. It is a mere question whether a man is entitled, when he is selling his own goods, to make a bargain as to the use which is to be made of them by the purchaser.

It is said this is against public policy. There is an old saying that when you are astride of public policy you are mounted upon a high horse, and you do not know where it may lead you. But to call in public policy in order to prevent Messrs. Elliman from exercising their own trade seems to me to be applying a well-settled principle of law to facts to which it can have no possible application. If the principle is to be applied in such a case as this, it must be applied elsewhere, and not by me. On the question, therefore, of the validity of the contract I am entirely against the contention of the defendants. Messrs. Carrington & Son have sold to Messrs. Thompson & Co., Lim., without procuring from them the agreement of a like character which they bound themselves to do, so that Messrs. Thompson

(3) 61 L. J. Q.B. 295; [1892] A.C. 25.
(4) 63 L. J. Ch. 908; [1894] A.C. 535.

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ELLIMAN, SONS & Co. *v.* CARRINGTON & SON.

& Co. have been at liberty, as between Messrs. Carrington and themselves, to sell at a lower price, and they have done so. If the contract is good, then Carrington & Son have broken the contract in that particular; and the contract being, in my opinion, good, they must take the consequences of not having fulfilled the bargain into which they solemnly entered. The same is true of Luke Crabtree, trading as W. Walker & Co.

That being so, is it a case for an injunction? Against what am I to enjoin these defendants? I am asked to enjoin them against now selling the goods which they must procure from Messrs. Elliman without procuring some agreement with their purchasers, and also, of course, to prevent them from themselves selling at the lower price. The remedy is entirely in the hands of Messrs. Elliman. They can close their accounts with the defendants. As against the future an injunction could do no good—it would be perfectly futile. It does not seem to me to be a proper remedy in a case of this kind.

The case is therefore reduced to a question of damages, and they are admitted to be merely nominal. For the present purpose I shall say that twenty shillings is the amount of damages, and Messrs. Carrington & Son and Luke Crabtree must each pay that amount.

As regards Messrs. Thompson & Co., there was no contract between them and the plaintiffs; and it was part of the plaintiffs' grievance with the others that there was no such contract. The action therefore fails against them, and must be dismissed with costs. The other defendants must pay the plaintiffs' costs in getting their contract held valid. Messrs. Thompson & Co. will get their costs from the plaintiffs.

Solicitors—Dalston, Son & Elliman, for the plaintiffs; Robbins, Billing & Co., agents for Charles Mills, Oldham, for the defendants.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

JOYCE, J. 1901. May 11, 13.

FURNESS, *In re*; FURNESS *v.* STALKARTT.

Will — Father and Child — Absolute Legacy—Settled Legacy—Subsequent Settlement on Legatee's Marriage—Ademption.

A father bequeathed a legacy of 20,000*l. to his daughter, a spinster—as to* 5,000*l. to her absolutely and as to* 15,000*l. upon trust for her for life with remainder to her children, and in default of children upon trust for her next-of-kin. Subsequently, upon her marriage, he settled a sum of about* 7,000*l. upon trusts in favour of her and her children, with ultimate trusts in default of children, not corresponding with the trusts of the settled legacy*:—Held, *that the marriage settlement fund must be taken in satisfaction pro tanto of the settled portion of the legacy, and that the daughter was entitled to the* 5,000*l. absolute legacy without diminution.*

Adjourned summons.

This was a summons raising a question as to what part of a legacy of 20,000*l.* bequeathed to the testator's daughter, of which part was given absolutely and the other part directed to be settled, was to be considered adeemed by a subsequent settlement made by the testator upon the marriage of his daughter in his lifetime.

By his will dated January 23, 1878, George Furness, the above-named testator, after various devises and specific and pecuniary bequests, directed that his trustees should hold the residue of his real estate and the trust funds of his will and the income thereof in trust for all and every his children and child living at his death or born in due time thereafter, who being a son should attain the age of twenty-five years, or being a daughter should attain that age or marry under that age, and if more than one equally. The testator declared that no division of his residuary estate should take place until his youngest child should attain the age of twenty-five years, or being a daughter should marry under that age with the consent of her mother, but his trustees should have full power to advance and pay to any of his daughters

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who should have attained that age or should have married with the consent of their mother under that age, any portion not exceeding one-third of their respective shares of his converted personal estate, the same to be for their sole and separate use. Provided also, that as to two thirds of the share of each daughter of and in his residuary real and personal estate, the same should be held upon trust for her for life, and after her death in trust for children as therein mentioned, and in default of children in trust for her next-of-kin.

By a codicil to his will dated February 14, 1885, the testator directed that instead of his residuary estate being divisible equally amongst all his children, each of his daughters should have the sum of 20,000*l.* at the age mentioned in his will, and that 15,000*l.* part thereof should be settled and go in the manner directed in his will with regard to two-thirds of the share of each daughter in his residuary estate, and the remaining 5,000*l.* should go in the manner directed concerning the other third.

The defendant Margaret Joanna Stalkartt, one of the testator's daughters, was married to the defendant Charles E. G. Stalkartt, on March 1, 1893, and in contemplation of her marriage the testator invested a sum of 7,199*l.* 13*s.* in the purchase of 7,300*l* 2*l.* 15*s.* per cent. Consols, and transferred the same to the trustees of a marriage settlement dated February 28, 1893, upon trust for his daughter and her children as therein mentioned, and in default of children then in trust for his daughter absolutely if she should survive her then intended coverture, but if she should die during the same then in trust for her brothers and sisters and their issue as she should appoint, and in default of and subject to any such appointment in trust for her statutory next-of-kin. Power was also thereby given to the defendant Margaret J. Stalkartt to appoint that after her death the income of the trust fund should be paid to the said C. E. G. Stalkartt during his life or any shorter period, he continuing a widower and unmarried.

The testator died on January 9, 1900, and his will was proved by his widow, the plaintiff, as surviving executrix, on February 9, 1900. The testator left two sons and two daughters surviving him, all of whom had attained the age of twenty-five years.

This was a summons taken out by the plaintiff against the defendants Mr. and Mrs. Stalkartt and their infant son, and George James Furness, one of the testator's sons, for the determination of the questions whether the legacy of 20,000*l.* was adeemed *pro tanto* by the sum settled by the marriage settlement, and, if so, whether the reduction should be borne by the 5,000*l.* legacy given absolutely and the 15,000*l.* settled legacy *pari passu*, or whether it should be borne wholly by the 15,000*l.*, or primarily by the 5,000*l.* legacy.

J. M. Stone, for the plaintiff, stated the case.

Hughes, *K.C.*, and *Vaughan Hawkins*, for the defendants Mr. and Mrs. Stalkartt.—It is clear that the settled legacy must be adeemed. The question of ademption is purely a question of intention, and there can be no doubt that the testator intended the sum settled by him on his daughter at her marriage to be regarded as part of the sum settled on her by his will, and not as a satisfaction of the absolute legacy to her. There is no ground or authority for the suggestion that the amount of the ademption should be apportioned between the settled and the absolute legacy.

Younger, *K.C.*, and *F. Stallard*, for the defendant George James Furness.—This defendant takes no part in the argument, for his only interest may be as next-of-kin of his sister, and so is very remote.

A. L. Ingpen, for the infant defendant.—The testator meant that the 5,000*l.* absolute legacy should be adeemed. When he made his will both his daughters were spinsters, and the scheme of the will was that they should each have 15,000*l.* settled on them in any event, and 5,000*l.* absolutely if unmarried. When Mrs. Stalkartt married, the testator settled on her this fund as an ademption of the absolute legacy, and in order to protect it from her husband, meaning to leave the settled 15,000*l.* untouched. At any rate, the

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ademption ought to be borne rateably by the absolute and settled legacies.

Hughes, K.C., replied.

Cur. adv. vult.

May 13.—JOYCE, J.—As a general rule, where a parent by will gives a legacy to a child, not expressing the purpose with reference to which it is given, he is understood to be giving what is commonly called a portion, and, in consequence of the leaning of Courts of equity against double portions, if the testator afterwards in his lifetime advances a portion on the marriage of the child the presumption arises that it was intended to be a satisfaction or ademption of the legacy, either altogether or *pro tanto*. A bequest of a sum of money to a daughter absolutely may be adeemed by a subsequent settlement on her marriage, and the same is the case although the bequest to the daughter by the will is thereby settled upon her and her family, nor is the presumption in favour of ademption rebutted by the circumstances, that the limitations of the portion under the will are different from the limitations in the settlement.

Again, if a legacy appears upon the face of a will to be bequeathed even to a stranger for a particular purpose, and a subsequent gift be made by the testator for the very same purpose, a presumption is raised *prima facie* that such gift is an ademption.

In the present case the testator by the joint effect of his will and codicil provided for each of his daughters the sum of 20,000*l.*—15,000*l.* part thereof to be settled and to go as in the will mentioned, and the remaining 5,000*l.* to be paid to the daughter. Subsequently upon the marriage of a daughter he settled a sum of between 7,000*l.* and 8,000*l.*, the limitations under this settlement not being the same as those of the 15,000*l.* under the will. It was not, and indeed could not have been, disputed that this sum settled upon the marriage must be taken as a *pro tanto* satisfaction of the 20,000*l.* legacy, but the question remained whether it must be taken and considered as in ademption of the 15,000*l.* or of the 5,000*l.*—the two parts into which the testator divided the legacy of 20,000*l.*

If the limitations of the settlement had been the same as those of the 15,000*l.* settled under the will and codicil, there would have been no question but that the 15,000*l.* was adeemed *pro tanto*; but as the limitations do not correspond the question asked by the summons arises. To my mind, the truth and common-sense of the matter appears to be that where a legacy to a child is taken to be adeemed by a subsequent portion, it is because the testator is considered in making provision for his children to be performing a moral obligation; and if he afterwards upon any occasion during his lifetime provides a portion, he is thereby by anticipation performing *pro tanto* the obligation above referred to, and is in his lifetime intending to discharge, or prepaying, the legacy given by the will. This idea is, I think, well founded in reason and upon experience. In the present case, which part of the testamentary provision for his daughter ought the testator to be considered as intending to discharge by the subsequent settlement? There are no special circumstances; and if the testator could be asked the question I cannot seriously doubt that he would answer that the settlement was to be taken in satisfaction *pro tanto* of the settled portion of the legacy, there being no reason whatever that I can see why the daughter's absolute legacy of 5,000*l.* should be taken away or diminished; and this accordingly I decide to be the result.

Solicitors—Stones, Morris & Stone, for plaintiff and defendant G. J. Furness; Hopgoods & Dowson, for other defendants.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

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JOYCE, J.
1901.
April 19.
May 4.

SCHNADHORST, *In re*; SANDKUHL *v.* SCHNADHORST.

Will—Construction—Gift to a Class—Substitutional Gift on Death Leaving Issue—Period of Vesting.

A testator directed that, subject to the payment of the income of his residuary real and personal estate to his wife during widowhood, and of an annuity to her on her re-marriage, and subject also to the maintenance of his children until the youngest living should attain twenty-one, his trustees should hold his said residuary estate and the accumulations of the income thereof "in trust for all my children who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry to whom I give and bequeath my residuary real and personal estate in equal shares. I direct that if any of my children shall die leaving issue such issue shall take his or her deceased parent's share equally as tenants in common." The testator died, leaving surviving him his wife and three children, two of whom, a son and a daughter, had already attained the age of twenty-one:—Held, *that there was nothing in the will to limit the contingency of death leaving issue to less than the whole life of the first taker whether a son or daughter, and that the divesting clause, or gift over, on death leaving issue, might operate not only during the lifetime of the widow, but also after her death.*

O'Mahony *v.* Burdett (44 L. J. Ch. 56*n*; L. R. 7 H.L. 388) *considered and applied.*

Adjourned summons.

This was a summons raising the question as to the time of indefeasible vesting of an absolute bequest of shares of residue given, subject to a prior life interest, to a class, males at twenty-one, females at twenty-one or marriage, with a substitutional gift to the issue of any member of such class who died leaving issue.

By his will dated December 13, 1889, Francis Schnadhorst, the above-named testator, after certain specific legacies, devised and bequeathed all the residue of his real and personal estate unto his trustees upon trust, after payment of his debts and funeral and testamentary expenses, for sale, conversion, and investment, and, after setting aside out of the trust fund thereby constituted the various sums therein mentioned, "upon further trust to pay the income of the residue of the trust fund to my said wife during her life if she shall continue my widow But if my said wife shall marry again Upon trust to pay her an annuity of 50*l.* per annum during the remainder of her life for her separate use independent of the debts and control of any future husband And subject to the provision aforesaid Upon trust after the decease or second marriage of my said wife to apply the income of the trust fund in or towards the maintenance education and advancement of my children until the youngest who shall be living shall attain the age of twenty-one years or being a daughter shall attain that age or marry Subject to the trusts and powers hereinbefore contained I direct that the trust fund and the income thereof and all accumulations of income or so much thereof as shall not have become vested or been applied pursuant to this my will shall be held in trust for all my children who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry to whom I give and bequeath my residuary real and personal estate in equal shares I direct that if any of my children shall die leaving issue such issue shall take his or her deceased parent's share equally as tenants in common."

The testator died on January 2, 1900, leaving surviving him his wife and three children — namely, the plaintiff Mary Frances Sandkuhl (wife of Hans Sandkuhl), the defendant Ernest Edward Schnadhorst, and Frank Gladstone Schnadhorst. The last-named alone of the testator's children was still an infant, having been born on July 28, 1880. The defendant Ernest Edward Schnadhorst, was married, and had two infant sons, who were also defendants.

The executors and trustees named in the testator's will renounced probate and disclaimed the trusts thereof, and letters

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of administration with the will annexed were granted to the defendant Ernest Edward Schnadhorst.

The plaintiff M. F. Sandkuhl, being desirous of ascertaining what interest she now had in her father's residuary estate, took out this summons for the determination of the following questions: Whether the children of the testator who survived him, and being sons attained the age of twenty-one years or being daughters attained that age or married, took vested indefeasible interests in the testator's residuary estate subject to their mother's interest, or whether they only took such vested indefeasible interests on surviving their mother, or on dying without leaving issue, or what was the interest that such children as aforesaid now took.

Younger, *K.C.*, and *A. F. Peterson*, for the plaintiff.—The plaintiff took an indefeasible vested absolute interest when she attained twenty-one. The operation of the direction in the event of any child dying and leaving issue is confined to the period antecedent to vesting. This case is very like *Home* v. *Pillans* [1833],[1] where it was held that the legatee took an absolute vested interest on attaining twenty-one, although there was a gift over to her children in case she should die leaving children. *Home* v. *Pillans*[1] was dealt with in *O'Mahony* v. *Burdett* [1874],[2] and not in any way disapproved of. There are only two periods to which death leaving issue can be referred—either before attaining twenty-one, or before the death of the tenant for life; and either of those events will suit the plaintiff. *Monteith* v. *Nicholson* [1837][3] is in the plaintiff's favour.

Dibdin, *K.C.*, and *R. J. Parker*, for the infant defendants.—The contingency of death leaving issue applies to the whole of the lifetime of the son or daughter, and therefore the plaintiff does not take an absolute indefeasible interest unless and until she dies without leaving children. This is as clear a case as ever was within *O'Mahony* v. *Burdett*.[2] It was in *Home* v. *Pillans*[1] that the rule was formulated which was upset in *O'Mahony* v. *Burdett*.[2] *Home* v. *Pillans*[1] was different from this case, for there there was no antecedent life estate, and there was a direct gift to the legatees. This is not a substitutional gift after a bequest to individuals *nominatim*, as in *Ive* v. *King* [1852].[4] *Monteith* v. *Nicholson*[3] is a different case.

Cozens-Hardy, for the defendant Ernest Edward Schnadhorst.—The death of the tenant for life is the latest time at which the shares vest indefeasibly. All the cases are cases of contingencies "without" something, or negative contingencies. This is the case of a contingency "with" something—*e.g.* death with issue—or an affirmative contingency, and is not touched by the decisions in *O'Mahony* v. *Burdett*,[2] which apply to negative or semi-negative contingencies. On a son's attaining twenty-one he takes a vested interest, which is only liable to be divested on death before the tenant for life—*Bolitho* v. *Hillyar* [1865].[5]

Younger, *K.C.*, replied.

Cur. adv. vult.

May 4.—JOYCE, J., read the material parts of the will and the summons, and, after stating the facts as above set out, continued: Now, it was contended in the first place, upon the authority of *Home* v. *Pillans*,[1] that the operation of the direction in the will in the event of children dying and leaving issue was confined to the period antecedent to the vesting—or, in other words, that the clause was not a gift over or divesting clause at all—in which case it would never apply to a daughter, but only to sons, for of course no daughter could die leaving issue unless she first married, whereupon a share would vest in her under the original gift, though perhaps not indefeasibly. *Home* v. *Pillans*[1] was a case in which a legacy was given to each of two named individuals, both females, when and if they attained twenty-one, for their sole and separate use free from marital control, and in case of the death of either, leaving children, the share of the one so dying

(1) 4 L. J. Ch. 2; 2 Myl. & K. 15.
(2) 44 L. J. Ch. 56*n*; L. R. 7 H.L. 388.
(3) 6 L. J. Ch. 247; 2 Keen, 719.
(4) 21 L. J. Ch. 560; 16 Beav. 46.
(5) 34 Beav. 180.

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was given to her children. There was no preceding life estate, and Lord Brougham held that the legacy of each legatee became absolutely vested on her attaining twenty-one. His Lordship's reasoning has been criticised by Mr. Jarman in his book on *Wills* (5th ed.), vol. ii. p. 1611, and some passages in the judgment are probably at variance with the judgments of the law Lords in *O'Mahony* v. *Burdett*.[2] But the decision has not been overruled; and if I may presume to say so respectfully, I think the decision was right, having regard to the terms of the particular gift which was the subject of it.

In the present case the gift which has to be construed is subsequent and subject to what amounts to a preceding life estate in the testator's widow. It is not to a named individual subject to a condition or contingency, but to a class—namely, the testator's children who being a son or sons attain twenty-one, or being a daughter or daughters attain that age or marry; and it is immediately followed by the direction that if any of the testator's children (not sons only) shall die leaving issue, such issue shall take their deceased parent's share. Now whether as a matter of construction this clause could ever operate with respect to the case of a son who died under twenty-one appears to be open to question, considering that there is no share at all given to a son who does not attain twenty-one—see the judgment of Mr. Justice North in *Hannam, In re* [1897],[6] and the proposition in *Ive* v. *King* [4] as stated by Vice-Chancellor Wood during the arguments in *Porter's Trusts, In re* [1857],[7] on page 191 of the report in Kay and Johnson. In my opinion also the reasons given by Lord Cairns for the terms of the bequest in *Home* v. *Pillans* [1] being held to point to a death under twenty-one are hardly applicable to the present case—it being, as it is, most unusual to provide for the family of a son who dies under twenty-one—whereas it is most usual, if not necessary, to provide for the family of a daughter who dies under twenty-one, this being ordinarily effected, as here, by making her share or legacy vest not only at twenty-one, but at twenty-one or marriage under that age. I think it is impossible to limit the operation of the clause or direction in question in the present case to the event of a son dying under twenty-one; or, in other words, to limit its operation to the period antecedent to the original vesting, until which no share is given to the parent at all. It appears to me to be a divesting clause, or gift over, operative at least during the widow's lifetime and in a certain event—namely, death without issue—passing or carrying over to issue their deceased parent's share.

The real question is whether this clause is to operate after the death of the widow, as well as during her lifetime, to the determination of which question the decision in *Home* v. *Pillans* [1] seems not to have any application. In *Bowers* v. *Bowers* [1870][8] Lord Hatherley says: "There have been many cases in which the Court has said that to refer a clause providing for the divesting of a share to the time of the testator's own death, so as to make it merely a provision against lapse, is not a natural construction. It is not *prima facie* to be supposed that he contemplates the death of the objects of his bounty in his lifetime, but he is to be considered as contemplating their death at some later period, unless he uses language which shews that he is referring to the time of his own death. Take the case of an immediate gift to A., and 'in case he shall happen to die' then to B. Here death being spoken of as contingent, the testator must be referring to death before some particular period; and as there is no other period to which it can be referred than his own death, we are obliged to treat the gift over as taking effect only in the case of A.'s dying in the testator's lifetime. But if the gift over is 'in case A. shall happen to die leaving issue,' we have a contingency, and there is no occasion to confine the death to any particular period."

For the purpose of determining the period within which the gift over is to take effect, I think it makes no difference what may be the particular contingency or collateral event coupled with death upon which such gift over is to take

(6) 66 L. J. Ch. 471; [1897] 2 Ch. 39.
(7) 27 L. J. Ch. 196; 4 K. & J. 188.
(8) 39 L. J. Ch. 351; L. R. 5 Ch. 244.

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effect—that is to say, whether it be death leaving issue, or death without issue, or death unmarried, or under twenty-one. Lord Brougham himself says in *Home* v. *Pillans* [1] that it is beyond dispute that no difference whatever is made by the circumstance of the legatees over being the children of the first taker. Now in *O'Mahony* v. *Burdett* [2] the particular contingency to be considered was death unmarried or without children, and Lord Cairns says in his judgment: "A bequest to A., and if she shall die unmarried or without children to B., is, according to the ordinary and literal meaning of the words, an absolute gift to A., defeasible by an executory gift over, in the event of A. dying, at any time, under the circumstances indicated, namely, unmarried or without children. And in like manner a bequest to X. for life, with remainder to A., and if A. die unmarried or without children to B., is, according to the ordinary and literal meaning of the words, an executory gift over, defeating the absolute interest of A. in the event of A. dying, at any time, unmarried and without children." It was decided in that case that there was no rule of construction arising from possible delay in the vesting of a gift which controls the natural meaning of the terms of the bequest, and that the ordinary and literal meaning of the words used to introduce a gift over in the case of the "death unmarried or without children" of a previous taker, is not to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper.

Lord Hatherley also, in giving judgment, says, "in those cases where the Court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the Courts have laid hold of that circumstance to say, 'We hold this defeasance to be before that period of distribution arrives,' holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed, and put into the hands of those who, having it in their hands, will of course spend it without any farther trust, and on the other hand that a subsequent event, namely, a certain person's dying childless after that distribution has taken place, should divest the property, that is to say, make it necessary for the executor to take steps to get back again, and recall that money which he has paid in order to hand it over to those who would take under the executory devise. The Courts have held that that was unreasonable." Later on his Lordship also says, "the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions in the will which are inconsistent with that supposition."

In the present case the only words that can be suggested as being words of payment, assignment, or distribution indicating the termination of a trust, are the words "to whom I give and bequeath my residuary real and personal estate in equal shares," immediately followed by what I have called the divesting clause or gift over. I am unable to convince myself that the gift and bequest I have just read are under the circumstances a direction to hand over the several shares so as to terminate the trust. I think it is not more than an apportionment of interests under the will, especially as there are no other words to define the shares in which the property the subject of the gift is to be taken or divided. It is no doubt in form an immediate gift—not, however, expressed to be absolute—but it must, I think, be taken and construed subject to and with the immediate context—namely, the direction "that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally as tenants in common"—see *per* Lord Justice Giffard in *Bowers* v. *Bowers*.[3]

The result is that I do not find anything in this will to limit the contingency—namely, death leaving issue—to less than the whole life of the first taker, whether son or daughter; and I am of opinion that the divesting clause or gift

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over may operate not only during the lifetime of the widow but also after her death. I shall therefore make a declaration accordingly.

Solicitors—Swann, Green & Co., for plaintiff; E. Flux, Leadbitter & Neighbour, for defendants.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

FARWELL, J. 1901. May 7, 13. } POWELL *v.* BRODHURST.

Mortgage—Amount Recoverable—Covenant for Payment—Joint-Account Clause—Payment to Partner—Implied Agency—Survivorship—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 61.

Payment to one of two joint creditors is a good discharge of a joint debt.

A partner has no implied authority to receive payment of a debt due to his co-partner in his individual capacity.

The amount recoverable upon a covenant for repayment of the principal moneys secured by a mortgage is not necessarily the only relevant consideration in determining the amount recoverable in foreclosure or redemption proceedings.

Where therefore a payment was made on account of a mortgage debt to the partner of one of two mortgagees entitled under a deed which contained the usual joint-account clause, the payment was held bad at law and in equity, although the partner mortgagee survived his co-mortgagee.

Matson *v.* Dennis (4 De G. J. & S. 345) *followed.*

On March 1, 1872, the defendant executed a mortgage of real estate at Worksop to Barnett & Birch to secure the repayment of 6,000*l.* and interest at 4 per cent. per annum, and by the same deed he covenanted to pay the principal sum with interest on September 1, 1872. In 1875, 1,000*l.*, part of the 6,000*l.*, was repaid. Both the mortgagees died, and on September 1, 1878, the executor of the survivor transferred the 5,000*l.* mortgage debt and the securities to Cartmell Harrison and James Crofts Ingram. In 1888 the defendant paid off another 1,000*l.*, leaving 4,000*l.* only remaining due on the security. In 1890 this sum of 4,000*l.* and the securities for it were transferred to De Paravacini and James Ingram. In August and September, 1892, the defendant sent two cheques for 500*l.* each to the firm of Ingram, Harrison & Ingram. The members of this firm were James Ingram, Cartmell Harrison, and James Crofts Ingram. Harrison acknowledged the receipt of the two sums as in part discharge of the amount remaining due on the mortgage security. In paying these two sums to the firm the defendant followed the same course as he had pursued in respect of the two sums of 1,000*l.* each, which he had previously paid off, and which had been duly paid over to the original mortgagees and their transferees. Both the sums of 500*l.* were paid into the account of the firm, and were credited in the books of the firm to the defendant, and the interest on the mortgage debt was throughout paid to the firm, and after September, 1892, was paid on 3,000*l.* only. On September 26, 1897, De Paravacini died, and on December 25, 1897, James Ingram died, and on May 1, 1900, his executors transferred the mortgage debt and security to the plaintiffs. The mortgage debt was stated in the transfer to be 4,000*l.*, but the transferees had notice of the payment of the two sums of 500*l.* to the firm of Ingram, Harrison & Ingram before execution of the deed. The mortgage debt was, in fact, an investment of trust-money, and no consideration passed from the plaintiffs to the executors on the occasion of the transfer. The mortgage and the transfers contained the usual joint-account clause, but beyond this the defendant had no notice or suspicion when he paid the two sums of 500*l.* in 1892 or before that the mortgage debt was trust-money.

James Ingram, one of the transferees in 1890, continued to be a partner in the firm of Ingram, Harrison & Ingram until his death on December 25, 1897. He was taken ill at the end of 1891, and did

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not come to the office at all in 1892. He never attended personally to any business after 1891, although he came to the office for a few days in 1893 and 1894. Cartmell Harrison and J. C. Ingram were partners in the firm from 1891 till December, 1897.

The plaintiffs brought the present action to enforce their security, and claimed to have an account taken of what was due under the covenant in the mortgage, and an order for payment and an account of what was due under and by virtue of the mortgage, and for foreclosure. The defendant admitted that 3,000*l.* was owing and secured, but denied his liability to pay more, and claimed to redeem on the footing that 3,000*l.* and not 4,000*l.* was owing on the security.

The burden being on the defendant to discharge himself from the liability which he had contracted, the case was opened by

Upjohn, K.C., and *George Cave*, for the defendant.—First, James Ingram, one of the transferees in 1890, was a member of the very firm which received the two sums of 500*l.* He was liable for these two sums if misapplied by his partner—*Marsh* v. *Keating* [1834],[1] *Blair* v. *Bromley* [1847],[2] *Blyth* v. *Fladgate* [1890],[3] *Rhodes* v. *Moules* [1894],[4] and *Mara* v. *Browne* [1895].[5] He became, in fact, the survivor, and, as he was unable to sue, the transferees from him are in no better position—*Turner* v. *Smith* [1900].[6]

Secondly, the debt was a joint debt in equity as well as at law—Conveyancing and Law of Property Act, 1881, s. 61.[7] The receipt of one joint creditor was a valid discharge at law—*Wallace* v. *Kelsall* [1840][8] and *Husband* v. *Davis* [1851].[9] In equity the mortgagees were *prima facie* entitled in common, whether the money was a joint advance or not, but it was otherwise in the case of a purchase—*Lake* v. *Craddock* [1732],[10] *Petty* v. *Styward* [1632],[11] *Rigden* v. *Vallier* [1751],[12] and *Morley* v. *Bird* [1798].[13] Now, since the Judicature Act, 1873, the equitable rule must prevail, if it conflict with the rule of law—*Steeds* v. *Steeds* [1889].[14] The result is that if the debt is joint in equity as well as at law there is a complete discharge; if, however, the transferees were entitled as tenants in common, there is a discharge as to a moiety. The observations of Knight-Bruce, L.J., in *Matson* v. *Dennis* [1864],[15] are not well founded. In the case of a trust the person is bound to see that the property gets into a proper state of investment—*Webb* v. *Ledeam* [1855].[16]

[FARWELL, J., referred to *Robbins on Mortgages*, vol. ii. p. 845.]

Butcher, K.C., and *H. E. Wright*, for the plaintiff.—A transfer by one of two joint tenants does not operate to pass a moiety—*Sloman* v. *Bank of England* [1845][17] and *Barton* v. *North Staffordshire Railway* [1888].[18] *Matson* v. *Dennis*[15] is also conclusive against the claim. But there is no liability on the part of James Ingram for the receipt of his partner unless the defendant can shew agency—*Jacobs* v. *Morris* [1900].[19] The

(1) 2 Cl. & F. 250; 8 Bligh (N.S.) 651; 1 Bing. N.C. 198.
(2) 16 L. J. Ch. 495; 2 Ph. 354.
(3) 60 L. J. Ch. 66; [1891] 1 Ch. 337.
(4) 64 L. J. Ch. 122; [1895] 1 Ch. 236.
(5) 65 L. J. Ch. 225; [1896] 1 Ch. 199.
(6) *Ante*, p. 144; [1901] 1 Ch. 213.
(7) Conveyancing and Law of Property Act, 1881, s. 61: "Where in a mortgage, . . . or a transfer of a mortgage, . . . the sum . . . advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, . . . or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money . . . for the time being due to those persons on the mortgage . . . shall be deemed to be and remain money . . . belonging to those persons on a joint account, as between them and the mortgagor . . . ; and the receipt in writing of the survivors or last survivor of them . . . shall be a complete discharge for all money . . . for the time being due, notwithstanding any notice to the payer of a severance of the joint account."
(8) 10 L. J. Ex. 12; 7 M. & W. 264.
(9) 20 L. J. C.P. 118; 10 C. B. 645.
(10) 3 P. Wms. 158; 2 Wh. & Tu. L.C. Eq. (7th ed.), 952.
(11) 1 Eq. Cas. Abr. 290; 1 Ch. Rep. 31.
(12) 2 Ves. sen. 252, 258; 3 Atk. 731.
(13) 3 Ves. 628, 631.
(14) 58 L. J. Q.B. 302; 22 Q.B. D. 537.
(15) 4 De G., J. & S. 345.
(16) 1 K. & J. 385.
(17) 14 L. J. Ch. 226; 14 Sim. 475.
(18) 57 L. J. Ch. 800; 38 Ch. D. 458.
(19) *Ante*, p. 183; [1901] 1 Ch. 261.

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fallacy which underlies the defendant's argument is that he is entitled to redeem on terms which do not recognise the rights of innocent third parties. *Steeds* v. *Steeds* [14] does not apply.

Upjohn, *K.C.*, in reply.—*Barton* v. *North Staffordshire Railway* [18] turned upon the construction of the Companies Clauses Act, 1845.

Cur. adv. vult.

FARWELL, J., after stating the facts and pointing out that the plaintiffs were in no better position than James Ingram, their immediate transferor, continued: There are, therefore, two questions involved. First, the liability under the covenant, which is a question of common law; and secondly, the liability in the foreclosure action, which is a question of equity.

In my opinion the old rule of common law—that payment to one of two joint creditors is a good discharge of the joint debt—still remains good. There is no equitable rule which can conflict with the rule of the common law, because no bill would lie in Chancery to recover a mere money demand. Equity had, no doubt, to deal with debts in the administration of the estates of deceased persons and in the liquidation of companies, but in determining whether claims for debts had been discharged or not, equity followed the law, and indeed, in cases of difficulty before the Chancery Procedure Act, 1852, ss. 61 and 62, sent cases for the opinion of common-law Courts. There is nothing inconsistent with this in *Steeds* v. *Steeds*.[14] The question there was whether it was so clear that the debt claimed was joint that the defence should be struck out, and it was held that there was a conflict between law and equity in the presumption to be drawn from the existence of a security to two without words of severance, and that the rule of equity as to such presumption now prevails. But this was a conflict of presumption—namely, whether there was or was not a joint tenancy—and had no relation to the legal consequences flowing from the existence of an admitted joint tenancy. In the present case both sides agree that this is a joint debt; and having regard to the words of the covenant, and the 61st section of the Conveyancing and Law of Property Act, 1881,[7] I take this to be correct. But the joint debt in this case was not paid to either of the joint creditors, but to the firm of which one of them was a member. Now payment to the firm of which the creditor is a member of a private debt due to a member of a firm will not, in my opinion, support a plea of payment in the absence of evidence that the creditor has expressly, or by a necessary implication, authorised the receipt of the money by the firm as his agents. The mere fact that the person who has made the payment would have a good cause of action against the firm to recover the money if the sum is not accepted in payment, does not make it payment. The defendants to such an action must be all the partners, and there is no set-off either at law or in equity of the private debt of one defendant against the joint debt of the firm—see *Lindley on Partnership* (5th ed.), p. 292 (4),[20] and the cases cited there. It is, no doubt, generally true that a man may do by his agent anything that he can do himself, and I will assume that a joint creditor may effectually receive payment of a joint debt by his agent; and, in an ordinary case, I should infer agency from the receipt and expenditure of the money by the firm or its entry in the firm's books; but there is a great difficulty in coming to such a conclusion in the present case. If James Ingram did in fact authorise the firm to receive this money he was guilty of a breach of trust, and the Court never infers that a man is guilty of a wrongful act unless the inference is irresistible. In the present case it is apparent from the admitted facts relating to James Ingram that he took very little part in the business of the firm after 1891. It is quite possible that he knew nothing whatever of the receipt of this money; and although he would be jointly liable with his partners to refund it because he had had the benefit of it, and his knowledge of the receipt being immaterial, it does not necessarily follow that he authorised the receipt. I do not think that I am bound, or indeed ought, to convict him of such a breach of trust.

(20) 6th ed., p. 302 (4); and see p. 147.

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I do not, however, propose to rest my judgment solely on this ground. The real contest between the parties has been as to the extent to which the property is charged. The plaintiffs argued that, even assuming that the 1,000*l.* has been paid off, so that 3,000*l.* only could be recovered under the covenant at law, nevertheless the defendant can only redeem on payment of the full 4,000*l.* The defendant argued that the mortgage is merely a security for the debt covenanted to be paid, and that if, and so far as, the debt is gone, the mortgage must be diminished to the same extent; and, indeed, Vice-Chancellor Stuart decided the case of *Matson* v. *Dennis* [15] on this very ground. That was an objection to title by a purchaser under a decree in the suit, and the Vice-Chancellor, upon an application by summons taken out by the plaintiffs in the cause to compel the purchaser to pay his purchase-money into Court, said that the purchaser was entitled to evidence that the joint debt was properly discharged; that a joint debt was properly discharged by payment to one joint creditor; that at law the receipt of one joint creditor was an extinction of the debt; and that no law was applicable but that of debtor and creditor; and he ordered the purchaser to pay his purchase-money into Court with costs. But his judgment did not meet with approval in the Court of Appeal. I have referred to it because it shews that the very point now argued was raised and decided. Lord Justice Knight-Bruce says: "The question is, whether when an equitable charge is vested in two persons—and as I will assume as joint tenants—the money can be paid to one without any special authority from the other so as to discharge the estate. I am not speaking of an action. I am speaking of discharging an equitable burden upon an estate, and so discharging the estate. In my judgment, and in the absence of special circumstances such as are not shewn to exist in the present case, that cannot be done. The purchaser is entitled to have it taken here, that Mr. McLeay"—that is, the other joint creditor—"was alive at the time, and that some money has, without any consent on his part, been paid to the other joint tenant or tenant in common. That, I repeat, in my judgment, does not discharge the estate in equity. Especially in the case of vendor and purchaser I think the purchaser has a right to say that the whole 3,000*l.* was not shewn to be discharged, but that it is consistent with the evidence to suppose that it may be still an available charge in equity." Lord Justice Turner shortly referred to the facts and concurred, adding that that part of the order under appeal which directed the payment of the purchase-money into Court was right, and ought to stand, because the title was good, and the question raised only involved one of conveyance. An order was made accordingly by which the purchase-money was to be brought into Court. No costs were given on either side, but the costs of the plaintiffs in the suit were directed to be costs in the cause. The reasoning of the Court of Appeal is contrary to the reasoning of Vice-Chancellor Stuart in the Court below, which I have read. It was urged that this amounts only to an expression of opinion that the purchaser was entitled, for his protection, to have the concurrence of a possible claimant; but I cannot regard it as confined to this. I am, of course, bound by the decision, and not the less because it coincides with my own opinion and the general practice of conveyancers. If the defendant is right, the joint-account clause ought never to be inserted where the mortgage-money is held on trust, and the existence of the trust ought always to be disclosed—a course which would revolutionise a settled practice of many years' standing.

The fallacy of the defendant's argument consists in the assumption that the question whether the money covenanted to be paid is recoverable at law is the only relevant consideration in foreclosure or redemption proceedings, and in disregarding the principles of equity that underlie foreclosure and redemption. The mortgagee's estate is absolute at law on breach of the covenant to pay on the appointed day; but the Court interferes for the benefit of the mortgagor on the terms that he does equity. The mere payment of the principal and interest legally recoverable is not necessarily sufficient.

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For example, the mortgagee is entitled to be repaid money laid out by him in permanent improvements enhancing the value of the property, although there is no covenant under which it could be recovered at law—*Shepard* v. *Jones* [1882][21] and *Henderson* v. *Astwood* [1894][22]; and in a mortgage of a reversionary interest in land, where time runs from the falling into possession of such interest, foreclosure will be granted although the remedy on the covenant is statute-barred—*Hugill* v. *Wilkinson* [1888][23]; and arrears of interest for more than six years may be retained in an action to redeem a mortgage of a reversion—*Dingle* v. *Coppen* [1898][24]; and the mortgagee's right to tack and consolidate depended upon the same principle. If a mortgagor chooses to pay otherwise than in strict accordance with the terms of his contract, he does so at his own risk. The proviso for redemption in a mortgage to two is never expressed to take effect on payment to the mortgagees or either of them, but upon payment to the mortgagees or the survivor of them; and if a mortgagor pays to one, although such payment is a good discharge at law, yet the matter is at large when he comes into equity, and the Court takes into consideration all the facts of the case, and ascertains whether the payee was beneficially entitled to the whole or to a part only, or whether he was a trustee with the other mortgagee, and treats the payment as good in whole, or in part, or altogether bad accordingly. It is not a question of fixing the mortgagor with notice of a trust, but it is the enquiry that the Court makes to satisfy itself that it is just and equitable, under all the circumstances, to deprive the mortgagee of his legal title to the property comprised in the mortgage. This, in my opinion, is a complete answer to the last argument of the defendant—that James Ingram was the actual survivor, and therefore could have received the money and given a valid receipt at a later date. The mortgagor did not in fact pay to the survivor, but to one of two. He can rely only on the receipt as at the time when it was given, and he has only himself to thank because he chose to pay otherwise than in accordance with the contract. Indeed, on his own evidence he trusted to the firm of Ingram, Harrison & Ingram to do what was right with the money, and to indorse a receipt for 1,000*l.* on the mortgage deed. The judgment will be in the usual form as settled in *Farrer* v. *Lacy* [1885],[25] the principal sum due being 4,000*l.*, and not 3,000*l.*

(21) 21 Ch. D. 469.
(22) [1894] A.C. 150.
(23) 57 L. J. Ch. 1019; 38 Ch. D. 480.
(24) 68 L. J. Ch. 337; [1899] 1 Ch. 726.

Solicitors—Bowman & Curtis Hayward, for plaintiffs; G. G. Vertue, agents for Hodding & Co., Worksop, for defendants.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

JOYCE, J. 1901. March 5, 6, 15.

SANFORD, *In re*; SANFORD *v.* SANFORD.

Will — Construction — Absolute Gift — Life Estate with General Power of Appointment—Repugnancy.

A testator by will, after certain devises and bequests, gave the residue of his real and personal estate to his wife absolutely, and appointed her executrix during her life and his two sons executors after her death. By a codicil the testator revoked his will and gave all his property to his wife, so that "she may have full possession of it and entire power and control over it, to deal with it or act with regard to it as she may think proper." In the event, however, of her not surviving him, or dying without having devised or appointed the whole or any part of his property, then his will was to take effect as if the codicil had not been made:—Held, *that on the true construction of the codicil the wife took a life estate only in the property with a general power of appointment.*

Summons.

By his will dated April 30, 1894, the testator, the Rev. Edward Ayshford Sanford, devised and appointed certain

(25) 55 L. J. Ch. 149; 31 Ch. D. 42.

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freehold hereditaments to the use of his eldest son, the defendant Eugene Aysh-ford Sanford, for his life, with remainder to the use of his first and other sons successively according to seniority in tail general with remainders over; and the testator gave and devised certain copyhold and leasehold hereditaments to the use of his second son, the defendant Edward Charles Perceval Sanford, upon trusts corresponding with the uses and trusts declared concerning the freehold hereditaments. The testator also disposed of certain personal estate, and gave and bequeathed the residue of his real and personal estate to his wife, Christina Emma Sanford, absolutely, and appointed her during her life, and after her death his sons E. A. Sanford and E. C. P. Sanford, to be executrix and executors of his will.

On January 14, 1898, the testator revoked his will by a codicil as follows: "Whereas various circumstances have occurred affecting my property devised and appointed in and by my said will, I deem it advisable to revoke it, and hereby do revoke it, and do bequeath devise and appoint to my dearest wife Christina Emma Sanford in the event of her surviving me all my property of whatsoever kind, whether real or personal, or in possession, reversion, remainder, or expectancy, for to or over which I may be at my death seised or entitled or have any power of disposal, so that my said wife C. E. Sanford may have full possession of it and entire power and control over it, to deal with it or act with regard to it as she may think proper. In the event, however, of my said wife C. E. Sanford not surviving me or dying without having devised or appointed the whole or any part of my said property, then my said will dated the 30th day of April, 1894, shall take effect as if this my said codicil had not been made, and I hereby appoint my said wife C. E. Sanford during her life executrix of this codicil."

The testator died on November 14, 1899. His widow, C. E. Sanford, died on July 17, 1900, having by will dated October 28, 1864, devised and bequeathed the whole of her real and personal estate to her husband absolutely.

The defendants E. A. Sanford and E. C. P. Sanford were the only issue of the marriage.

By a settlement executed in 1882 upon his marriage, the defendant E. A. Sanford covenanted with the trustees thereof that if he should become possessed from any one source of property to the value of 500*l.*, he would convey the same to the trustees to be held upon the trusts of the settlement. The trustees of this settlement were made defendants to this summons.

The present summons was taken out by the infant son of the first defendant, E. A. Sanford, by his next friend, as plaintiff, for the determination of the question whether, upon the true construction of the will and codicil of the testator, his widow, C. E. Sanford, became entitled at his death to his real and personal estate absolutely, or whether she took a life estate only with a general power of appointment.

Hughes, K.C., and *J. T. Prior*, for the plaintiff.—The testator clearly intended to give his wife a life estate only with a general power of appointment, and with this idea in view he provided for the event of her not exercising her power of appointment—*Stringer's Estate, In re; Shaw* v. *Jones-Ford* [1877],[1] and *Lowman, In re; Devenish* v. *Pester* [1895].[2]

Badcock, K.C., and *T. T. Methold*, for the first defendant, supported the same argument.

Younger, K.C., and *A. Adams*, for the second defendant.—There is here an absolute gift of the whole of the testator's property, with a gift over which is repugnant and therefore void. There is an irresistible chain of authorities which shew that the absolute gift cannot be cut down by the superadded words—*Jones, In re; Richards* v. *Jones* [1898],[3] *Mortlock's Will, In re* [1857],[4] and *Yalden, In re* [1851].[5]

R. J. Parker and *G. R. Northcote*, for

(1) 46 L. J. Ch. 633; 6 Ch. D. 1.
(2) 64 L. J. Ch. 567; [1895] 2 Ch. 348.
(3) 67 L. J. Ch. 211; [1898] 1 Ch. 438.
(4) 26 L. J. Ch. 671; 3 K. & J. 456.
(5) 1 De G. M. & G. 53.

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the other defendants, supported the same argument.

Hughes, K.C., in reply.—The true construction is a life estate with a general power of appointment, and then there is no objection to her appointment. The case of *Pounder, In re; Williams* v. *Pounder* [1886],[6] cited by Byrne, J., in *Jones, In re*,[3] is a strong authority in my favour; and if we were here dealing with residue only, it would be an exact authority in my favour.

[He also referred to *Borton* v. *Borton* [1849].[7]]

Cur. adv. vult.

March 15.—JOYCE, J.—In reference to the question which arises in this case there are multitudes of decisions upon similar or analogous testamentary instruments, but none upon a disposition couched in precisely the same terms as those which we have here to consider.

It has been said by the Court of Appeal that the true way to construe a will is to form an opinion apart from the decided cases, and then to see whether these decisions require any modification of that opinion; not to begin by considering how far the will in question resembles other wills upon which decisions have been given. I proceed therefore to examine the language of the codicil which we have to construe.

By his will the testator had given, devised, and bequeathed all his real and personal estate not thereby otherwise disposed of unto his wife Christina Emma Sanford, for her absolute use and benefit, subject to the payment of his debts, funeral and testamentary expenses, and legacies. By the codicil in question, after reciting that various circumstances had occurred affecting the property devised and appointed in and by his will, and that he deems it advisable to revoke the said will, and thereby does revoke it, the testator bequeaths, devises, and appoints to the same lady, in the event of her surviving him, all his property of whatsoever kind, whether real or personal, or in possession, reversion, remainder, or expectancy of or to or over which he may at his decease be seised or entitled or have any power of disposal. Now, pausing here for a moment, it is to be observed that there are no words of limitation in this gift to the wife; it is wholly indefinite. There is no expression of any intention that she should take absolutely or for her own use and benefit, nor, on the other hand, are there any words limiting the gift to a life interest or otherwise. It cannot be doubted, however, that if the codicil had now gone on to dispose of the property after the death of the testator's wife, or to prescribe in any manner how it was to go upon her decease, she would have taken only a life interest under the words which I have read—see *Russell, In re* [1885].[8] Moreover, having regard to section 28 of the Wills Act, these words do not pass more than a life estate in the realty comprised in the gift if a contrary intention appear anywhere in the codicil. I am by no means certain that such a contrary intention does not appear. The codicil then proceeds, "so that my said wife C. E. Sanford may have full possession of it and entire power and control over it to deal with it or act with regard to it as she may think proper." By these words the testator (it is not a lawyer's will) appears to me to limit and define the precise character of the gift which he is making, and which as yet was indefinite. He says that she is to have not the absolute property, but full possession (involving, I suppose, use and enjoyment of the income), and entire power and control over it to deal with it or act with regard to it as she may think proper; adding, "In the event, however, of my said wife C. E. Sanford not surviving me or dying without having devised or appointed the whole or any part of my said property, then my said will dated the 30th day of April 1894 shall take effect as if this my codicil had not been made."

The alternative results between which I have to choose are an absolute gift of the property on the one hand, and on the other the gift of a life estate with a power of appointment. In making the selection it is not, I think, immaterial to consider that the testator in the clause under

(6) 56 L. J. Ch. 113.
(7) 18 L. J. Ch. 219; 16 Sim. 552.
(8) 52 L. T. 559.

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consideration expressly makes use of the word "power," and speaks of his wife dying without having devised or appointed; directing in effect that the property not devised or appointed by her is to go as under the will he had previously made. If by the codicil in question the testator meant his wife to take absolutely there was no use in his providing expressly for having the possession or the power and control. The reference to a power to deal with the property shews, I think, that the testator did not intend her to have such an estate or ownership as would enable her to dispose of the subject-matter without the assistance of that power. Then by the later words he treats the former as having conferred upon her a power of appointment. If the Court were to construe this to be an absolute gift to the wife, the clause, "so that my said wife may have full possession of it and entire power and control over it to deal with it or act with regard to it as she may think proper," would be rendered ineffective, and what follows void or inoperative. The rule is to construe a will *ut res magis valeat quam pereat*, and to give effect so far as possible to all the words used by the testator. If this codicil in question be so construed as to give to the wife a limited interest with a power of appointment and to give over that which she did not appoint, every word is rendered operative. There is not here the difficulty which there was in *Constable* v. *Bull* [1849],[9] because the ultimate disposition of what the wife may not have devised or appointed is completely explained by the fact that the testator considered what he had given to her was a power of appointment. This part of my judgment has been taken almost verbatim from a passage in the judgment of Mr. Justice Kay in *Pounder, In re*.[6]

Upon the whole, I come to the conclusion, from a consideration merely of the words which the testator has used, that this case falls rather within the class of cases in which the donee takes a life estate with a power of appointment than within the class in which the devisee or legatee is held to take the property absolutely with a further gift upon her death, which the law holds to be inoperative and void. The adoption of the construction which I prefer has the not unimportant merit of effectuating the obvious and expressed intention of the testator; and if the terms of the codicil be ambiguous—I do not think they really are—there is not wanting authority to shew that in a case of obscurity or ambiguity, even where the question is one of invalidity on the ground of remoteness, repugnancy, or the like, weight may be given to the consideration that it is better to effectuate than to frustrate the testator's intention—see *per* Lord Selborne in *Pearks* v. *Moseley* [1880],[10] and *per* Lord Kingsdown in *Towns* v. *Wentworth* [1858].[11]

I decline therefore, unless compelled, to adopt the opposite construction; and I do not think that there is any expression in the codicil or that any authority has been cited which compels me to do so. The case of *Jones, In re*,[2] which was strongly insisted upon in argument, was, in my opinion, very different. There the property was given to the donee expressly for her absolute use and benefit, this gift being followed by an attempted disposition of what might be left not sold or disposed of.

The result, therefore, if I am right, is that, in the present case, Mrs. Sanford having died without making any effectual appointment of the property in question, it passed upon her decease as under the will of her husband, and this accordingly is what I propose to declare.

Solicitors—Lethbridge & Prior, for plaintiff; W. M. Sturges; Hollams, Sons, Coward & Hawksley, for defendants.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

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(9) 18 L. J. Ch. 302; 3 De G. & Sm. 411.

(10) 50 L. J. Ch. 57; 5 App. Cas. 714.

(11) 11 Moore P.C. 526, 543.

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[IN THE COURT OF APPEAL.]

COLLINS, L.J.
STIRLING, L.J.
1901.
May 21.

NEW ZEALAND MIDLAND RAILWAY, *In re*; SMITH *v.* LUBBOCK.

Company—Debenture-holder's Action—Costs — Taxation — Insufficient Assets — Costs of Plaintiff — Solicitor-and-Client Costs.

In an action by a debenture-holder on behalf of himself and all other the debenture-holders of a company to enforce their security, where the assets are insufficient for the payment of the debentures in full, the plaintiff is entitled to be allowed costs as between solicitor and client, and not as between party and party only.

The principle laid down in Thomas *v.* Jones (29 L. J. Ch. 570, 571; 1 Dr. & S. 134, 136) *applied.*

Queen's Hotel Co., Cardiff, Lim., *In re* (69 L. J. Ch. 414; [1900] 1 Ch. 792), *distinguished.*

Appeal from a decision of Kekewich, J.

The action was brought by the plaintiff on behalf of herself and all other the debenture-holders of the company to enforce their security. The assets were insufficient for the payment of the debentures in full. Upon the further consideration of the action the question was raised whether the plaintiff's costs ought to be taxed as between solicitor and client, or as between party and party.

Kekewich, J., held that the costs ought to be taxed as between party and party. He was of opinion that the rule under which the plaintiff in a creditor's administration action, where the estate is insufficient for payment of the creditors in full, is held entitled to his costs as between solicitor and client, ought not to be extended to debenture-holders' actions; and he considered that the principle applicable in debenture-holders' actions was laid down by Cozens-Hardy, J., in *Queen's Hotel Co., Cardiff, Lim., In re* [1900].[1]

The plaintiff appealed.

Warrington, K.C., and *A. à'B. Terrell*, for the plaintiff.—The result of the order is that the plaintiff, who has been mainly instrumental in recovering the fund for the debenture-holders as a whole, will get less than the others. She will get her share less the difference between solicitor-and-client and party-and-party costs, while the other debenture-holders will get the whole of their shares *pro rata*. The same rule should be applied as in a creditor's administration action where the assets are insufficient, and the plaintiffs' costs should be taxed as between solicitor and client. That is the rule in both creditors' and legatees' actions, though in every case the Court has a discretion. This is a meritorious case, and one in which the larger allowance should be made. It is not fair that the plaintiff should be mulcted owing to her exertions on behalf of the whole body.

The history of the practice in creditors' administration suits was that a creditor who took proceedings was made answerable for the costs, and it was a personal duty of other creditors who were admitted under the decree to contribute towards the costs. It was afterwards found more convenient to allow the plaintiff solicitor-and-client costs—*Shortley* v. *Selby* [1820],[2] *Bluett* v. *Jessop* [1821],[3] *Stanton* v. *Hatfield* [1836],[4] *Cross* v. *Kennington* [1848],[5] and *Goldsmith* v. *Russell* [1855].[6] The principle upon which solicitor-and-client costs have been allowed to the plaintiff where the assets are insufficient was stated by Kindersley, V.C., in *Thomas* v. *Jones* [1860],[7] and recognised in *Richardson, In re; Richardson* v. *Richardson* [1880],[8] and *McRae, In re; Norden* v. *McRae* [1886].[9] That practice was followed in a debenture-holder's action by Stirling, J., in *Smith* v. *Law Guarantee and Trust Society*,[10] in July, 1895, and by North, J., in *Hodgson* v. *Martineau, Lim., In re*,[11] in April, 1897. The decision in *Queen's Hotel Co., Cardiff, Lim.*,[1] does not really cover this case. The assets there were more than sufficient

(1) 69 L. J. Ch. 414; [1900] 1 Ch. 792.
(2) 5 Madd. 447.
(3) Jacob, 240.
(4) 5 L. J. Ch. 301; 1 Keen, 358.
(5) 11 Beav. 89.
(6) 25 L. J. Ch. 232; 5 De G. M. & G. 547, 556.
(7) 29 L. J. Ch. 570, 571; 1 Dr. & Sm. 134, 136.
(8) 49 L. J. Ch. 612; 14 Ch. D. 611.
(9) 55 L. J. Ch. 708; 32 Ch. D 613
(10) Unreported.
(11) Unreported.

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to pay in full the debenture-holders whom the plaintiffs represented.

If there is no rule in favour of allowing solicitor-and-client costs in a case of this kind, there is, at any rate, no rule against it, and the Judge has a discretion. The Court should either make an order for these costs, or else send the case back to the Judge with an intimation that he is to exercise his discretion. As yet he has not exercised it.

Tootal v. *Spicer* [1831] [12] is another case in which the practice for which the plaintiff contends has been adopted, and see 2 *Seton's Judgments and Orders* (5th ed.), pp. 1,233 and 1,265.

[STIRLING, L.J., referred to *Hood* v. *Wilson* [1831].[13]]

Renshaw, K.C., and *Waggett*, for the trustees of the debenture trust-deed.—The trustees think it only just that solicitor-and-client costs should be allowed to the plaintiff. The Court has a discretionary power to allow solicitor-and-client costs—*Andrews* v. *Barnes* [1888].[14]

P. O. Lawrence, K.C., and *A. R. Kirby*, for debenture-holders.—These debenture-holders are attending the proceedings at their own expense to watch them on their own behalf. It is to their interest to argue that party-and-party costs only should be allowed; but they do not wish to do so. They think it unfair that the plaintiff should have to bear the cost of what she has done on behalf of all.

[STIRLING, L.J.—There is, then, no argument on the other side. I should have expected to be referred on the other side to cases which shew that the rule of giving solicitor-and-client costs does not apply where the creditors or legatees have been paid in full.]

Warrington, K.C.—Stanton v. *Hatfield* [4] and *Goldsmith* v. *Russell* [6] were cases of that kind. *Richardson, In re; Richardson* v. *Richardson*,[8] also throws light on the matter; but the principle is stated in the best way in *Thomas* v. *Jones*.[7]

C. T. Mitchell, for parties having liberty to attend.

(12) 4 Sim. 510.
(13) 2 Russ. & M. 687.
(14) 57 L. J. Ch. 208, 694, 697; 39 Ch. D. 133, 141.

COLLINS, L.J.—Mr. Justice Kekewich, as I understand his judgment, conceived himself to be bound by some rule of practice which debarred him from giving to the plaintiff more than party-and-party costs. The plaintiff has by her exertions and at her cost succeeded in bringing into the power of the Court, for the benefit of the debenture-holders, a certain fund. That fund is not large enough to pay all the debenture debts in full, and she claims that, having by her exertions and at her cost secured for the benefit of the whole class, of which she is one, a particular fund not adequate to the complete satisfaction of all their claims, but earmarked and ascertained and exclusively belonging to that class, she ought on a distribution of that fund to be put in precisely the same position as all the other persons interested in it, and that the fund cannot be equitably distributed without compensating her for her extra expense, which she will fail to get if she is only allowed party-and-party costs. Apart from any doctrine of equity, it seems to me that the contention rests upon broad common-sense antecedent to any decision of the Courts, and we are told that the Courts in a particular class of case—namely, creditors' administration actions—have conceded this right as a fact, but that the principles upon which it was done were not formulated until many years afterwards. It seems to me that in so doing the Courts were obeying that instinct of justice which is implanted in all of us, and which does not require analysis before it is acted upon, and that the scientific person came in later, and analysed and ascertained the principles underlying the actual facts. It seems to me that the principle is the simple one which I have attempted to state. Where the fund exclusively belongs to a particular class so that they may be indemnified in full by a distribution of that fund, and they are not seeking indemnity at anybody else's expense, then it seems to me, as a matter of common-sense, that there should be a complete indemnity to the person through whose instrumentality this fund has been won for the benefit of all, and that complete indemnity could not be given without allowing that person

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costs as between solicitor and client. There seems, however, to have been some doubt whether there was any established practice in the case of actions by debenture-holders of applying the rule which is applied in administration suits, and Mr. Justice Kekewich has felt himself constrained by what he considered the absence of any practice extending the benefit of the rule to the case of a debenture-holder's action It seems to me that the principle is just as applicable to a debenture-holder's action as to any other action in which a fund exclusively belonging to the persons among whom it is to be distributed has been secured at the individual expense of one person. The principle of equal distribution applies just as much whatever the fund is.

We have had a very interesting discussion, and counsel for the appellant have brought before us historically the cases out of which the practice, as now understood, was evolved, and in the course of that evolution the principle was formulated, and, to a certain extent, extended—in fact, the formulation involved an extension. The principle was applied in creditors' administration actions, where, there being a fund exclusively belonging to creditors, and not sufficient to pay them in full, the right of the creditor who had instituted the suit to get the costs as between solicitor and client out of that fund was recognised, and in *Thomas* v. *Jones* [7] the principle was applied in the case of a legatee's action, where the particular fund belonged exclusively to the legatees. Vice-Chancellor Kindersley in that case stated what seems to me to be the principle upon which the practice rests. He says: "If a creditor files a bill on behalf of himself and all the other creditors, and it turns out that the estate applicable to the payment of debts is insufficient, the estate belongs to the creditors exclusively; and therefore if a creditor has for the benefit of all the other creditors instituted a suit, in which he has recovered a fund, it is extremely unreasonable that the fund which would be divisible among the creditors *pro rata* should be applied in the payment of debts without recouping that creditor what he has properly expended in recovering the fund, and he is clearly entitled to his costs as between solicitor and client, and not as between party and party only. If the fund is sufficient to pay all the creditors, and there is a surplus, that surplus does not belong to the creditors, but to the residuary and general legatees. Suppose, as in some of the cases cited, the bill had been filed by one of the residuary legatees, all the other residuary legatees must under the old practice have been made parties; and although under the new practice they are not all necessarily made parties originally, yet it is necessary that they should be brought before the Court under the decree. In such a case as that there is no more reason why the residuary legatee filing the bill should have his costs as between solicitor and client than the other residuary legatees who are made parties originally, or brought before the Court under the decree; the principle is not applicable to such a case as that. In the same way, if in any ordinary legatee's suit the fund is not sufficient to pay creditors, the legatee who files the bill has no right to costs as between solicitor and client, as the fund does not belong to the legatees, but to the creditors; and he has no right to be allowed extra costs out of a fund belonging to another class of persons. But where a legatee files a bill, and the fund, though sufficient to pay the creditors, will only suffice to pay a portion of the legacies, what remains after satisfying the creditors belongs exclusively to the legatees. The legatee filing the bill, whether it is expressed or not that he files it on behalf of himself and the other legatees, is considered as representing them all. And as he has for the benefit of all the legatees recovered the fund which belongs exclusively to the legatees, I think the same principle as to costs applies as in the case of a creditor's bill where the fund recovered is insufficient to pay all the debts." That seems to me to be a clear pronouncement by the learned Judge that the practice rested on principle; and he applied the principle to something to which it had not theretofore been applied—namely, to the rights of legatees as distinguished from creditors. Therefore, in the present case, it seems to me that we are clearly

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bound by the principle which is applicable to this case as much as to the particular case to which it was applied in *Thomas* v. *Jones*.[7] But the matter does not rest there, because we have had brought before us two orders—and I daresay they are samples of many others—one made by Mr. Justice Stirling and the other by Mr. Justice North, in debenture-holders' actions, in which the same principle was applied, and it appears that what was done was done in giving effect to a principle, and not to any special circumstances of the case.

The case of *Queen's Hotel Co., Cardiff, Lim., In re*,[1] seems to me to have no bearing really on this case. That was really a mortgagees' action, and if solicitor-and-client costs had been allowed to the plaintiffs there, they would have been allowed at the expense of somebody else. They would have been allowed at the expense of the mortgagor or, possibly, of the puisne mortgagees. It does not affect the principle of a case like the present where a fund belongs exclusively to a particular class, and is not adequate to satisfy all the claims upon it. Where the fund is sufficient for all claims, I can see reasons why different considerations might apply, and it may be that the Courts of equity have felt that there was no established rule that the same equitable principle should be applied in cases where the fund is more than sufficient. It is not necessary, I think, to deal with what the practice of the Courts of equity is in such cases, because, as it seems to me, the principle that we have to apply to-day is perfectly well established, and rests upon the broad basis of common-sense.

I think that the learned Judge was wrong in thinking himself bound to deprive the plaintiff of the costs as between solicitor and client, and that the appeal ought to be allowed.

STIRLING, L.J.—The short question which is raised by this appeal is this: Whether a plaintiff who brings an action on behalf of himself and all other holders of debentures issued by a company for the purpose of realising the property on which the debentures are charged is entitled, when that property proves insufficient for payment of the debentures in full, to costs as between party and party or as between solicitor and client. The learned Judge has thought that under the circumstances the plaintiff was entitled to party-and-party costs only. It is well known that in administration actions brought by creditors or legatees a practice prevails which would lead, if applied here, to a different conclusion. A practice has been for many years established that where a creditor or legatee brings an action for the administration of the estate of a deceased person, and the fund realised proves insufficient for payment of the debts or of the legacies, as the case may be, in full, the plaintiff is allowed his costs as between solicitor and client, but where the fund realised is more than sufficient for payment of the debts or legacies, as the case may be, in full, then the plaintiff as a general rule is only allowed costs as between party and party. The question which we have really to consider is whether the practice in cases of actions by creditors and legatees where the fund proves insufficient for payment of the debts or legacies in full rests on any principle, or is a mere anomalous rule which has been adopted, being in the nature of a rule of thumb, for the purpose of, as far as may be, redressing an apparent injustice.

It is not immaterial in considering this question to see how the practice originated. Apparently it was established about the year 1831, for we find that on July 13 of that year Vice-Chancellor Shadwell, in *Tootal* v. *Spicer*,[12] made an order in accordance with that practice, and two days later—on July 15—in *Hood* v. *Wilson*[13] application for a similar order was made by Sir Edward Sugden to the Lord Chancellor, and it was opposed on the ground that no general practice to that effect had been established, and that Lord Eldon, though repeatedly asked so to do, had uniformly refused to lay down any such rule; but the Lord Chancellor said he saw no reason why he should depart from what appeared to be the rule adopted in other branches of the Court, and he therefore gave costs as between solicitor and client. No case has been brought to our notice to-day (and I am not aware of any) in which the principle

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upon which that rule was laid down was stated by the learned Judges who acted upon it, and no such principle appears to have been formulated until the year 1860—nearly thirty years afterwards. Earlier cases had established the rule as regards creditors, but in *Thomas* v. *Jones*[7] Vice-Chancellor Kindersley was asked to extend it to the case of a legatee's suit, as to which the practice appears not to have been settled at that date; and he had to consider whether the practice did or did not rest on principle, and he held that it did rest on principle, and he stated that principle. Putting it shortly, he said that if a creditor had for the benefit of all the other creditors instituted a suit in which he had recovered a fund, it was extremely unreasonable that the fund which would be divisible among the other creditors *pro rata* should be applied in the payment of the debts without recouping that creditor what he had properly expended in recovering the fund, and he was clearly entitled to his costs as between solicitor and client, and not as between party and party only. The Vice-Chancellor recognised the other branch of the practice—namely, that where the fund is more than sufficient for payment of debts the plaintiff creditor only gets party-and-party costs—and he pointed out that if the fund is sufficient to pay all the creditors and there is a surplus, that surplus does not belong to the creditors, but to the residuary and general legatees; and he observed (and I apprehend that is the principle upon which the practice rests) that the plaintiff has no right to be allowed extra costs out of a fund belonging to another class of persons. If a creditor sues a living man for a debt, he only recovers his debt and party-and-party costs; and if he sues the executors of a dead man for a debt he only recovers against the executors with party-and-party costs, the action being an action at law, and equity in an administration action gives the creditor suing, or the body of creditors suing, no more as against the estate of the deceased.

The only difficulty which arises with reference to whether the practice rests on principle or not appears to me to be this, that Courts of equity have not been quite logical in following out the principle which was laid down by Vice-Chancellor Kindersley. If it were true that in all cases where a creditor has, for the benefit of all the other creditors, instituted a suit and recovered a fund he should get his costs as between solicitor and client, and not as between party and party only, it would seem logical that the rule ought to apply where the fund recovered is sufficient to pay the debts in full. The plaintiff creditor would not, indeed, be entitled to get those costs as against the representative of the deceased, or out of his estate, but, inasmuch as the creditors come in and get the benefit of the action, it would seem right that the plaintiff, if this rule be well founded, should get them out of the fund which has been acquired by his exertions for the benefit of all the creditors—that is to say, that they should be taken out of the fund which is available for payment of the creditor's debts in the first instance, and then the balance distributed rateably among the creditors; and, in point of fact, as has been pointed out by counsel for the appellant in their very excellent argument, that course was adopted in *Stanton* v. *Hatfield*[4] and in *Goldsmith* v. *Russell*.[6] In both those cases actions were brought for the purpose of setting aside fraudulent transactions by which creditors were prejudiced, and in both an order was made on the basis which I have suggested—namely, that the costs of the plaintiff as between party and party should be paid out of the fund which was recovered, and the extra costs of the plaintiff—that is to say, the difference between solicitor-and-client costs and party-and-party costs—should be paid *pro rata* by all the creditors who partook of the benefit of the suit. But I understand that those cases are both based upon special circumstances. The only special circumstance which I can detect is the setting aside of the transaction in question, though it may be possible on a careful examination of the facts to detect something else, and I do not express an opinion about that; but I understand that in practice (and in that I am borne out by the statement of Mr. Carrington, the Registrar, whose experience in these matters is very great) such an order as

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was made in *Stanton* v. *Hatfield*[4] and *Goldsmith* v. *Russell*[6] is not of course, but is only made under the most special circumstances. That is really the only difficulty. In other respects, the principle which is stated by Vice-Chancellor Kindersley is a most reasonable one—namely, that where the fund recovered proves insufficient for payment of all the creditors in full, or of the class of persons represented by the plaintiff in full, the plaintiff should be entitled to an indemnity from the persons that he represents in respect of the costs which he has incurred on their behalf, and should therefore have his costs as between solicitor and client and not as between party and party. If there is a principle of this kind, why is it not applicable in the case of a debenture-holder bringing an action on behalf of himself and all other debenture-holders for the realisation of the debenture-holders' security and obtaining a fund which is insufficient for the payment of the claims in full? I confess I do not see why it should not be applied. In *Richardson, In re; Richardson* v. *Richardson*,[8] and in *McRae, In re; Norden* v. *McRae*,[9] the practice to which I have referred is treated by Sir George Jessel and by Mr. Justice Kay as based on principle, and, at this distance of time, I conceive that we must so treat it and deal with it. I think, therefore, that, it being based on principle, it ought to be applied to debenture-holders' actions.

I do not see that *Queen's Hotel Co., Cardiff, Lim., In re*,[1] and the case reported with it, affect the present case at all. In those two cases the debenture-holders' actions were brought against not merely the company which issued the debentures, but against other debenture-holders who ranked after the class represented by the plaintiffs. In both cases the class of persons represented by the plaintiffs obtained payment of their debentures in full out of the fund which was realised, and the question there was whether, the assets being sufficient to pay the holders of the first debentures in full, but not sufficient to pay the subsequent debenture-holders, the plaintiffs were entitled to their costs as between solicitor and client. Mr. Justice Cozens-Hardy appears to me to have reasoned in a way which is quite irresistible. The plaintiffs were simply mortgagees, enforcing their security against the mortgagors and their incumbrancers. Suppose there were no subsequent incumbrancers, and the mortgagors stood alone, the plaintiffs would have been entitled simply to their costs as between party and party. The general rule of the Court is to that effect. What difference does it make that they had assigned their equity of redemption by charging it? Why should the assignees of the equity of redemption, the second debenture-holders, be in a worse position than the mortgagors themselves? The learned Judge considered that there was no reason, and therefore that the ordinary rule must prevail. That is quite in accordance with the rule laid down in *Thomas* v. *Jones*,[7] that the plaintiff has no right to be allowed extra costs out of a fund belonging to another class of persons, but it does not apply at all in this case, because the mortgagors get nothing after realisation of the property. The whole of the fund belongs to the debenture-holders.

I have only this further remark to add, that I am not quite certain—it may be that my doubts would disappear on further consideration—whether the principle was accurately applied by Mr. Justice Kay in *McRae, In re; Norden* v. *McRae*,[9] but here again the case before us differs entirely from that case, and that case does not in the least stand in the way of the conclusion at which I have arrived. I therefore agree that this appeal ought to be allowed and the order of the Judge varied by directing the costs of the plaintiff to be taxed as between solicitor and client.

Appeal allowed.

Solicitors—W. H. Smith & Son, for appellant; Golding & Hargrove; Slaughter & May; Blyth, Dutton, Hartley & Blyth, for respondents.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

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KEKEWICH, J. 1901. April 19. } BROAD, *In re*; SMITH *v.* DRAEGER.

Power of Appointment — Execution — Document "purporting to be a will."

By a settlement property was vested in trustees upon trust to pay the income to A. for her life, and after her decease to her husband for his life, and after the death of the survivor of them upon trust for the children of A. as she should by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament, or any codicil or codicils thereto, or "by any writing in the nature of or purporting to be a will or codicil," direct or appoint. A. executed a document which purported to be her last will, but which, inasmuch as it was not signed by her in the presence of the attesting witnesses as her last will and testament, was not admitted to probate: — Held, *that though the document was not a will according to law, it was one which "purported" to be a will, and, being so, operated as a valid execution of the power of appointment.*

Jane Arthurine Broad, by a settlement dated August 4, 1848, made on her marriage with Stephen Gowar, assigned her sixth share of real estate to which she was entitled under the will of her father, James Broad, to trustees upon trust to pay the income to her for life, and after her decease to her husband, and after the decease of the survivor of them upon trust for all and every or such one or more exclusively of the others or other of her children by her present husband or any future husband, upon such conditions, with such restrictions, and in such manner as she should, after the decease of Stephen Gowar, in case she should survive him, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament or any codicil or codicils thereto, or "by any writing in the nature of or purporting to be a will or codicil," direct or appoint, and in default of appointment in trust for all her children by Stephen Gowar or any future husband.

There were five children of the marriage, three of whom survived the settlor. Stephen Gowar, the husband, died in 1863, and his wife, Jane Arthurine Gowar, died on December 23, 1899, having signed a document in the following terms and form:

"This is the last will of me Jane Arthurine Gowar, of No. 8 Sprowston Road, Forest Gate, in the County of Essex. I bequeath 428*l.* 17*s.* 9*d.* Consolidated Bank of England Stock 2¾ per cent. as follows: To Edmund Gowar 300*l.*, to Alexander James Gowar 50*l.*, to Marion Arthurine Smith 78*l.* 17*s.* 9*d.* I further bequeath to my daughter Marion Arthurine Smith the one sixth part of rents to which I am entitled through my father's will in trust situate at Cambridge in the county of Cambridgeshire, Badingham in the county of Suffolk, Brentford in the county of Middlesex, Coombe in the county of Oxfordshire. The said Marion Arthurine Smith to pay quarterly to her brother Alexander James Gowar the fourth part of such rents during his lifetime and after his death to his wife Florence during her lifetime and after her death to go to Marion Arthurine Smith. My furniture books plate glass china pictures and ornaments I leave for my sister Ann Broad's use during her lifetime and after her death to be divided equally between my three children Edmund Gowar, Alexander James Gowar, Marion Arthurine Smith and their heirs now in the possession of my son Edmund. My wardrobe and trinkets I leave to my daughter Marion Arthurine Smith. As witness my signature: Jane Arthurine Gowar, this 15th day of November one thousand eight hundred and ninety-five: 8 Sprowston Road, Forest Gate, Stratford, E. Witness to my signature, Harriet Dickenson, senior, 8 Sprowston Road, Forest Gate, Essex, November 19th, 1895. Witness to my signature, Harriet Dickenson, junior, 8 Sprowston Road, Forest Gate, Essex, November 19th, 1895."

The evidence of the witnesses was as follows: That Jane Arthurine Gowar "did not sign her name as it now appears

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in the testimonium clause of the said document in our presence, nor did she declare such signature to be the signature to her will, nor did she refer in any way to the nature of the document. The said deceased merely placed the said document before us, and asked us to sign it. Whereupon we both consented and respectively signed our names and addresses as they now appear in the presence of the said deceased, and we further say that there was no other person present at the same time besides ourselves."

This summons was taken out by Marion Arthurine Smith, as plaintiff, for the determination of the question whether the document of November 15, 1895, was a valid execution of the power of appointment given by the settlement of August 4, 1848.

Warrington, K.C., and *T. B. Napier*, for the plaintiff.—The document is such an instrument as is specified by the donor of the power; it is a writing purporting to be a will. This case does not fall within *Barretto* v. *Young* [1900][1] and *Hummel* v. *Hummel* [1898],[2] where in each case the document purporting to be a will required attestation. This document purports to be a will, but as an exercise of the power does not require attestation. Supposing it is not a valid exercise of the power, the Court will use its jurisdiction in aid of the invalid execution.

Sheldon, for the sole surviving trustee of the settlement.

S. O. Buckmaster, for the legal personal representative of a deceased child.—The power did not authorise the donee to exercise it merely by an unattested writing; it must be exercised by deed or will, or something in the nature of a will, which necessarily includes attestation.

P. O. Lawrence, K.C., and *P. Wheeler*, for the other defendants.—"In the nature of a will" means the same as a will, which must be executed according to the requirements of the Wills Act—*Sugden on Powers* (8th ed.), p. 230, *Farwell on Powers* (2nd ed.), p. 173, and *Longford* v. *Eyre* [1721].[3] The words "purporting to be" are practically the same as "in the nature of." This document is not capable of purporting to be a will, because there is no attestation, and cannot therefore be a valid exercise of the power. If it were valid as a testamentary instrument we admit it would be a valid exercise of the power.

KEKEWICH, J.—The question in this case—upon which it appears that authority is wanting, and which therefore must be treated as of first impression—is as to the meaning of the words "purporting to be a will or codicil." The peculiarity of the case is that the instrument creating the power contemplates the execution of it—first, by a deed or writing not being testamentary; then in the next place by a will or codicil—that is to say, by a real testamentary instrument, one which not only is in the nature of, and purports to be, but which is in a legal sense the will of the testator, being expressed in certain terms and executed with certain formalities. But then the settlor is minded to extend the scope of the power, and he does so by saying that it may be exercised "by any writing in the nature of or purporting to be a will or codicil." It is obvious that to say that those words mean only a will or codicil is to destroy the effect of that addition. Whoever framed this instrument must have intended that these alternative words should refer to something different from the deed or writing which is referred to in the first alternative, or the will or codicil which is referred to in the second alternative; and if the third alternative is confined to a will or testamentary instrument capable of operating as a will, it adds nothing to the first and second alternatives. That is a strong argument against so limiting it.

There is authority, and strong authority, for holding that a writing "in the nature of" a will must be a will in the strict sense of the word. The passage referred to in Lord St. Leonards' work on *Powers* (8th ed.), p. 230, and the cases there referred to, go far to establish that proposition. If therefore I had here only

(1) 69 L. J. Ch. 605; [1900] 2 Ch. 339.
(2) 67 L. J. Ch. 363; [1898] 1 Ch. 642.
(3) 1 P. Wms. 740.

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the words "in the nature of," without the words which follow, I should probably be bound by the authorities; and, notwithstanding the difficulty of construction to which I have adverted, I might be obliged to say that the document of November 15, 1895, was not an instrument of the kind indicated by the power, and was therefore not an execution of the power. But then the framer of the instrument creating the power has added these words "or purporting to be." What is the meaning of the expression "purporting to be a will or codicil"? Counsel for the deceased child's representative endeavoured to enumerate the documents which would come within the terms of this power; but I am not satisfied that his enumeration is complete. I think, however, that the terms of the power would extend to a document in the nature of a will made by a man who intended simply to exercise the power, and to make no further disposition, so that the document would not be a will in the ordinary sense, though clothed in the language and accompanied by the formalities characteristic of a will. That would, I think, be a good example of a document purporting to be a will. But the question here is whether a document which is in form and substance a will, but which, because it does not comply with legal technicalities, fails to be a will in a legal sense, is or is not a document which "purports to be a will." I have had the curiosity to send for the *Century Dictionary* in order to see what is there said about the word "purport." I find under the verb "purport" this: "To convey to the mind as the meaning or thing intended; imply; mean, or seem to mean: as, the document *purported* to be official." That is an excellent instance, for one might have an office copy of an affidavit on the Court paper, and yet, if it did not bear the official stamp, the Court would not admit it, because, although "purporting" to be an official document, it would not really be one. That is a useful illustration. The quotations given by the *Dictionary* are not so precisely in point, but there is one good one which I will read: "I do not believe there ever was put upon record more depravation of Man, and more despicable frivolity of thought and aim in Woman, than in the novels which *purport* to give the picture of English fashionable life." If that is the real meaning of the word "purport," why does not this document "purport" to be a will? It is true there is no residuary bequest and no appointment of executors; and these no doubt are two things for which one looks in considering whether a document is intended to be a will. But in disposing of the Consols the deceased lady uses the word "bequeath," and in purporting to dispose of this particular property she again uses the word "bequeath," which is a technical word, properly used in a will and in no other instrument. It is also to be observed that, though there is no residuary gift, she disposes of furniture and other articles, and in reference to them uses the word "leave." That word, though not perhaps so strictly applicable to a will only as the word "bequeath," points in the same direction. The same observation applies to the gift of the wardrobe and trinkets, a sort of gift which one very often finds in a will, but, I think, never elsewhere. This document, therefore, is on the face of it a disposition of property made in contemplation of death, and it only fails to be a will because she did not comply with the requirements of the English law that the witnesses should be present when she signed it.

I must hold therefore that this document of November 15, 1895, is one which purports to be a will. If it is, it is not disputed in argument that it was a good execution of the power created by the settlement of August 4, 1848, except so far as it confers an interest on a person who was not an object of the power. There must therefore be a declaration that, to the extent I have mentioned, the power was well executed by this document.

Solicitors—W. A. Bilney, for plaintiff; Lovell, Son & Pitfield; Brown & Aylen; and E. Dean, for defendants.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

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FARWELL, J. 1901. May 21. } SANDBACH SCHOOL AND ALMSHOUSE FOUNDATION, *In re*; ATT.-GEN. *v.* CREWE.

Charity—Inhabitants of "Parish"—Several Townships — Separate Rating — Separate Overseers and Churchwardens—Exemption from Church Rates — Poor Relief Act, 1662 (14 *Car.* 2. *c.* 12), *s.* 21.

The primary meaning of the word "parish" is the ancient ecclesiastical parish. Where the parish originally included several townships, the fact that some of these townships have from time immemorial maintained their own churches, been exempt from church rate for the maintenance of the mother church, and appointed their own churchwardens, does not prove that such townships are not included in the parish or that the inhabitants thereof are not entitled to share in a charity for the poor of the parish.

The fact that a township is separately rated to the poor is in cases within the Poor Relief Act, 1662 (*which provides for the appointment in certain cases of separate overseers for each township*), *of no weight as evidence that it is a separate parish.*

This was an originating summons taken out by the Attorney-General in the matter of the charity called "The Sandbach School and Almshouse Foundation," for the determination of the question, what persons were eligible under the scheme governing the charity as satisfying the description of "deserving poor of the Parish of Sandbach" or the description of "Inhabitants and Parishioners of the Parish of Sandbach" of that part of the endowment of the charity applicable for purposes not educational, and in particular whether the inhabitants of the hamlets or townships of Blackden, Cotton, Church Hulme, Cranage, Goostrey, Lees, and Tremlow, were so entitled.

The defendants were the governors of the charity. The charity was founded by a private Act of Parliament in 1848, which consolidated two sets of charities founded many years before—namely, an endowed school and certain eleemosynary charities, and directed their administration according to a scheme set forth in the schedule.

It was proved that the parish of Sandbach originally comprised thirteen townships—namely, Sandbach, Arctis, Bradwall, Betchton, Hassall, and Wheelock, referred to as "the privileged townships," and the seven townships mentioned in the summons, referred to as the "out townships."

The out townships were locally separated from the privileged townships by intervening parts of two other parishes.

The three out townships of Church Hulme, Cranage, and Cotton were included in the chapelry of Church Hulme, and those of Goostrey, Blackden, Tremlow, and Lees were included in the chapelry of Goostrey. Each of these chapelries had a separate church.

Before the Act the school was open to the children of inhabitants of the whole parish. The benefits of the eleemosynary charities were confined to the six privileged townships.

The provisions of the scheme which were referred to in the argument and judgment were as follows:

Clause 23 provided for the payment to the chapelwardens of Church Hulme and Goostrey of certain small annual sums to be by them distributed amongst the poor of those chapelries.

Clause 24 directed the trustees to pay and apply 200*l.* per annum "to and amongst the deserving poor of the parish not receiving parochial relief, either in clothes, provisions, or coal," as therein mentioned.

Clauses 26 and 29 provided for the establishment and management of a school "to be open to all the children of the inhabitants of the parish of Sandbach generally who should have attained the age of 7 years."

Clause 43 provided for the erection of twenty almshouses for the reception of twenty poor persons "who have been inhabitants and parishioners of the said parish and qualified as hereinafter mentioned."

Section 44 explained qualified persons to be persons "who have been resident in the Parish of Sandbach and who have paid rates for the relief of the poor of the said parish for a period of 5 years."

The surplus income was to be applied

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in aid or extension of the same charitable purposes.

A new scheme for the regulation of the charity was passed under the Endowed Schools Acts in 1887, but it merely provided that the part of the endowment to be thenceforth applied for purposes other than educational should be applied as before. The income had considerably increased. This scheme substituted governors for trustees.

The trustees and governors of the charity had, ever since its foundation, confined the non-educational benefits to inhabitants of the six privileged townships, and desired to continue to do so.

They contended that the out townships had for all purposes ceased to be part of the parish of Sandbach long before the date of the Act, and that on the true construction of the Act itself the word "parish" was intended to include only the six privileged townships.

In support of this contention the following facts were proved: Each of the thirteen townships appointed separate overseers of the poor, guardians, surveyors of highways, and waywardens, and had levied a separate poor rate and highway rate. The churchwardens and sidesmen for the parish of Sandbach were always chosen by and from the inhabitants of the six privileged townships; the chapelries of Church Hulme and Goostrey elected their own churchwardens.

The out townships were never assessed to, and never received any share of, the church rates of the parish of Sandbach before their abolition, and in particular, when the Sandbach church (which stood in the township of Sandbach) was rebuilt in the years 1847 and 1848, all the six privileged townships, but none of the out townships, were assessed and rated for the purpose of providing the funds.

The churches at Goostrey and Church Hulme had from time immemorial been endowed with glebe, and that at Church Hulme with rectorial tithe issuing from lands in the townships of Church Hulme and Cranage.

The parish of Sandbach was always locally considered to include only the privileged townships.

On the other hand, the vicarial tithe from all thirteen townships was paid to the vicar of Sandbach. No rectorial tithe was paid for ecclesiastical purposes except as aforesaid.

In an account of the endowments of curacies in the deanery of Middlewich, furnished in 1704 by the then dean to the Bishop of Chester, and in a list of all the churches and chapels in the diocese of Chester, found in the diocesan registry and made between 1711 and 1713, Church Hulme and Goostrey were entered as "Parochial Chapells in the parish of Sandbach." They were similarly described in answers given by the vicar of Sandbach and the incumbent of Goostrey to enquiries at the bishop's visitations in 1778, 1789, and 1811.

From 1757 to the present time the incumbents of Church Hulme and Goostrey were always nominated by the vicar of Sandbach, and were licensed by the bishop to the chapel or to the perpetual curacy of Church Hulme and Goostrey respectively, and had never been instituted or inducted as they would have been if the incumbencies had been regarded as parishes with independent cure of souls.

The Attorney-General (*Sir R. B. Finlay, K.C.*), *Dibdin, K.C.*, and *E. Beaumont*, for the summons.—The primary meaning of "parish" is the ancient ecclesiastical parish. All persons resident in any part of the old parish are eligible to the benefits of the charity, unless the defendants can shew that the out townships never were part of the parish or have been made into separate parishes; and this can only be done by Act of Parliament.

Jenkins, K.C., and *Austen-Cartmell*, for the defendants.—The view of the trustees and governors has always been that, upon the true construction of the Act, the eleemosynary part of the charity was applicable only for the benefit of the six privileged townships.

The word "parish" is ambiguous. It may mean either the area of an old ecclesiastical parish, or an area separately rated to the poor, or an area assessed to the church rate for or contributing to the support of one church.

The circumstances of the case here shew that the third meaning was intended.

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SANDBACH SCHOOL AND ALMSHOUSE FOUNDATION, IN RE.

Ever since the Poor Relief Act, 1601, the primary test of what is a parish is whether it maintains its own poor—*Att.-Gen.* v. *Grant* [1720].[1] The out townships maintain their own poor, and do not contribute to the poor rates for the parish of Sandbach; they are therefore not within it.

In this case each township was a civil unit, but they were combined for ecclesiastical purposes. *Steer's Parish Law* (6th ed.), p. 1, defines a parish as the district in charge of one clergyman. The out townships have for centuries been separated from the original parish for all purposes, and have maintained their own churches, not paying church rates for the maintenance of the parish church of Sandbach. Locally the parish has always been considered to comprise only the privileged townships. There is a latent ambiguity in the Act; the Court can look at extrinsic evidence, and on the evidence will find that the word "parish" was intended to include only the privileged townships.

Dibdin, K.C., in reply.—A township may be rated for civil purposes in one parish though ecclesiastically part of another—*Reg.* v. *Watson* [1868].[2] Separate rating for the maintenance of the poor was conclusive before the Poor Relief Act, 1662,[3] but since that statute, in cases to which it applies, each township must have separate overseers and be separately rated.

A separate church rate is no proof of a separate parish. Arrangements by which the different parts of a parish respectively maintain their own church or chapel are common and legal—*Craven* v. *Sanderson* [1838].[4] The appointment of churchwardens is a matter of custom only, and a separate appointment for chapels of ease is no proof of separation from the old parish—*Green* v. *Reg.* [1876][5] and *Bremner* v. *Hull* [1866].[6]

The facts that vicarial tithe is paid for the whole parish to the vicar of Sandbach, and that marriages between persons both of whom reside in the out townships have always been celebrated in Sandbach church, are conclusive in favour of the parish including all the townships—*Reg.* v. *Clayton* [1849].[7] All the records point the same way.

FARWELL, J. (after stating the question raised by the summons, and the effect of the Act of 1848 as above).—The argument presented has been this. It has been said that "parish" here may mean one of three things—it may mean either the ecclesiastical area, the ecclesiastical parish; or the various parishes or authorities in the nature of parishes to which rates are paid; or so much of the ecclesiastical parish as on the evidence has contributed towards church rates and to repairs of the old parish church. In my opinion the cases and the Act of Parliament referred to shew conclusively that the first and the larger sense is the only possible one. The ecclesiastical parish is, properly speaking, the whole parish and parish proper.

Now, what are the tests which I can use to ascertain whether that is the meaning in this Act or not. In the first place, I can find no words in the Act itself which point in any way to a limita-

(1) 1 P. Wms. 669.

(2) 37 L. J. M.C. 153; L. R. 3 Q.B. 762.

(3) The Poor Relief Act, 1662, s. 21: "Whereas the inhabitants of the counties of Lancashire, Cheshire, . . . and many other counties in England and Wales, by reason of the largeness of the parishes within the same, have not, nor cannot reap the benefit of the Act of Parliament made in the three and fortieth year of the reign of the late Queen Elizabeth for relief of the poor; (2) therefore be it enacted . . . That all and every the poor . . . persons within every township or village within the several counties aforesaid, shall from and after the passing of this Act be maintained, kept, provided for and set on work, within the several and respective township and village wherein he, she or they shall inhabit, or wherein he, she or they was or were last lawfully settled, . . . (3) and that there shall be yearly chosen and appointed, according to the rules and directions in the said Act of the three and fortieth year of Queen Elizabeth mentioned, two or more overseers of the poor within every of the said townships or villages, who shall from time to time do, perform and execute all and every the acts, powers and authorities for the necessary relief of the poor within the said township or village, . . . as is . . . mentioned and appointed in and by the said in part recited Act."

(4) 7 L. J. Q.B. 81; 7 Ad. & E. 880.

(5) 1 App. Cas. 513.

(6) 35 L. J. C.P. 332; L. R. 1 C.P. 748.

(7) 18 L. J. M.C. 129; 13 Q.B. 354.

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tion of the generality of the word "parish" in either of the ways pointed out by the argument of the defendants' counsel. Nothing on the face of the document that I can see suggests it. Then what is relied upon is, first of all, this item of evidence. It is said that each of these townships have paid poor rates to their own overseers, and have not paid to the overseers of the parish of Sandbach generally. That is conclusively answered by the reference to the Poor Relief Act, 1662, which shews that it was the only possible way in which the rates could have been made, having regard to the magnitude of the parish and that Act of Parliament. Separate overseers had to be appointed, and no argument at all can be founded on the existence of such overseers. Then against that on the other side there is the point that the whole vicarial tithe is received by the vicar of the parish of Sandbach. That was considered to be a matter of very great importance in the case of *Reg.* v. *Clayton*,[7] and to my mind is almost conclusive; and when I couple that with the fact that persons living in the two chapelries, which are said to include the excluded townships, have been in the habit—as it is plain on the evidence they have been—of being married in the parish church, having regard to Lord Hardwicke's Act (26 Geo. 2. c. 33), it appears to me that that also is very strong evidence as to what is the meaning of the word "parish" as applied to Sandbach. Against that it is said that the church rates, and repairs of the church, have been borne by the inhabitants of the townships other than the seven who are now claiming to come in. That, again, I think, is answered by the authority referred to of *Craven* v. *Sanderson*,[4] because it is plain that such an arrangement as that under which the inhabitants of the ecclesiastical district resorted to the parish church, and the inhabitants of the districts attached to the chapels of ease contributed each exclusively to the repairs of the place of worship within their own district, is a legal and a possible one; and if that be so, no argument can be founded on the fact, which may be attributable, and is attributable, to such an arrangement. Then there are the Orders in Council, which throughout treat the two chapelries in question as within the parish of Sandbach.

In my opinion it is proved conclusively that the parish of Sandbach does include these two chapelries; and I can find in the Act of Parliament and the scheme nothing whatever which would shew that the word "parish" means anything less than the whole parish of Sandbach, and I answer the question accordingly.

Solicitors—Solicitor to the Treasury, for plaintiff; Pritchard, Englefield & Co., agents for Robert Bygott & Sons, Sandbach, for defendants.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

FARWELL, J.
1901.
May 10, 11, 13, 14, 15, 16.

BURROWS *v.* LANG.

Easement — Artificial Watercourse — Temporary Purpose—Right of Dominant Tenement to Compel Continuous Flow—Right to Enjoy de facto Flow—"Temporary"—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.

In considering whether the right to the enjoyment of an artificial watercourse on land of the vendor has passed, in the absence of express reference, to the purchaser of land adjoining the artificial watercourse under section 6 *of the Conveyancing and Law of Property Act*, 1881, *it is not sufficient to point to the relative position of the property sold and of the watercourse, and to claim that the enjoyment of the watercourse is obvious. It is necessary to consider whether, having regard to all the circumstances of the case, the enjoyment is one which could ever be erected into a right on the basis of prescription or of a lost or presumed grant.*

In considering the question of a presumed grant it is necessary completely to review the whole of the surrounding circumstances—e.g. the purposes for which the artificial watercourse was originally made, the burden of its maintenance, and

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similar considerations; and on the question of prescription it is material to discover whether the watercourse was constructed for a temporary purpose.

A right to enjoy such water in an artificial watercourse—and such water only—as the owner of the watercourse chooses to allow to flow down the watercourse, is "precario," and, as such, incapable of constituting a legal easement.

"Temporary," as a legal term, does not mean merely that a thing happens to last in fact, or is intended to last, for only a few years. It means that a thing may, within the reasonable contemplation of the parties, be expected to come to an end some day, sooner or later, and that it is not of the nature of a grant in fee-simple.

Trial of action with witnesses.

The plaintiff was the owner in fee-simple of the copyhold property known as Cwm Farm, in the parish of Shirenewton, Monmouthshire. The defendant was the owner of Cwm Mill and certain adjacent copyhold lands in the parishes of Caldicott and Caerwent. An orchard forming part of the farm belonging to the plaintiff abutted for some distance on to an artificial millpond forming part of the property belonging to the defendant.

Previous to the year 1886 the orchard and millpond had for more than fifty years been in the hands of a single owner, but in that year Cwm Farm (including the orchard) was sold to the plaintiff by the trustees for sale under the will of James Cox, deceased, and the plaintiff was admitted on October 2. The conveyance to him contained no express mention of any right for cattle in the orchard to water at the millpond. The defendant purchased the Cwm Mill property (including the millpond) from the same vendors on April 27, 1893.

The millpond in question, which was more than a century old, was fed from the Castroggy Brook by an artificial mill-race running entirely over the defendant's property, and the supply was regulated by a sluice constructed at the point where the mill-race quitted the natural stream. Prior to 1884 this mill-race had consisted of an open leat; but in that year, owing to the naturally porous nature of the soil, and to the leakage occasioned by the pumping works in connection with the construction of the Severn Tunnel, it became necessary to substitute pipes. There was no evidence as to the ownership of the respective properties in question at the time of the original construction of the millpond and mill-race.

Although the conveyance of the orchard to the plaintiff in 1886 contained no express reference to any right of the plaintiff to water his cattle in the orchard at the millpond subsequently conveyed to the defendant, yet the plaintiff claimed that, under the circumstances, such a right had passed to him by virtue of section 6 of the Conveyancing and Law of Property Act, 1881.[1] The defendant, however, denied this right on the part of the plaintiff, and had lately dug out the bank of the pond in such a manner as to prevent cattle in the orchard from watering at it, and had further placed a fence round the pond on the boundary of the plaintiff's property. He had also—though this, he alleged, was only for the temporary purpose of puddling the pond—shut off the supply of water through the mill-race by closing the sluice, with the result of causing the pond to run dry. The plaintiff, accordingly, now sought for an injunction to restrain the defendant from obstructing the flow of water into the pond through the mill-race, or from otherwise interfering with the right of the plaintiff to water his cattle at the pond.

His Lordship found as a fact, on the evidence offered at the hearing of the action, that there was no defined and actual watering-place at the pond in the plaintiff's orchard at the date of his admission on October 2, 1886. He found,

(1) Conveyancing and Law of Property Act, 1881, s. 6, sub-s. 1: "A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

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however, that in consequence of the natural formation of the ground, cattle in the orchard could, and occasionally did, drink from the millpond. He doubted whether they could possibly have done it unless the pond had been reasonably full. He found, also, that cattle would be liable to do considerable damage by trampling the bed of the pond, and that the water was of very considerable value to the lower riparian owners. He found, further, that the maintenance of the race and millpond in such repair as was necessary to insure that the water was returned to the natural brook in such volume and quality as were legally due to the lower riparian owners necessarily involved a considerable expense on the part of the defendant.

Butcher, *K.C.*, and *Stewart-Smith*, for the plaintiff.—We put forward a double claim—first, that the defendant is under obligation to send us down from the brook a constant and undiminished supply; secondly, that we are at any rate entitled to the enjoyment of such water as is actually sent down. Both of these rights, or one of them, passed to us by virtue of section 6 of the Conveyancing Act, 1881,[1] on the occasion of our admission to the orchard in question on October 2, 1886.

Upjohn, *K.C.*, and *F. H. Colt*, for the defendant.—The mill-race was constructed only for temporary use, and the plaintiff is not entitled to its continued existence—*Arkwright* v. *Gell* [1839],[2] *Wood* v. *Waud* [1849][3] and *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* [1878].[4] The defendant, therefore, is not obliged to maintain a regular flow. As to the claim of the plaintiff to enjoy whatever flow there may happen to be, that is an easement unknown to the law. In the first place it is precarious, and an easement must be "*nec per vim, nec clam, nec precario.*" In the second place, it is repugnant to say he has a right, if it be admitted that he is liable to be deprived of his enjoyment altogether at the defendant's will.

(2) 8 L. J. Ex. 201, 214, 215; 5 M. & W. 203, 231, 232.
(3) 18 L. J. Ex. 305, 313; 3 Ex. 748, 777, 779.
(4) 4 App. Cas. 121.

[FARWELL, J., referred to *Hanna* v. *Pollock* [1898][5] and *M'Evoy* v. *Great Northern Railway* [1899].[6]]

Whatever use of the pond cattle in the orchard may have *de facto* enjoyed in 1886, it cannot be supposed that it was ever intended to erect this enjoyment into a right—*Birmingham, Dudley, and District Banking Co.* v. *Ross* [1888].[7]

[They referred also to *Greatrex* v. *Hayward* [1853][8] and *Mason* v. *Shrewsbury and Hereford Railway* [1871].[9]]

Butcher, *K.C.*, in reply.—In *Hanna* v. *Pollock*[5] and *M'Evoy* v. *Great Northern Railway*[6] the watercourses were really purely temporary. Here the watercourse was made before living memory and cannot properly be called temporary at all. In those cases, again, the peculiar circumstances negatived all possibility of grant or prescription; whilst here the evidence suggests at least an inference that the pond was originally constructed not merely for the convenience of the mill-owner. The present case is really governed by *Watts* v. *Kelson* [1871].[10] In 1886 the cattle in the orchard enjoyed a *de facto* right to drink at the pond, and that right passed to the plaintiff on his admission under section 6 of the Conveyancing Act, 1881.[1]

FARWELL, J., after stating the conclusions at which he had arrived on the facts, continued as follows: The questions that have been argued are (1) has the plaintiff a right to compel the flow of water into the millpond so as to get the benefit of watering his cattle and drawing water from the orchard; (2) supposing that he has not got this larger right, has he got at any rate the right to take water for the purposes of his cattle, and otherwise, from the orchard, if, and so far as, there shall be any water in the millpond at the time?

The question in this case appears to me to be one of the construction of the

(5) [1898] 2 Ir. R. 532, 548; on app.: [1900] 2 Ir. R. 664, 671, 690.
(6) [1900] 2 Ir. R. 325, 333.
(7) 57 L. J. Ch. 601; 38 Ch. D. 295.
(8) 22 L. J. Ex. 137; 8 Ex. 291.
(9) 40 L. J. Q.B. 293; L. R. 6 Q.B. 578
(10) 40 L. J. Ch. 126; L. R. 6 Ch. 166.

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general words in section 6 of the Conveyancing and Law of Property Act, 1881.[1] I have no evidence to shew the circumstances under which this particular mill-race was made, nor do I think the point material, for both properties were in the same hands for at any rate fifty years prior to 1886, and therefore no rights could arise. What I have to find is whether there was anything which could pass under the general words of the Conveyancing Act, 1881, as enjoyed with the orchard at the time of the conveyance in 1886. On that point, I have the assistance of Lord Justice Cotton's exposition of the Act in *Birmingham, Dudley, and District Banking Co.* v. *Ross*.[7] It is not sufficient simply to point to the state of nature and say, "There is a stream; I must, of course, have the right to dip into it, and to draw from it, because it abuts on my land." If the stream be a natural stream, it is true, there is the right to enjoy the flow of its water as a riparian proprietor, with the incidental right of taking water subject to the rights of the lower riparian owners. But if it be an artificial stream other considerations arise. I think that *Birmingham, Dudley, and District Banking Co.* v. *Ross*[7] is useful as an authority, because it shews, to my mind, that I have to consider those other circumstances, and that it is not enough for the plaintiff merely to point to the state of the land and say: "I must have got a right to the water because of its position relatively to my land—it is obvious when you go upon the property." The case in the Court of Appeal was a case of light; there was, apparently, the right to light over a particular piece of land, and if one had simply looked at the land, one would have said "the right to the light is obviously enjoyed over this piece of land." The decision, however, as embodied in the headnote, is as follows: "The maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee"; and Lord Justice Cotton says in his judgment: "I think it could not be said that the light coming over that low building to these windows could be considered as enjoyed with it [the house] within the meaning of this section. The light did in fact at the time come over that building; but it came over it under such circumstances as to shew that there could be no expectation of its continuance." That appears to me to render it proper for me to consider this case in the same mode as I should have had to consider it if it had been a question of prescription or of implying a lost grant.

Now the law with regard to that is to some extent settled. I take it as stated by the Privy Council in *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*,[4] in which the common-law cases are conveniently referred to. Sir Montague Smith, who was himself a very eminent common lawyer, said: "There is no doubt that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle." I venture to add to that: The right to water flowing through an artificial watercourse constructed on a man's own land, and passing by his neighbour's land, does not rest on the same principle as that of water flowing in a natural channel by another man's land. I take the statement of the principle from Baron Parke in *Greatrex* v. *Hayward*[8]: "The right of the party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse, and the circumstances under which it was created." Applying that to the present case by the light of *Birmingham, Dudley, and District Banking Co.* v. *Ross*,[7] it appears to me that what I have to consider is whether, having regard to the fact that this is an artificial watercourse through the defendant's land, rendering repairs necessary from time to time, made solely for the use of the mill, and used entirely for mill purposes, I can infer that there was an intention to grant the right to compel the miller to continue to send down the water whether he wanted it or whether he did not, although he might have given up the mill altogether, and although it might

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not be worth his while to keep the pond watertight. Am I, in short, to infer from these facts that the grant of the orchard conferred any such right?

If I were regarding this problem as raising a question of prescription, I should have to consider whether the artificial watercourse had been made for a temporary purpose or not; and I think that such consideration is relevant to the present question. Counsel for the plaintiff accordingly have pressed upon me that this mill-race was not made for a temporary purpose. That depends on the meaning of the word "temporary." *Arkwright* v. *Gell*[2] was a case of water pumped from mines, and flowing over another man's land. That had gone on for over sixty years. "Temporary," therefore, does not mean merely that a thing happens to last in fact for only a few years; but to my mind it means that the thing may, within the reasonable contemplation of the parties, come to an end some day, and is not meant to be equivalent to a grant in fee. For example, if a man pump water from his mines for the purpose of draining them, that is "temporary" in the sense that it is limited by the working of the mines. If a man make through his own land a duct leading water to his millpond for the use of his own mill—that, to my mind, is "temporary" in the sense that it is limited to the period for which he uses the mill. In both cases, in my judgment, the purpose is "temporary" within the meaning of the authorities. It is not meant to be a new formation, an alteration of the face of nature, to remain *in perpetuum*—but it is an alteration temporary in the sense that it is for the purpose of, and coextensive with, the carrying on of a particular business—in this case the business of a miller. I think, therefore, that this mill-race and pond, within the authorities, were constructed for the purposes of a temporary business.

There is this point, however, further to be considered. Counsel for the plaintiff argued that this case is to be distinguished from the case of water pumped over another man's land, because this water does not flow on the plaintiff's land at all, but abuts on it. To my mind, that is a distinction which is against the plaintiff. One can well understand that the Court might the more readily presume an agreement between the parties if the one of them pumped water out of his own land for his own convenience, and the other accepted it and allowed it to run over his land for his own convenience. If there were any evidence tending to shew it, one could more readily come to the conclusion that there was an arrangement that the flow of the water should be for the mutual benefit of both. But no such consideration arises when you simply have the water brought by a man entirely on his own land, and not in any way going over the land of his neighbour. In such a case nothing moves from the neighbour by way of consideration. This is pointed out by Chief Baron Palles in *M'Evoy* v. *Great Northern Railway*[6]: "It is settled law that the rights to the water flowing in an artificial watercourse constructed by a particular person upon his own land and for his own benefit are not regulated by the law applicable to natural watercourses, but are to be ascertained by a view of the purpose for which the original structure was built." The Chief Baron then refers to the various English authorities and to one Irish case, and continues: "I . . . . hold that, as a general rule, circumstances which are sufficient to create an easement in favour of a particular person, do not necessarily subject the land of that person to the servitude of continuing to maintain in existence, for the benefit of the servient tenement, the works constructed by him for the purposes only of that easement. In other words, the existence of an easement does not carry with it any presumption of the creation or existence of a counter-easement in the owner of the servient tenement against the owner of the dominant tenement. Certain circumstances may give rise to such counter easement. The circumstance that part of the works executed on the lands of another are such as to require the consent of the owner of the servient tenement may in certain circumstances tend to do so, especially in cases in which the easement has been acquired by prescription, and in which the circumstances of the original

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structure, or its subsequent use, indicate an intention that it was constructed for the benefit of both tenements. But no case of this exceptional class has any application to the present; for here all the works were on the defendant's own land: the consent of those from whom the plaintiff claims was not necessary for their legality; and the only inference capable of being drawn is, as I have already said, that they were constructed for the sole benefit of the railway company."

I cannot, therefore, draw any presumption, from the fact that the water abuts on the plaintiff's land, that the water was intended to be for his benefit and not for the sole benefit of the mill, in order to work which the water was originally diverted. I hold, accordingly, that no right has been shewn to compel the continuance of the flow of water, and I pause here to point out the very serious consequences that would result from my holding the contrary. In the first place, to do so would impose upon the miller the burden of having to keep in repair the hatch at the point where the duct quits the natural stream, and of having to keep a man to let it up or down—because he certainly would not be safe in always keeping it up whether he wanted the water for his mill or not, thus running the risk of its being lost in transit, to the detriment of the lower riparian proprietors. Moreover, it would certainly entail on him the liability of keeping in repair the whole length of the duct, the whole bottom of the millpond, and the other works which lie between the millpond and the returning point of the water into the Castroggy Brook, because he is liable to the lower riparian owners, in diverting the water from its natural course, to return it to them without undue diminution, whereby they might suffer loss. If he allowed the millpond to get out of repair so that the water escaped, he would be answerable to riparian proprietors lower down. If, again, the plaintiff had the right that he claims, I do not see how he could prevent his cattle trampling, to some extent, on the puddled bottom of the millpond in order to drink. It would be exceedingly difficult, without fencing off so as to prevent their drinking from the pond altogether; and there would be the continued risk of some leakage being caused by such trampling; and the servitude that I should be imposing on the defendant would be of a very onerous nature. It seems to me to be inconceivable that any such burden could have been intended to have been undertaken by the vendors at the date when they made the grant to the plaintiff—a grant which contains no express reference to the water at all, and which admittedly can only have imposed the burden, if it imposed it at all, by virtue of implication of law and of the statutory provisions of the Conveyancing Act, 1881. It seems to me inconceivable that the vendors could have intended to undertake any such burden; and perhaps from this point of view there may be something in the fact that they were trustees. It certainly would have been a most extraordinary liability for them to impose on their trust estate—namely, the burden of keeping this millpond and duct in proper repair.

Then it is said—and as regards this point I should have been glad if I could have seen my way to help the plaintiff—it is said, assuming that there is no right to have the water continue to flow, there is still the right to take water if, and when, it shall be there. To my mind, that is a right which is inconsistent with the very idea of the nature of an easement. An easement, as stated by Lord Coke, taking his definition from the common law and quoting *Bracton*, must be "*nec per vim, nec clam, nec precario.*" What is "precarious"?—that which depends not on right, but on the will of another person. As *Bracton* (lib. iii. fol. 221A) puts it: "*Si autem* [*seisina*] *precario fuerit et de gratia, quæ tempestive revocari possit et intempestive, ex longo tempore non acquiritur jus.*" That is to say, if a man can "*tempestive*" or "*intempestive*"—whether the claimant of the easement like it, or whether he does not—put a stop to it, then there is no easement, because it negatives the idea of right altogether. The right in this case to have the water flow I have already negatived. How then can the defendant claim any right to the water which may happen to be

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in the pond at any particular moment, if he has no right to compel a continuous flow to be sent down to him? So far as I know, this particular point has not arisen previously, except so far as it is determined in certain Irish cases. It is touched on, for instance, in *Hanna* v. *Pollock*,[5] and there is a passage in the judgment of Lord Justice Fitzgibbon which seems to me to be material on this subject: "The whole doctrine of presumed grant rests upon the desire of the law to create a legal foundation for the long-continued enjoyment, *as of right*, of advantages which are *prima facie* inexplicable in the absence of legal title. In cases such as this, where the grant is admittedly a fiction, it is all the more incumbent on the Judge to see, before the question is left to the jury, that the circumstances and character of the user import that it has been '*as of right*.' It appears to me, in the present case, that the evidence is inconsistent with right, and that the user is consistent only with permission to enjoy what the supposed grantor did not want, if and so long as that user might be consistent with the rights of third parties, and also with the grantor's right to use his own property from time to time in a reasonable manner. Such a user never could have been as of right in its inception; it could never acquire during its continuance any higher than a permissive character, and it therefore never could be, or become, a foundation for the presumption of a grant." Lord Justice Walker uses words to the same effect. That, to my mind, is a very clear exposition of the law, and accords with my own view that you cannot create a new burden which is something short of an easement, and which is, so far as I know, hitherto unknown to the law—that is to say, an easement which shall be *nec per vim, nec clam, sed precario*. To my mind there is no such right known to the law.

But then counsel for the plaintiff say that the Conveyancing Act, 1881, contains divers other words—for example, besides "waters" and "watercourses," "liberties, privileges, easements, rights, and advantages whatsoever" enjoyed with the land. The words are satisfied by giving the plaintiff that which really was enjoyed with the land—namely, what Lord Justice Fitzgibbon calls, in the passage that I have just read, the permissive user, so long as the miller did not choose to stop it. That advantage he gets; but to say that these words create any new right hitherto unknown to the law is what I have never before heard suggested, and I certainly am not going to be the first to hold. If the right is not one which is known to the law, it appears to me that it cannot pass under the general words implied by section 6 of the Conveyancing Act, 1881.

The only other point I think I need refer to is this—counsel for the plaintiff relied on *Watts* v. *Kelson*.[10] Of course, I should follow that case if it were a decision in point; but, to my mind, it has really nothing whatever to do with the present case, because the whole of the basis on which I rest my judgment was absent in *Watts* v. *Kelson*.[10] There was no question in that case of an artificial watercourse having been made for one property only. The artificial watercourse in that case, on the contrary, had been made for the express purpose of providing both the properties with water. The question that arises here was never argued there at all—the point did not arise; the only point argued there was whether, admitting that there was no easement in the proper sense of the law, but something which would by its nature have been an easement if there had not been common ownership—whether that something passed by the grant, and it was held that it did.

In the present case that is entirely excluded, because I hold that there is no easement which could pass by prescription in the present case by reason of the nature of the works.

The result is that the plaintiff's case wholly fails, and I must dismiss it with costs.

Solicitors—Thomas White & Sons, agents for J. C. Llewellin, Newport, Mon., for the plaintiff; Warriner & Co., agents for Davis, Lloyds & Wilson, Newport, Mon., for the defendant.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

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BYRNE, J. 1901. May 22, 23.

CLUTTERBUCK, *In re*; FELLOWES *v.* FELLOWES.

Will—Partial Accumulation of Income of Property—Direction at End of Ten Years to Invest Accumulations in Purchase of Real Estate—"Land"—Interpretation Act, 1889 (52 & 53 *Vict. c.* 63), *s.* 3—*Accumulations Act*, 1892 (55 & 56 *Vict. c.* 58), *s.* 1.

The word "land" in the Accumulations Act, 1892, *s.* 1, *when read in conjunction with the Interpretation Act*, 1889, *s.* 3, *includes incorporeal as well as corporeal hereditaments.*

Consequently a direction in a will to accumulate the rents and annual income of a mining property for ten years and at the expiration of that time to invest the accumulations in the purchase of "real estate" is a direction to accumulate "for the purchase of land only" within the Act of 1892, *and, there being no minor in existence who, if of full age, would be entitled to receive the rents and income so directed to be accumulated, is void.*

Supposed dictum of CHITTY, J., *in* Danson, *In re*; Bell *v.* Danson (13 R. 633), *discussed and disapproved.*

Thomas Clutterbuck, by his will dated April 22, 1893, after appointing the plaintiffs his executors and trustees, devised, amongst other devises and bequests, his mining property unto and to the use of his trustees upon trust out of the income arising therefrom to pay certain charges therein mentioned and subject thereto "upon trust to invest in the parliamentary stocks or funds of the United Kingdom the rents and annual income of my mining property for the period of ten years computed from my death and during that period to pay the income arising from such investments to my nephew Algernon Barlow And I direct that at the expiration of that period the whole of such investments be transferred or paid to my nephew Algernon Barlow if he be living but if he be dead at such expiration then the same shall be invested in the purchase of real estate so as to go along with my estate at Whittle And subject to the aforesaid trusts I direct that my mining property shall be held upon trust for my said nephew Algernon Barlow for his life with remainder upon trust for his first and other sons successively according to seniority in tail with remainder upon trust for his first and other daughters respectively in tail with remainder upon trust for my own right heirs." The testator devised his freehold estate at Whittle to the use of Algernon Barlow for his life without impeachment of waste, with remainder to his first and other sons in tail, with remainder to his first and other daughters in tail, with remainder to the testator's own right heirs.

The testator died in June, 1900. Algernon Barlow was now living, and was a defendant. He had one daughter, Essex Eleanor Barlow, an infant seven years of age, who was also a defendant.

The defendant Algernon Barlow claimed to be immediately entitled to receive the rents of the mining property directed to be accumulated, on the ground that he was tenant for life, subject only to the trust for accumulation, and that in the event of his death before the expiration of the period of accumulation, such accumulation was "for the purchase of land only," and was void under the Accumulations Act, 1892,[1] and that in the event of his surviving the period of accumulation it was an accumulation merely for his own benefit.

Amongst other questions raised by this originating summons was the question whether the trust for the accumulation of the income of the testator's mining property was valid to any and what extent.

Eastwick, for the plaintiffs, the trustees of the will.

(1) The Accumulations Act, 1892, provides: Section 1: "No person shall, after the passing of this Act, settle or dispose of any property in such manner that the rents, issues, profits or income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who under the uses or trusts of the instrument directing such accumulation would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated."

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CLUTTERBUCK, IN RE.

Dauney, for the defendant Essex Eleanor Barlow.—The question turns upon the construction of the words "for the purchase of land only" in the Accumulations Act, 1892. The "real estate" directed by the testator to be purchased with the investments need not of necessity be "land." The word "land," as defined by the Interpretation Act, 1889, s. 3,[2] means corporeal hereditaments—*Danson, In re; Bell* v. *Danson* [1895].[3] Reading that definition into the Accumulations Act, 1892,[1] it follows that the direction to invest the accumulations in the purchase of real estate is not within that Act, and consequently is not void, inasmuch as such real estate might consist of incorporeal hereditaments.

Levett, K.C., and *A. L. Ellis*, for the defendant Algernon Barlow.—The direction to accumulate for the purchase of real estate is a direction to accumulate "for the purchase of land only" within the Act of 1892,[1] and is void. The word "hereditaments" in the Interpretation Act, 1889, s. 3, is a most comprehensive expression and includes not only lands and tenements, but whatever is capable of being inherited, whether corporeal or incorporeal. The only authority for confining the expression "hereditaments," as used in the Act of 1889, to corporeal hereditaments is the *dictum* of Chitty, J., in *Danson, In re*.[3] From the context it would seem that that *dictum* was a slip in the report. It was not necessary to the decision in that case.

Dauney, in reply.

Rowden, K.C., and *C. Gurdon; T. H. Carson, K.C.*, and *E. S. Ford; Borthwick* and *A. F. Peterson*, for other parties to the action, took no part in the argument of this question.

BYRNE, J.—The question in this case turns upon the true construction to be placed upon section 1 of the Accumulations Act, 1892. The testator devised his mining property upon trust after paying certain charges to invest the rents and annual income thereof in the parliamentary stocks or funds of the United Kingdom for the period of ten years, to be computed from his death, and during that period to pay the interest arising from such investments to his nephew Algernon Barlow. That is therefore a partial accumulation that is directed. Then the testator directs "that at the expiration of that period the whole of such investments be transferred or paid to my nephew Algernon Barlow if he be living, but if he be dead at such expiration then the same shall be invested in the purchase of real estate so as to go along with my estate at Whittle." There is in the case before me no minor in existence, who if of full age would be entitled to receive the rents, issues, and profits so directed to be accumulated, and the question is whether, inasmuch as there is a direction to invest in the purchase of "real estate," that direction comes within the vice hit at by the Accumulations Act.[1]

In order to ascertain the meaning of the words "for the purchase of land only," we must have recourse to section 3 of the Interpretation Act, 1889, to find out what is the true meaning of "land," because, unless a contrary intention appears, the word "land" will have the meaning attributed to it by that Act. It is argued that the real estate, which by the will is directed to be purchased, need not necessarily be land. It need not necessarily be land in the ordinary sense of the word "land." The question is, whether you can find any "real estate" which is not a messuage, tenement, or hereditament, house, or building of some tenure or other. Counsel for the infant admitted that he could not point out anything that would be real estate, and would not be covered by those words. He could point out certain real estate which is not "land" in the ordinary sense, but none that is not "land" within the exclusive meaning to be given to the expression "land" by virtue of the Interpretation Act.

One difficulty has arisen in consequence of a supposed observation of the Judge in a case of *Danson, In re*,[3] decided by Lord Justice Chitty when Mr. Justice Chitty, where he is reported as saying,

(2) The Interpretation Act, 1889, enacts by section 3: "The expression 'land' shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure."

(3) 13 R. 633.

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CLUTTERBUCK, IN RE.

"It is not in my view possible to say that the terms used in the Act of 1889 import 'money to be laid out in purchase of land': that could only be effected by an express definition clause. 'Land,' therefore, in the definition of the Interpretation Act, means 'corporeal hereditaments.' That definition I read into the Act now before me, whose words I consequently find to mean that which they would naturally at first sight appear to mean." The expression was not necessary for the determination of the case, because, as was pointed out by the learned Judge there, you might have a permanent investment in Consols by virtue of the provisions of the Settled Land Act, 1882, and the decision would be just as good if the Judge had said it meant corporeal or incorporeal hereditaments. I think it would be too strong to import into the report of this judgment the meaning sought to be put on it—namely, that land within the meaning of the Accumulations Act, 1892, must mean corporeal hereditaments. The judgment was not corrected by the Judge, and I think there must be a slip in the report. Under these circumstances I think that the direction to lay out the investments at the expiration of ten years, if Algernon Barlow be then dead, in the purchase of real estate is bad. The result is that in any event Algernon Barlow takes the rents so directed to be accumulated.

Solicitors—Pontifex, Hewitt & Pitt, agents for Nevinson & Barlow, Malvern; Black & Moss; Oldman, Clabburn & Co., agents for J. Wilson Gilbert & Co., Norwich; Hardisty, Rhodes & Hardisty.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

KEKEWICH, J. 1901. May 1, 2, 15. } BELLERBY *v.* ROWLAND AND MARWOOD'S STEAMSHIP CO.

Company — Voluntary Surrender of Partly Paid Shares—Release from Liability—Ultra Vires—Successful Company —Restoration to Register—Equity—Companies Act, 1862 (25 *& 26 Vict. c.* 89), *s.* 35.

A surrender of partly paid-up shares to a company, although voluntarily made for the benefit of the company, will, if followed by a release of the shareholder's liability for the amount remaining unpaid on the shares, constitute in effect a purchase by the company of those shares at the price of discharging the shareholder from such liability, and consequently will be ultra vires of the company, and bad within Trevor *v.* Whitworth (57 L. J. Ch. 28; 12 App. Cas. 409). *But although such surrender is bad, the Court will not, in the exercise of its discretionary power under section* 35 *of the Companies Act*, 1862, *rectify the register by restoring thereto the name of the shareholder in respect of the surrendered shares, and so enable the shareholder after the lapse of seven years to share in the profits of the company, unless he can satisfy the Court that there is an equity in his favour to disturb the existing state of things.*

Semble, *since* Trevor *v.* Whitworth (57 L. J. Ch. 28; 12 App. Cas. 409) Snell's Case (L. R. 5 Ch. 22) *is no longer law.*

Action.

The defendant company was incorporated in May, 1890, with the object of acquiring steamships and other vessels, and of carrying on the business of shipowners. The capital of the company was 275,000*l.*, divided into 25,000 shares of 11*l.* each, on which 10*l.* per share had been paid up. The articles of association of the company provided by article 37 as follows: "The directors may accept from any member, on such terms and conditions as shall be agreed, the surrender of his shares, or stock, or any part thereof."

In July, 1893, the plaintiffs, John

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Bellerby, James Sharphouse Moss, and Christopher Marwood, together with William Wright and John Rowland (both since deceased), all of whom were the then directors of the company, by deed-poll voluntarily surrendered eighty-three shares each in the defendant company, on which shares all but 1*l.* had been paid up, in order to make good to the company a loss of over 4,000*l.*, which the company had incurred in respect of the sale of one of its steamers owing to the depressed condition of the shipping trade, but which loss the directors were under no legal liability to make good. The surrender of the shares was duly accepted by resolutions of the board of directors, and the certificates of the shares were cancelled.

From July, 1893, down to the issue of the writ in this action on November 13, 1900, the company had been carried on successfully, and dividends which amounted in the aggregate to 5*l.* 5*s.* 3*d.* per share, had been regularly paid three times a year in respect of the shares in the company, other than the surrendered shares, with which the company had never purported to deal.

William Wright died on April 25, 1899, and the plaintiffs Kate Wright and George Buchanan were his executors. John Rowland died on September 3, 1899, and the plaintiffs Christopher Marwood Lewis, Stephen Edwardes Trousdale, and Robert Elliott Pannett were his executors.

The plaintiffs subsequently became desirous of participating in the prosperity of the defendant company in respect of the surrendered shares, and at an informal meeting of a large number of the shareholders on October 10, 1900, the suggestion that the plaintiffs should be restored to the register was unanimously approved. The plaintiffs accordingly commenced this action against the company, claiming—First, a declaration that the surrender of the shares and the acceptance thereof by the defendant company were *ultra vires* of the company; secondly, to have the deed-poll set aside and cancelled; thirdly, payments of all dividends in respect of the said share since June, 1893; and fourthly, that the register of the defendant company might be rectified accordingly.

The plaintiffs alleged that the directors surrendered the shares under the belief and with the intention that the shares should be surrendered to and become vested in the company, and that the directors should in no way remain liable for the sum of 1*l.* per share at that time remaining unpaid.

The claim for payment of the arrears of dividends in respect of the surrendered shares was abandoned by the plaintiffs before the hearing.

P. O. Lawrence, K.C., and *Eustace Smith*, for the plaintiffs.—This surrender was *ultra vires* of the company because it amounted to a reduction of its capital. There are two classes of cases in which a surrender is valid—namely, where the company is in a position to forfeit the shares, and where a surrender is made for the purposes of the shares being cancelled and of issuing in exchange for them, *bona fide*, an equivalent amount of new shares—*Teasdale's Case* [1873][1] and *Eichbaum* v. *City of Chicago Grain Elevators* [1891].[2] There is no diminution of capital involved in either of those classes, but the transaction in this case does involve a diminution of capital within the principles of the decisions in *Dronfield Silkstone Coal Co., In re* [1880],[3] and *Trevor* v. *Whitworth* [1887].[4] That being so, the surrender was *ultra vires* of the company. Further, if on the one hand the release of the liability in respect of the uncalled capital was good, then this transaction was in effect a purchase of the shares by the company and accordingly *ultra vires*; but on the other hand, if it was bad, then the real transaction has not been carried out; for if the company were wound up, the liquidator could recover that amount from the plaintiffs, and accordingly in either event they are entitled to restitution, and no injustice will in the circumstances be done to any one by the restoration of their names to the register in respect of these shares.

Warrington, K.C., and *H. E. Wright*, for the company.—Except where the

(1) 43 L. J. Ch. 578; L. R. 9 Ch. 54.
(2) 61 L. J. Ch. 28; [1891] 3 Ch. 459.
(3) 50 L. J. Ch. 337; 17 Ch. D. 76.
(4) 57 L. J. Ch. 28; 12 App. Cas. 409

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surrender takes the form of a purchase, there is no decision that a surrender *per se* is invalid, but there are decisions in which surrenders of shares have been held to be valid both in cases where there is a release of the liability and in cases where there has been no such release; therefore the argument that because the surrender involves a reduction of capital, it is therefore *ultra vires* of the company, is unsound. Every surrender, in one sense, involves a reduction of capital. Assuming that a company has power by its articles to accept a surrender of shares, then the validity of the surrender depends upon its *bona fides*, and not upon the question whether it involves a reduction of capital or not. There are actual decisions affirming the validity of surrenders. In *Eichbaum* v. *City of Chicago Grain Elevators*[2] there was a plain surrender of shares with a release of the liability so far as those shares were concerned. That case deals with the decision in *Teasdale's Case*[1] and the earlier cases upon which that decision proceeded. In *Snell's Case* [1869],[5] which was mentioned in *Trevor* v. *Whitworth*,[4] and not disapproved of, Giffard, L.J., had no doubt but that a shareholder who had been registered could have surrendered his shares, and in that case there was a release from liability. In *Teasdale's Case*[1] there was a surrender but no release from liability. In *Denver Hotel Co., In re* [1893],[6] the reduction of capital which was sanctioned by the Court involved a surrender of shares, which, however, Lord Herschell in *British and American Trustee and Finance Corporation* v. *Couper* [1894],[7] said he thought could not be anything but a purchase of shares. Moreover, a voluntary surrender does not necessarily involve an ultimate reduction in capital, for it places the company in a position to reissue the shares and obtain their value over again, and so in fact increase the capital. In *Trevor* v. *Whitworth*[4] there was a purchase of shares, and the result of the judgments in that case is this—Is the transaction in substance a "dealing" by the company in its own shares, or a purchase by the company of its shares? If it is, then it falls within the purview of *Trevor* v. *Whitworth*[4] and is bad; if it is not, then it is good and falls within the scope of *Dronfield Silkstone Coal Co., In re*.[3] It is only where the essence of the transaction called a surrender is a purchase that that surrender is not valid. Here the plaintiffs received nothing in return for the surrender, and there was no release from liability except in respect of the 1*l.* uncalled, the amount of which liability was infinitesimal. Further, even if the transaction is a bad one, the Court ought not now to interfere by rectifying the register in favour of the plaintiffs on the ground that the real transaction was not carried out, and that in a winding-up they would be liable to the liquidator; that would not be so, for the liquidator could not after the lapse of eight years recover the sum—*Trevor* v. *Whitworth*.[4] Moreover, the plaintiffs have no equity to induce the Court to put their names back on the register. In 1893 they were willing permanently to get rid of their interest in these shares, and they never then thought of being replaced on the register, and now they have no equity on their side.

P. O. Lawrence, K.C., in reply.—The proposition that every surrender which does not involve a purchase of the shares is valid, is too wide. In *Snell's Case*[5] the amount paid on the share was repaid to the surrenderor, and therefore that case is in conflict with *Trevor* v. *Whitworth*,[4] and cannot stand. In *Hall's Case* [1870].[8] there was an express release which was held invalid. The decision in *Teasdale's Case*[1] is too wide. Since *Trevor* v. *Whitworth*,[4] a surrender out of the assets of a company is bad. There is no practical difference between a surrender out of the assets of the company and the release by it of a good debt. In this case there is no difference in principle between the surrender of these 415 shares, and the surrender of the whole 275,000 shares of the company.

This is really a sale, and comes within Sir George Jessel's proposition in *Dronfield Silkstone Coal Co., In re*.[3] There is nothing in the objection that the plain-

(5) L. R. 5 Ch. 22.
(6) 62 L. J. Ch. 450; [1893] 1 Ch. 495.
(7) 63 L. J. Ch. 425; [1894] A.C. 399.
(8) 39 L. J. Ch. 730; L. R. 5 Ch. 707.

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tiffs have no equity. There will be no injustice done to any one by this rectification, and there has been no objection on the part of any shareholder.

Cur. adv. vult.

May 15.—Kekewich, J.—There was submitted in argument the dry question whether a company under the Companies Act, 1862, can accept a surrender of shares. It is a question of deep interest, affording opportunities of subtle argument and involving consideration of general and statute law and also of the nature of a share which, though commonly and conveniently treated as an entity, is really only a right with liability attached. It is inconsistent, says Lord Watson in *Trevor* v. *Whitworth*,[4] with the essential nature of a company that it should become a member of itself; and the observation connotes many, if not all, of the objections to a surrender founded on general law. But a company under the Act of 1862 is the creature of statute, and the limit and extent of its powers must be ascertained from Acts of Parliament. These Acts have been examined again and again with somewhat varying results, and it may be that an answer to the dry question, which has never been clearly decided, cannot be certainly found in any of the authorities. It will not be found in this judgment.

There is a strong current of opinion in favour of upholding surrenders in connection with forfeiture for due cause, even though the forms of forfeiture have not been complied with; and more than one Judge has inclined to, if he has not expressed, the opinion that, to use the language of Lord Justice FitzGibbon in *Balgooley Distillery Co., In re* [1886],[9] "shares might be given by a shareholder gratuitously for the advantage of the company." In a concise summary, which indicates the absence of finality, Mr. Palmer in his work on *Company Law* (3rd ed.), p. 67, says: "Possibly a surrender to the company by way of donation may be free from objection." But it must be taken to have been conclusively settled by the House of Lords in *Trevor* v. *Whitworth*[4] that a company under the Act of 1862 has no power to purchase its own shares, and that such a transaction cannot be sanctioned even by the memorandum of association.

What took place in 1893, when the directors of the defendant company surrendered eighty-three shares each, was distinctly, to my mind, a transaction of purchase and sale, and not a gratuitous gift for the advantage of the company, or a donation; and on that ground I hold it to be bad without more. My view is easily explained. The shares of the company were of 11*l.* each, and on each share 10*l.* had been paid, so that there remained 1*l.* per share liable to be called up at any time when the needs of the company required it. By the surrenders the directors were freed from their liability, or, in other words, the company purchased the shares at the price of discharging the directors from such liability. That there was no express bargain of this kind is, to my mind, immaterial; but it is not beside the mark to observe that at the date of the surrenders the company was not successful, and the possibility of the 1*l.* per share being called up was by no means remote. Having regard to the comments on other cases in the House of Lords in *Trevor* v. *Whitworth*,[4] none of them can be treated as now in force as against the view above expressed; but in *Snell's Case*[5] Lord Justice Giffard upheld a surrender of shares on which there was a liability for calls; and if that decision can properly be treated as unimpeached, it is undoubtedly in conflict with my opinion, which I should therefore be bound to abandon. *Snell's Case*[5] was cited in *Trevor* v. *Whitworth*,[4] and, according to the reporter, commented on at length, but it is not noticed by either of the learned Lords who took part in the judgment of the House. It seems to me, however, that the Lord Justice's decision is not only inconsistent with much that was said, but is directly in conflict with the actual result. In saying this I am of course assuming the soundness of my view that the surrender of shares not fully paid up is really a transaction of sale and purchase; and *Snell's Case*[5] does not say that it is not.

It does not follow that because the

(9) 17 L. R. Ir. 239, 263.

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surrenders of shares were bad, the plaintiffs are now entitled to succeed in their claim to be restored to the register in respect of them. The power of rectifying the register given by the 35th section of the Act of 1862 is discretionary in this sense, that the Court properly can only exercise it if satisfied of the justice of the case; and on many applications the Court has declined to exercise this power on the ground that it would not be fair to do so, or, to put it more technically, that the applicant has not established any equity to disturb the existing state of things. And in considering this, the Court has always had regard to the lapse of time and to any facts and circumstances indicating acquiescence in the existing state of things by those on whose behalf the application is made to disturb it. The applications have been generally made by official liquidators seeking to establish liability for calls, but obviously the like considerations must apply to applications by those who seek to be restored to the privilege of shareholders. Of the authorities on such applications *Sichell's Case* [1867][10] is a good example, but I will not refer to it in detail or further than to add that it is particularly valuable for a considered judgment of Lord Cairns. There is, I think, an even more pointed and cogent authority to be found in Lord Macnaghten's comments on the *Dronfield Silkstone Coal Co.'s Case*[3] in the House of Lords. That case was necessarily discussed at length in *Trevor* v. *Whitworth*,[4] and the grounds of the decision of the Court of Appeal were not regarded with favour. But Lord Macnaghten took occasion to point out that, while disapproving of the grounds, he thought the decision itself was sound.[11] In short, he held that the liquidator had no equity to place Mr. Ward's name on the register when it had been off it for seven years, during which the company had been prosperous and the shareholders who remained had received dividends largely increased by Ward's retirement. Lord Macnaghten cites Lord Cairns's decision in *Sichell's Case*,[10] and fully approves it.

(10) 37 L. J. Ch. 373; L. R. 3 Ch. 119.
(11) 57 L. J. Ch. 44, 45; 12 App. Cas. 439, 440.

Here the surrenders took place in 1893, and more than seven years afterwards the surrenderors ask the Court to restore them to their original position. Nothing has occurred in the meantime except that this company, which was embarrassed, has turned out to be prosperous, and the plaintiffs, if placed on the register, will become entitled to share the fruits of prosperity which were renounced when apparently not within reach. It is conceivable that some persons purchased shares in the company, and perhaps at a premium, with the knowledge that the capital had been reduced by the surrenders, and with the anticipation that their proportion of profits would be larger than it would have been if those surrenders had not been made; but, apart from this or any like consideration, it lies on the applicants to satisfy the Court that justice requires their application to be granted—that there is an equity in their favour to disturb the existing state of things. I am told that the shareholders as a body desire the application to be granted, and deem it only fair that those who acted generously in the past should be treated generously now; but, dealing with the case judicially, I cannot hold that the plaintiffs have brought themselves within the requirements of the statute, by which my conclusions must be guided. There will be judgment for the defendants. I take it for granted that they do not ask for costs.

Solicitors—Bell, Brodrick & Gray, agents for W. Seaton Gray, Whitby, for plaintiffs; Radford & Frankland, agents for Buchannan & Sons, Whitby, for defendant company.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

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COZENS-HARDY, J.
1901.
May 7, 17.

MEARS *v.* CALLENDER.

Landlord and Tenant—Market Garden—Glass-Houses—Trade Fixtures—Right of Removal—Fruit Trees—Compensation—Landlord's Consent—Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61).

Glass-houses erected for the purpose of his trade by a tenant who is carrying on the business of a market gardener, with the knowledge of his landlord, are trade fixtures, and may be removed by the tenant during the tenancy though attached to the freehold. A power in an agreement for an agricultural tenancy for the tenant to turn meadow land into orchard is a consent in writing by the landlord to the planting of fruit trees within section 3 *of the Agricultural Holdings (England) Act*, 1883, *and the tenant is entitled to compensation for trees so planted.*

The plaintiff was the owner of a small farm, called Kingwood Farm, in Gloucestershire. On August 17, 1877, he granted to the defendant a lease of the farm for seven, fourteen, or twenty-one years from Michaelmas, 1877, at the yearly rent of 165*l*. The lease, in addition to the usual covenants applicable to a small agricultural tenancy, contained the following clauses:

(10) Subject to clause 14, the tenant shall not break up or convert into tillage any meadow or pasture land without the landlord's written consent, and if he shall do so he shall, during the remainder of the tenancy, pay the additional yearly rent of 50*l*. for every acre of land which shall be so broken up or converted into tillage, and so in proportion for any less quantity than an acre, such additional rent to be payable half-yearly on the days aforesaid, and to be recoverable by distress or otherwise as rent hereby reserved, and generally the tenant shall manage and cultivate the farm in husbandlike and in the best manner, so as not to impoverish any part thereof, and shall leave the same at the end of the tenancy in good heart and condition. (13) In the last year of the tenancy the landlord or his incoming tenant shall be at liberty to enter upon the lands for a wheat season so soon as the crop for that year is cleared off, in order to prepare the same for such season, and may also sow seeds among the Lent and summer corn, which the tenant shall harrow in; and the tenant shall also leave gratis for the landlord or his incoming tenant all the roots remaining unconsumed in the ground, and also all improvements made by the tenant, and all cultivations, dressings, and manures, in consideration of no claim being made by the landlord for similar matters on the tenant now entering. (14) The tenant may at any time during the said term, at his own cost, extend the present kitchen garden, part of the said premises, eastward across the full extent of the pasture field surrounding the said house by a line at right angles with the present kitchen garden wall, and also at the like cost convert into an orchard so much of the meadow land surrounding the said house as he may think proper. (21) The Agricultural Holdings (England) Act, 1883, shall not apply to this contract of tenancy.

Shortly after the date of the lease the defendant converted part of the meadow surrounding the house into an orchard, planted fruit trees, and erected ten glass-houses, in which grapes, peaches, and other fruit were grown. The defendant, with the knowledge of the plaintiff, carried on the business of a market gardener on a large scale.

The defendant gave notice to determine his tenancy at Michaelmas, 1901. There were at the date of the notice about 1,200 fruit trees in the orchard in good bearing condition. The defendant claimed a right to remove the glass-houses and compensation for the fruit trees. He had pulled down three houses before action. The plaintiff then brought this action for an injunction to restrain the defendant from pulling down the houses, and for determination of the question as to right to compensation.

The Court held upon the evidence that the glass part of one house, called the grape-house, merely rested by its weight upon a concrete wall, and could be removed without injury to the freehold, but that the other houses were fixed to the freehold.

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MEARS *v.* CALLENDER.

An injunction had been granted until the hearing.

Eve, K.C., and *J. G. Wood*, for the plaintiff.—Clause 13 of the agreement clearly shews that the tenant was not to be entitled to any compensation. The bargain was that as he paid none he was to receive none. The agreement is for an ordinary farming tenancy with a provision that some pasture might be thrown into the kitchen garden. The holding was meant to be a farm, and the landlord cannot be saddled with expensive improvements which would be detrimental to letting the land as a farm. The defendant is not entitled to the fixtures under section 34 of the Agricultural Holdings Act, 1883, for clause 21 of the agreement excludes that Act; and section 55, which forbids such exclusion, only applies to rights under Schedule I.

The houses are not removable as trade fixtures under the common law. Removable fixtures must be chattels. It makes no difference that they must be taken to pieces to be moved, but it is not enough that it should be possible to pull down the structure and use the materials in building a new one—*Whitehead* v. *Bennett* [1858].[1] The statement of the law in that case was approved by Lord Selborne in *Wake* v. *Hall* [1880, 1883],[2] which case was affirmed by the House of Lords. A fixture must be removable without losing its identity. A building which must be reduced to its elements in order to be removed is not a trade fixture —*Elwes* v. *Maw* [1802].[3]

Vernon Smith, K.C., and *A. F. Peterson*, for the defendant.—As to the fruit trees, the tenant is entitled to compensation under the Agricultural Holdings Act, 1883. Planting fruit trees is one of the improvements in Schedule I. which require the written consent of the landlord. But clause 14 of the agreement contains such a written consent.

The glass-houses are trade fixtures which the defendant is entitled to remove by the general law. The grape-house merely rests by its own weight on a concrete foundation, and can be removed, though the foundation is built into the soil—*King* v. *Otley* [1830][4] and *Wansborough* v. *Maton* [1836].[5] The rest of the houses are trade fixtures, and not the less removable because they cannot be moved in bulk. In *Penton* v. *Robart* [1801][6] Lord Kenyon expressly quotes a market gardener's green-houses as instances of removable fixtures. In *Elwes* v. *Maw*[3] Lord Ellenborough seemed to think Lord Kenyon's statement too wide; but the *ratio decidendi* in that case is that an agricultural tenant could not take out of the land what he had used to work it. A distinction is drawn between agriculture and trade, and Lord Ellenborough cites without disapproval *Dean* v. *Allalley* [1798],[7] another decision of Lord Kenyon's which is strongly in our favour.

Even if these are not removable as trade fixtures, the defendant is entitled to remove them under the Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27), which applies section 34 of the Agricultural Holdings Act, 1883, to all market gardens. The Scotch Court of Appeal have held, upon the construction of a precisely similar section in the Market Gardeners' Compensation (Scotland) Act, 1897—*Callander* v. *Smith* [1900][8]—that the Act did not apply to improvements made before its date. But that decision is not binding on this Court and cannot be supported.

[They also referred to *Rex* v. *St. Dunstan* (*Inhabitants*) [1825][9] and *Buckland* v. *Butterfield* [1820].[10]]

Eve, K.C., in reply.—The landlord's power to give or withhold consent to improvements in Schedule I. of the Act of 1883 is absolute. He can give it subject to any condition. If the agreement amounts to a consent, it is only given upon the condition that the tenant makes no claim for compensation. *West* v.

(1) 27 L. J. Ch. 474.
(2) 50 L. J. Q.B. 545, 549; 7 Q.B. D. 295, 301. In H.L.: 52 L. J. Q.B. 494; 8 App. Cas. 195.
(3) 3 East, 38.
(4) 1 B. & Ad. 161.
(5) 5 L. J. K.B. 150; 4 Ad. & E. 884.
(6) 2 East, 88.
(7) 3 Esp. 11.
(8) 2 Ct. of Sess. Cas. (5th series), 1140; affirmed in House of Lords after the argument, *sub nom. Smith* v. *Callander*, 70 L. J. P.C. 53.
(9) 4 B. & C. 686.
(10) 2 Br. & B. 54.

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Blakeway [1841][11] shews that a greenhouse is not removable.

Cur. adv. vult.

May 17.—COZENS-HARDY, J. (after stating the clauses of the agreement and the facts as above).—Under these circumstances questions of importance and difficulty arise for my consideration. It is contended on the part of the plaintiff that the defendant is bound to leave the orchard and all the houses without claiming compensation. On the other hand, the defendant claims, both at common law and under the Agricultural Holdings (England) Act, 1883, as enlarged by the Market Gardeners' Compensation Act, 1895, to be entitled to remove or to have compensation for all the glass-houses, and he claims under those Acts or one of them to be entitled to compensation for the orchard trees. It will be convenient to consider—first, what are the rights of the parties irrespective of the Acts of 1883 and 1895, and whether, and to what extent, their rights are modified or affected by those Acts.

At common law it is plain that the defendant could not cut down or remove the orchard trees or claim compensation. But as to the glass-houses a much more difficult question arises. If erected for the mere purpose of pleasure and ornament, and not for the purpose of a trade, they would not be removable—*Buckland* v. *Butterfield*[10] and *Jenkins* v. *Gething* [1862].[12] If, however, they were erected, as in the present case, by a market gardener for the purposes of his trade different considerations arise. In *Penton* v. *Robart*[6] Lord Kenyon intimated a strong opinion in favour of the tenant: "The old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier: but in modern times the leaning has always been the other way in favour of the tenant, in support of the interests of trade which is become the pillar of the State. What tenant will lay out his money in costly improvements of the land, if he must leave everything behind him which can be said to be annexed to it? Shall it be said that the great gardeners and nurserymen in the neighbourhood of this metropolis, who expend thousands of pounds in the erection of greenhouses and hothouses, &c. are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade. If it were otherwise, the very object of their holding would be defeated. This is a description of property divided from the realty." On the other hand, Lord Ellenborough, in the leading case of *Elwes* v. *Maw*,[3] did not approve of Lord Kenyon's observations in this case and *Dean* v. *Allalley*,[7] at least in so far as they might be taken to apply to agriculture. He says, referring to the latter case: "He"—that is, Lord Kenyon—"certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming, were, or rather ought to be, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always put and recognized as a known, allowed, exception from the general rule, which obtains as to other buildings." I am not satisfied that Lord Ellenborough dissented from Lord Kenyon's view so far as market gardeners were concerned. If, however, there be any difference between Lord Kenyon and Lord Ellenborough, I prefer the view that glass-houses erected by a nurseryman for the purpose of carrying on his trade may be removed. The *dicta* of Lord Bramwell in *Wake* v. *Hall*[2] support this view. Moreover, the whole tendency of the Courts in recent years has been to enlarge the rights of tenants in respect of fixtures. Nor do I consider that there is anything in Vice-Chancellor Kindersley's judgment in *Whitehead* v. *Bennett*[1] which ought to lead me to a contrary conclusion. Unless, therefore, the defendant is precluded by some covenant in the lease, I think he is entitled to remove the glass-houses.

But it is contended that by clause 13 the defendant is bound to leave all the houses without claiming any compensation from the plaintiff, these houses being

(11) 10 L. J. C.P. 173; 2 Man. & G. 729.
(12) 2 J. & H. 520.

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"improvements" made by the tenant within the meaning of clause 13. Upon the whole, I do not think this contention can prevail. I think clause 13 only applies to "similar matters" to those in respect of which the landlord made no claim when the defendant entered—in other words, to the tillages, &c., in respect of which, according to the custom of the country, payment would otherwise have to be made to an outgoing tenant of an agricultural holding. I cannot read them as applying to extensive houses of the nature of trade fixtures erected by a market gardener on the property.

The next question is as to the effect of the Acts of 1883 and 1895. The Agricultural Holdings (England) Act, 1883, divides improvements into three classes—first, those to which the consent of the landlord is required; secondly, those in respect of which notice to the landlord is required; and thirdly, those which require neither consent nor notice. By section 3 compensation under the Act is not payable in respect of improvements of the first class, unless the landlord has previously consented in writing to such improvement, and any such consent may be given by the landlord unconditionally or upon such terms as to compensation or otherwise as may be agreed upon between the landlord and the tenant, and in the event of any agreement being made between the landlord and the tenant any compensation payable thereunder shall be deemed to be substituted for compensation under this Act. The improvements of the first class include planting of orchards or fruit bushes and erection or enlargement of buildings. By section 34, "Where after the commencement of the Act a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this Act or otherwise entitled to compensation, . . . then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy." By section 54 the Act applies to a holding such as the defendant's. By section 55 "Any contract, agreement, or covenant made by a tenant, by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement mentioned in the First Schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act), shall, so far as it deprives him of such right, be void both at law and in equity." By section 60 what I may call the common-law rights of the tenant are preserved.

I am relieved from considering the effect of section 4 of the Market Gardeners' Compensation Act, 1895, which confers certain benefits on market gardeners, for, since this case was argued before me, it has been held by the House of Lords in *Smith* v. *Callander*[8] that, under a precisely similar section in the Market Gardeners' Compensation (Scotland) Act, 1897, no right to compensation is given except in respect of improvements made after the date of the Act.

The consequence is that I must put aside the Act of 1895, and consider only the Act of 1883. Now, as to the glass-houses, the written consent of the landlord was not obtained, and the Act does not help the plaintiff. The attempt in the lease to exclude the Act of 1883 succeeds as to section 34, which is not hit by section 55.

But the landlord's consent in writing to planting the orchard was given by the lease, and there is nothing in clause 13 which sufficed to deprive him of his statutory right to compensation. If, however, my view of the true construction of clause 13 is not correct, then it seems to me that section 55 applies, and that the contract by which, on that hypothesis, he is deprived of his right to claim compensation is void both at law and in equity. A landlord cannot impose as a condition of his consent the term that no compensation shall be paid. The Act prohibits this. The result is that, in my opinion, the plaintiff fails in his contentions, and the action must be dismissed with costs.

Solicitors—Coode, Kingdon & Cotton, for the plaintiff; Drake, Son & Parton, for defendant.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

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FARWELL, J. 1901. March 14, 22.

HOLLAND, *In re*; GREGG *v.* HOLLAND.

Post-nuptial Settlement — Wife's Property—Recital of Ante-nuptial Agreement to Settle—Statute of Frauds, s. 4—Estoppel —Husband's Trustee in Bankruptcy.

A parol agreement before marriage to settle the wife's property cannot support a voluntary settlement made after marriage. A recital in such a settlement of the previous agreement is not a sufficient memorandum within section 4 of the Statute of Frauds, though it will bind by estoppel the parties to the settlement and volunteers claiming under them.

The rule that a trustee in bankruptcy stands in the bankrupt's shoes does not apply to cases under settlements which come under section 47 of the Bankruptcy Act, 1883, or the statute of 13 Eliz. c. 5, or to cases of fraud.

A post-nuptial settlement made by a husband in 1873 of his wife's property may be void under 13 Eliz. c. 5, as being in fraud of creditors.

Pearson, *In re*; Stephens, *ex parte* (3 Ch. D. 807), *followed.*

On August 27, 1872, Isidore M. Bourke married Charlotte Fanny Holland, an infant. She was entitled, under the will of Henry Holland dated April 26, 1871, to one eighth share of the proceeds of sale of his residuary real and personal estate in remainder expectant on the death of his widow. On February 8, 1873, a deed of post-nuptial settlement was executed by I. M. Bourke and Charlotte Fanny his wife, still an infant, of the first part; the trustees of the will of Henry Holland, who were also guardians of C. F. Bourke, of the second part; and two trustees of the third part. This deed contained the following recital: "And whereas the said parties hereto of the first part intermarried on August 27, 1872, and previously to such marriage the said Isidore M. Bourke agreed to make such settlement of the fortune of his said wife as is hereinafter contained"; and I. M. Bourke thereby covenanted with the trustees that immediately upon the share and interest of and in the residuary estate and effects of the said Henry Holland, to which the husband and wife or the husband in her right or either of them then were or was or thereafter might become entitled, becoming an interest in possession, the husband and wife or the survivor and all other necessary parties would assign and transfer the said share to the trustees of the settlement upon the trusts thereinafter declared.

The trusts of the settlement were for the said C. F. Bourke for her life for her separate use without power of anticipation, and after her death, if the husband should not have become bankrupt or assigned or alienated his interest, in trust for him, until he should become bankrupt or assign or alienate his interest, with remainder for the issue of the marriage in such shares as the husband and wife should appoint, with remainder to such issue equally *per stirpes*.

On April 14, 1877, C. F. Bourke died leaving three sons.

On October 25, 1897, I. M. Bourke appointed two-thirds of the trust fund to two of his sons, and surrendered to them his life interest in the appointed shares. On March 1, 1898, a receiving order was made against him, and on March 18 he was adjudicated bankrupt.

On December 11, 1899, Mrs. Holland, the testator's widow, died, and the one eighth share in his residuary estate given by his will to C. F. Bourke fell into possession.

The trustees of the will took out this summons for the determination of the question to whom this fund ought to be paid. The defendants were the trustees of the post-nuptial settlement and the persons interested under it, and the official receiver, as trustee in bankruptcy of I. M. Bourke.

Cozens-Hardy, for the trustees of the will.

St. John Clerke, for the trustees of and parties interested under the settlement.—The recital of an ante-nuptial agreement, contained in the settlement, estops the parties to the settlement from saying that it is voluntary or setting it aside—*Codrington* v. *Lindsay* [1872],[1] *Young* v.

(1) 42 L. J. Ch. 526; L. R. 8 Ch. 578.

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Smith [1865],[2] and *Buckland* v. *Buckland* [1900].[3]

The settlement is itself a sufficient memorandum of the agreement to take the case out of the Statute of Frauds—*Montefiore* v. *Behrens* [1866].[4]

Upjohn, K.C., and *A. Adams*, for the official receiver.—The recital in a post-nuptial settlement of a parol agreement to settle entered into before marriage will not take the case out of the Statute of Frauds. *Dundas* v. *Dutens* [1790][5] is quoted as an authority that it will; but it is a *dictum* only, as is clear from the report in *Vesey*.

Spurgeon v. *Collier* [1758],[6] *Warden* v. *Jones* [1857],[7] and *Trowell* v. *Shenton* [1878][8] are clear authorities that such a settlement cannot be maintained against creditors. In *Whitehead, In re; Routh, ex parte* [1884],[9] Cave, J., decided that such a settlement was void under the statute, and the Court of Appeal decided the case on wholly different grounds.

Pearson, In re; Stephens, ex parte [1876],[10] shews that the settlement is void under 13 Eliz. c. 5.

St. John Clerke, in reply.—The reference to an ante-nuptial agreement is only necessary to get rid of the technical rule that Courts of equity will not assist volunteers. There is no question of the policy of the bankruptcy laws. The trustee can only take subject to all the equities to which the bankrupt was subject—*Harris* v. *Truman* [1882].[11] *Pearson, In re*,[10] stands alone, and ought not to be followed.

Cur. adv. vult.

March 22.—FARWELL, J. (after stating the facts as above).—It is conceded by counsel for the trustees of the settlement that it rests *in fieri*, and cannot be enforced unless it can be supported by the consideration of marriage; and he relies on the recital of an ante-nuptial contract which I have already read.

The first question that I have to determine is whether the settlement of February 8, 1873, containing such a recital is sufficient to satisfy the Statute of Frauds. In my opinion it is now settled that in the absence of such a recital a parol contract before marriage cannot support a settlement made after marriage. The cases are conflicting, but this is, in my opinion, the conclusion on the balance of authorities. In *Hodgson* v. *Hutchenson* [1712][12] it is reported as follows: "A father encourages the courtship of his son with another's daughter, who proposes by letter to give her 500*l.* if the father would settle 100*l.* per annum on the son, which is refused; The son and daughter marry privately, and after this letter is written; then he, that refused, consented, and he that consented, refused. On a bill for performance of this agreement it was objected, that these promises were within the Statute of Frauds, and that the letter being after the marriage should not bind; but decreed *contra* on circumstances of the father's privity and consent to the match and of the marriage by afterwards approving of it. That it was out of the statute if no letter, for the agreement is admitted by the answer; but this case doth not depend on parol evidence or admissions; for the letter after marriage, considering the transactions before, is sufficient. The offer to settle 100*l.* per annum shall be in tail, with a power to the husband to charge it with 500*l.* for younger children, being the mother's portion, and decreed accordingly; *per* Harcourt Lord Keeper." The first ground on which this was decided is that where the agreement is admitted by the answer the statute cannot be pleaded, and this was correct at that time, although it is no longer law—see *Moore* v. *Edwards* [1798][13] and *Blagden* v. *Bradbear* [1806].[14] The second ground is so concisely stated in the report that it is difficult to say what it really amounts to.

Montacute v. *Maxwell* [1720][15] was a

(2) L. R. 1 Eq. 120.
(3) 69 L. J. Ch. 648; [1900] 2 Ch. 534.
(4) L. R. 1 Eq. 171.
(5) 1 Ves. 196; 2 Cox, 235.
(6) 1 Eden, 55.
(7) 27 L. J. Ch. 190; 2 De G. & J. 76.
(8) 47 L. J. Ch. 739; 8 Ch. D. 318.
(9) 54 L. J. Q.B. 88; *sub nom. Whitehead, Ex parte; Whitehead, in re*, 14 Q.B. D. 419.
(10) 3 Ch. D. 807.
(11) 51 L. J. Q.B. 338; 9 Q.B. D. 264.
(12) 5 Vin. Abr. 522, pl. 34.
(13) 4 Ves. 23.
(14) 12 Ves. 466.
(15) 1 Eq. Ca. Abr. 19; Prec. in Ch. 526 1 Str. 233 1 P. Wms. 618.

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case of fraud, the reduction of the agreement into writing having been prevented by the fraud and practices of the party to be bound. In the report of the case in *Strange*, Lord Chancellor Parker says: "But such parol promise on marriage is sufficient consideration, to support a settlement made agreeable to it after marriage. This has been frequently determined. So it is also sufficient consideration to establish a promise made in writing after marriage." Lord St. Leonards in his work on *Powers* (8th ed.), p. 647, treats this as a mere *dictum*; and the editor of *Eden's Reports*, in a note at vol. i. p. 62, says that there is no decision to warrant such a *dictum*. The report of this case in *Peere Williams*, which was cited in *Warden* v. *Jones*,[7] does not contain the second hearing of this case, in which this *dictum* is stated. In *Taylor* v. *Beech* [1741][16] the defendant pleaded the statute in bar to discovery as well as to relief, and I read the case as confined to this—that the Lord Chancellor thought that there were circumstances which might raise an equity in the plaintiff's favour if full discovery was made, and that he would not shut out such circumstances by refusing discovery. In *Surcome* v. *Pinniger* [1853][17] there is a *dictum* of Lord Justice Turner's: "But it has been held, in many cases, that if there be a written agreement after marriage in pursuance of a parol agreement before marriage, this takes the case out of the statute." This *dictum* was not necessary for the decision, and the Lord Justice does not refer to any case except *Taylor* v. *Beech*,[16] which he treats as a case of part performance by acts other than mere marriage. In *Barkworth* v. *Young* [1856],[18] Vice-Chancellor Kindersley decided that a statement of a parol agreement in an affidavit made after the marriage by the party to be charged was sufficient to satisfy the statute. He said: "the defendant objects, that, supposing this was in every other respect a sufficient note or memorandum in writing, it was not made till after the marriage, and therefore is not good within the intent of the statute. And the opinion expressed by Sir W. Grant in *Randall* v. *Morgan* [1805][19] is relied upon. Sir W. Grant's opinion is expressed in the form of a strong doubt, and unquestionably even the doubts of such a Judge are entitled to the utmost consideration and deference. But, notwithstanding that doubt, it has been since held by Lord Langdale in *De Beil* v. *Thomson* [1841],[20] and by Lord Cottenham in the same case on appeal, that a written memorandum or note made after the marriage of a parol agreement made before the marriage would be sufficient within the statute; the former referring to Lord Harcourt's opinion in *Hodgson* v. *Hutchenson*,[12] and the latter referring, not only to that case, but also to Lord Hardwicke's decision in *Taylor* v. *Beech*,[16] and to that of Lord Macclesfield in *Montacute* v. *Maxwell*.[15] All these opinions must, I think, outweigh Sir W. Grant's doubt." I have already referred to two of the cases on which the Vice-Chancellor relied; and with regard to *De Biel* v. *Thomson*[20] and *Hammersley* v. *De Biel* (*Baron*) [1845],[21] I would point out, with all respect, that Lord Langdale did not decide the case on the ground that a subsequent memorandum would satisfy the statute, but said that the subsequent letter was either a sufficient note to satisfy the statute or a sufficient adoption of an ante-nuptial contract purporting to have been entered into by his sons in writing on his behalf; and, further, that Lord Cottenham, in *Lassence* v. *Tierney* [1849],[22] expressly stated that his judgment in *Hammersley* v. *De Biel* (*Baron*)[21] turned on part performance by acts other than the mere marriage. Except so far, therefore, as *Hodgson* v. *Hutchenson*[12] is an authority, I come to the conclusion that the Vice-Chancellor's judgment was not supported by express authority.

On the other hand, in addition to a *dictum* of Sir William Grant's in *Randall* v. *Morgan*,[19] there are three cases of the highest authority which, in my opinion, shew that *Barkworth* v. *Young*[18] cannot be supported. In *Spurgeon* v. *Collier*[6] there was a settlement made after marriage; evidence was tendered of an ante-

(16) 1 Ves. sen. 297.
(17) 22 L. J. Ch. 419; 3 De G. M. & G. 571.
(18) 26 L. J. Ch. 153; 4 Drew. 1.
(19) 12 Ves. 67.
(20) 3 Beav. 469; 12 Cl. & F. 64*n*.
(21) 12 Cl. & F. 45.
(22) 1 Mac. & G. 551.

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cedent parol agreement. The evidence failed, but Lord Northington said: "Secondly, if proved, it would not better the case. It is admitted, that, since the statute, though such promise was made, Dr. Alston could have no remedy. Then the settlement was voluntary, for it could not be compelled. It was made to a person having no right to demand it; for where there is no remedy, there is no right. But, if such a parol agreement were to be allowed to give effect to a subsequent settlement, it would be the most dangerous breach of the statute, and a violent blow to credit. For any man, on the marriage of a relation, might make such promise, of which an execution never could be compelled against the promisor, and the moment his circumstances failed, he would execute a settlement pursuant to his promise, and defraud all his creditors." I read this as a clear expression of the Lord Keeper's opinion that such an agreement, although followed by a settlement in pursuance of it, cannot satisfy the statute. In *Warden* v. *Jones*[7] creditors filed a bill to set aside a settlement as fraudulent within the statute of Elizabeth. The Lord Chancellor assumed the existence of an antecedent parol agreement, and decided that it was not sufficient to satisfy the statute so as to give consideration to the settlement made after marriage in pursuance of such agreement. Finally, in *Trowell* v. *Shenton*[8] Sir George Jessel says: "Some observations were made during the argument as to the effect of a subsequent acknowledgment in writing of a contract, and *Barkworth* v. *Young*[18] was referred to in support of the contention that the settlement was for value, though there was no ratification till after the marriage. The answer to this is given by *Warden* v. *Jones*,[7] which is subsequent in date to *Barkworth* v. *Young*,[18] and therefore, so far as the two are inconsistent, overrules it. Lord Cranworth, there referring to a post-nuptial settlement reciting that it was made in pursuance of an ante-nuptial agreement, says: 'Lord Thurlow decided in *Dundas* v. *Dutens*[5] that such a settlement is good, and on that decision I will only remark, that if it be a correct view of the law, the whole policy of the statute is defeated. It cannot be enough merely to say in writing, that there was a previous parol agreement. It must be proved that there was such an agreement, and to let in such proof is precisely what the statute meant to forbid.' In that short passage the Lord Chancellor disposed of all the other authorities." And in the same case Lord Justice Cotton says: "It was urged that, though no action could be maintained for breach of the agreement, yet the settlement was not to be treated as voluntary. *Warden* v. *Jones*[7] appears to me to decide the exact contrary of this contention. The consideration was held to be insufficient in that case, because the Statute of Frauds provided 'that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, signed,' &c. Here the question does not turn on the Statute of Frauds, but on Lord Tenterden's Act; but if in one case it is held that a parol contract before marriage cannot support a settlement made after marriage, so here a settlement cannot be supported by an infant's contract of which there is no written confirmation." See also *Sugden on Powers* (8th ed.), pp. 647, 650.

In the two last mentioned cases the Court expressly pointed out that there was no recital of any ante-nuptial agreement, and the next question that I have to consider is whether the existence of such a recital makes any difference. In my opinion it does not. The decision of the Courts that a post-nuptial settlement is not supported by an antecedent parol agreement involves the proposition that no post-nuptial settlement can by itself satisfy the statute. It is the date of execution, not the contents, of the document that is material. Recitals may in some cases raise a case of estoppel, but they cannot affect the construction of a statute, nor can the same document be at one and the same time an agreement within and an agreement not within the statute, according as it is impeached by a settlor or his creditors. The question, What is an agreement sufficient to satisfy the statute? must be answered in the same way in all cases. Further, I come to the same conclusion on the construction

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of the statute. Section 4 enacts "that no action shall be brought whereby . . . to charge any person upon any agreement made upon consideration of marriage . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." An agreement or memorandum or note thereof to satisfy the statute must, in my opinion, be reduced into writing and signed before the marriage. It is true that the statute does not render the agreement void or illegal, but it renders written evidence of it indispensable—*Maddison* v. *Alderson* [1883].[23] An agreement which a man cannot be compelled to perform is a voluntary agreement. He cannot be compelled to perform the ante-nuptial agreement, because it is parol, nor the post-nuptial, because it is founded on a past consideration, and fails, therefore, to possess that essential part of a contract—the consideration for value—for it is well settled that a past consideration will not support a present promise, and the contract in consideration of marriage differs from contracts for sale, within sub-sections 4 and 17 of the statute, as to which it has been held that the agreement must be signed before action—*Lucas* v. *Dixon* [1889][24]—because the marriage is performed once for all and is irrevocable. But in contracts for sale the consideration continues, for, if the whole purchase-money has not been paid the balance unpaid remains a consideration at the date of the contract, and, if the whole has been paid, the purchaser can recover it back if the contract is repudiated. I do not forget that the post-nuptial agreement here is under seal, but this is immaterial for the present purpose, for equity will not aid a voluntary covenant by specific performance—*Jefferys* v. *Jefferys* [1841][25]—and the defendants are claiming the funds *in specie*, not damages for breach of covenant.

Is there, then, any authority that prevents my holding in accordance with my own opinion? It is very doubtful whether *Dundas* v. *Dutens*[5] amounts to more than a *dictum*. It is certainly a mere *dictum* as reported in *Vesey*: "Lord Chancellor: If the husband made an agreement, that he would settle, and then in fraud of that agreement got married, would not he be bound by it? I thought, there was a case in point for that. What the settlement might be, if made upon himself after marriage is another question. But in Eq. Cas. Ab." (which I apprehend is the case of *Montacute* v. *Maxwell*,[15] which I have referred to), "where there was an agreement before marriage, and the father drew the man in, and was privy to his having married without any execution, and then refused to execute, relief was given. If in this case there was an agreement before marriage, and afterwards he drew her in to be married, and then refused to perform it, it appears to me to be that kind of fraud, against which this Court will relieve. If there is a parol agreement for a settlement upon marriage, after marriage a suit upon the ground of part performance would not do, because the statute is expressed in that manner; but is there any case, where in the settlement the parties recite an agreement before marriage, in which it has been considered as within the statute?" The Solicitor-General said he did not think it would be good. And Sir William Grant so treats it in *Randall* v. *Morgan*[19]; and although Lord Ellenborough calls it a decision in *Shaw* v. *Jakeman* [1803],[26] he refers to the report in *Vesey*, where it is not more than a *dictum*. In *Cox* it is reported as a decision; but I think *Vesey's* report, supported as it is by Sir William Grant, is the more trustworthy. I have considered this in detail, because, if Lord Thurlow decided the point, Lord Cranworth's *dictum* could not overrule it, and it would, of course, be binding on me. But I think that it is only *dictum*, and that it is outweighed by the *dicta* of Lord Cranworth in *Warden* v. *Jones*[7]: "This most reasonable construction of the statute is consistent with the decision of Lord Cottenham in *Lassence* v. *Tierney*,[22] and though the precise question does not arise

(23) 52 L. J. Q.B. 737, 749; 8 App. Cas. 467, 488.

(24) 58 L. J. Q.B. 161; 22 Q.B. D. 357.

(25) Cr. & Ph. 138.

(26) 4 East, 201.

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in the case now before me, I have thought it right to advert to these authorities, in order that it may not be thought I decide the present case merely on the ground that it is distinguishable from *Dundas* v. *Dutens*.[5] I incline to think that, even if this settlement had contained a statement that it was made in pursuance of a previous ante-nuptial parol agreement, I should still have considered it, as I now consider it, void against creditors." This was approved by the Court of Appeal in *Trowell* v. *Shenton*,[6] and by Lord St. Leonards in his work on *Powers* (8th ed.), p. 649. The defendants' counsel placed great reliance on a passage in Lord Selborne's judgment in *Codrington* v. *Lindsay* [1]: "What, then, are the considerations for the settlement of the Bank of Bengal shares, and the 6,213*l*. Consols, and 4,562*l*. reduced stock, expressed on the face of the deed of March 31, 1850? First, I find in it an express recital 'that upon the treaty for the marriage it was agreed' (which I take to mean agreed between the plaintiff's father and her husband) that as well the two several sums of 6,213*l*. Consols and 4,562*l*. reduced stock (which had been then actually transferred into the names of the trustees of the deed), as also all the interest of the plaintiff or of her husband in her right under the settlement of August 17, 1824 (that is, her interest in the 80,000 S.R.) 'should be settled upon the trusts and in the manner thereinafter mentioned.' This recital cannot, as against any person not a party to it, alter the consideration or the true character of the deed, or supply the want of other evidence of a binding ante-nuptial contract: *Warden* v. *Jones*.[7] But I apprehend it is good evidence as between the father and the husband, at all events, of the terms of and the considerations for their agreement *inter se*." In that case, as well as in *Battersbee* v. *Farrington* [1818],[27] there was an express recital of an ante-nuptial contract contained in the post-nuptial settlement. The true meaning of Lord Selborne's statement is illustrated by Sir Thomas Plumer's judgment in *Battersbee* v. *Farrington* [27]: "On the first question, (which I am not now to decide,) the distinction, I apprehend, is, that against all persons claiming under the settlor the recital is conclusive; but it would be difficult to maintain, that a recital in a post-nuptial settlement of ante-nuptial articles, of the existence of which there is no distinct proof, would be binding on creditors. Such a doctrine would give to every trader a power of excluding his creditors by a recital in a deed to which they are not parties. In this instance there appears no motive for the recital if untrue; a recital in a deed executed before the party engaged in trade, when he was not indebted, and 20 years prior to his death." The meaning is that, although the post-nuptial settlement does not satisfy the statute, the recital of an ante-nuptial contract may bind the party making it, and volunteers claiming under him, by estoppel, and counsel for the defendants has accordingly argued that the trustee in bankruptcy stands in no better position than the bankrupt, and is as much bound by estoppel as the bankrupt himself would be.

Now, it is no doubt true as a general proposition that the trustee in bankruptcy stands in the bankrupt's shoes, but this is subject to several exceptions. It is only necessary here to mention three —first, under section 47 of the Bankruptcy Act, 1883; secondly, under the statute of 13 Eliz. c. 5; and thirdly, in cases of fraud. In the first two cases the trustee has a paramount right by statute which overrides the title of the bankrupt and persons claiming under settlements made by him. The third exception is not peculiar to the trustee in bankruptcy, but is of more general application. It is conceded that the first exception is excluded in the present case, both by the terms of the section itself and by the periods that have elapsed. I will deal with the second exception presently. The third exception may be stated in Baron Martin's words in *Horton* v. *Westminster Improvement Commissioners* [1852] [28]: "The meaning of estoppel is this—that the parties agree for the purpose of a particular transaction to state certain facts as true; and that, so far as regards that transaction, there shall be no question about them. But the whole matter is opened when the state-

(27) 1 Swans. 106.

(28) 21 L. J. Ex. 297, 301; 7 Ex. 780, 791.

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ment is made for the purpose of concealing an illegal contract; for persons cannot be allowed to escape from the law by making a false statement." See also *Doe d. Williams* v. *Lloyd* [1839],[29] where the heir-at-law of a grantor was allowed on this ground to impeach the validity of his ancestor's deed. To return to the second exception. The statute 13 Eliz. c. 5 avoids voluntary settlements made with a view to defeat or defraud creditors. When the husband entered into the covenant of February 8, 1873, he was entitled *jure mariti* to the property in question, which was a reversionary interest in personalty, subject only to the contingency of his wife's surviving him before he had reduced it into possession. By that settlement he expressly provided that his property should be withdrawn from his creditors in case he became bankrupt. It is therefore fraudulent within the statute 13 Eliz. c. 5, according to the case of *Pearson, In re; Stephens, ex parte*,[10] the authority of which is not affected by *Detmold, In re; Detmold* v. *Detmold* [1889],[30] which was the case of a marriage settlement; while *Pearson, In re*,[10] was a voluntary settlement, and is therefore on all-fours with the present case.

It was argued that *Pearson, In re*,[10] stood alone, and was wrongly decided, but I am not aware that it has ever been doubted, and it is right that I should follow it. *Montefiore* v. *Behrens*[4] was also cited, but the reasoning on which the Master of the Rolls proceeded in that case is inapplicable to the present; he put it on the ground that the fund was the wife's property, and that she was entitled to enforce her equity to a settlement. But here there was no such right in the wife, because the property was a contingent reversionary interest in personalty—see *Osborn* v. *Morgan* [1852][31]—and she was dead long before the fund fell into possession, and the equity is, of course, personal to her. I am of opinion, therefore, that the trustee in bankruptcy would not be bound by estoppel if any such arose.

But I am further of opinion that the recital is not sufficiently precise to create an estoppel. It is quite consistent with the existence of a mere parol agreement; for a pleader might insert the very words of that recital in his defence, and yet plead that such agreement was not in writing, so as to satisfy the Statute of Frauds. Even if the recital had been of an agreement in writing, it would have been open to the trustee in bankruptcy to adduce evidence to shew that it was untrue, and, if it were untrue, it would be fraudulent within Baron's Martin's judgment cited above. It has not been argued that the deed of October 25, 1897, has any independent validity or effect, and the other points made on this deed and otherwise in the case do not arise in the view that I take of the matter. The costs of all parties will come out of the fund.

(29) 9 L. J. C.P. 53; 5 Bing. N.C. 741.
(30) 58 L. J. Ch. 495; 40 Ch. D. 585.
(31) 21 L. J. Ch. 318; 9 Hare, 432.

Solicitors—H. Clifton Lambert, for plaintiffs; Tarry, Sherlock & King, for official receiver; Van Sandau & Co., for other defendants.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

BYRNE, J. 1901. May 3, 7.

CLARKE, *In re*; CLARKE *v.* CLARKE.

Will—Gift to Corps of Commissionaires —"To aid in purchase of barracks or in any other way beneficial to the corps"— Voluntary Association — Charity — Perpetuity.

A gift to a perpetual institution not charitable is not necessarily bad. The gift is good if it is not subject to any trust that will prevent the existing members of the association from dealing with it as they please, or if it can be construed as a gift to or for the benefit of the individual members of the association. If the gift is one which by the terms of it, or which by reason of the constitution of the association in whose favour it is made tends to a perpetuity, the gift is bad.

The Corps of Commissionaires is a voluntary association with a somewhat special constitution for the benefit of able-bodied and disabled soldiers and sailors alike,

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which is mainly supported by the subscriptions of the members and intended for their benefit; and although there are funds appropriated to the benefit of the corps which, taken separately, may be considered as charities, the corps as at present constituted would not appear to be a charity within the legal meaning of that expression.

A gift to the committee for the time being of the corps "to aid in the purchase of their barracks or in any other way beneficial to that corps" is good on the ground either that some of the objects of the corps are charitable, or else that it does not tend to a perpetuity, inasmuch as the committee for the time being of the corps can deal with it in any way they please for the benefit of the corps.

Dictum in Cocks *v.* Manners (40 L. J. Ch. 640; L. R. 12 Eq. 574) *approved and applied.*

Dutton, *In re*; Peake, *ex parte* (48 L. J. Ex. 350; 4 Ex. D. 54); Amos, *In re*; Carrier *v.* Price (60 L. J. Ch. 570; [1891] 3 Ch. 159); Clark's Trusts, *In re* (45 L. J. Ch. 194; 1 Ch. D. 497); Thomson *v.* Shakespear (29 L. J. Ch. 276; 1 De G. F. & J. 399); *and* Carne *v.* Long (29 L. J. Ch. 503; 2 De G. F. & J. 75) *discussed and distinguished.*

The testator, William H. S. Clarke, by his will dated August 9, 1873, after giving out of the share of his father's property coming to him at his mother's death the several legacies therein mentioned, amounting in the whole to 3,200*l.*, proceeded as follows: "The remainder of my share of my father's property I give devise and bequeath to the Committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks or in any other way beneficial to that Corps." The share of his father's property coming to the testator at his mother's death was about 5,000*l.*, and was subject to her life interest. The testator died in 1876, and his mother died in February, 1899, when the fund became distributable.

It appeared from the evidence of the adjutant that the corps was founded shortly after the Crimean war in order to find employment for discharged and disabled soldiers and sailors; that it had grown from very small dimensions until at the present time between 2,500 and 2,600 soldiers and sailors found employment by means of its agency at good and remunerative wages. The corps was said to be entirely self-supporting so far as the men employed were concerned. All men forming the corps were required to contribute to the general funds and to the sick fund, and to encourage providence for old age each man was expected to open a savings-bank account, into which he was to pay a certain amount either monthly or quarterly. Nothing, however, was charged against the men or the general funds of the corps for the officers' salaries, or for other expenses from which the men did not directly receive any benefit. Soon after the formation of the corps it became necessary to establish quarters at which the business of the corps might be carried on, and premises were consequently bought by Sir Edward Walter in Exchange Court, Strand, for the purpose, which were subsequently paid for mainly by means of a benefaction from the late Marchioness of Westminster. Additional premises were from time to time acquired until a large block of premises lying between the Strand on the south, Maiden Lane on the north, and Bedford Street on the west, had been bought and paid for out of the funds of the corps. The greater part of these premises was occupied by the corps, some of the houses having been pulled down and rebuilt in the form of barracks. It was intended ultimately to utilise the whole of the sites so acquired by the erection thereon of buildings for administrative purposes and barracks for the men's accommodation. As the corps increased in numbers it became necessary to employ a staff for the conduct of its affairs, and Sir E. Walter, feeling that it would be a burden on the men to charge them with the cost of the maintenance of the staff, in or about the year 1863 started an officers' endowment fund for the purpose of providing for such and other expenses, to which legacies and subscriptions and donations had from time to time been made. When founding this fund the design or object was declared to

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be as follows: "The Endowment fund of the Corps of Commissionaires is designed for the payment of the Officers of the Staff and such other objects connected with the institution as may in the opinion of the Board require assistance provided such object is not contrary to any fundamental principle of the Corps." The scheme which was adopted in June, 1863, provided that the income of the endowment fund should be devoted by the board to the following purposes—first, payment of officers of staff; secondly, offices for adjutant and staff; thirdly, allowance for out-quarter divisions, consisting of thirteen men and upwards, not exceeding 10*s.* per man. Any surplus was to be invested to form the nucleus of a fund for building permanent barracks. A considerable sum appeared to have been accumulated by this means, though more was needed before the complete building scheme could be carried out. The management and property of the corps was vested in a board of governors composed of two permanent trustees, an administrative board consisting of eighteen officers, and an executive committee of seven. The duty of the executive committee was, among other things, to authorise and make investments of the fund, to authorise payments thereout and the purposes for which it was to be applied, and to appoint officers and fix their salaries. A sum of money calculated according to the numbers of the members of the corps was carried over every year from the endowment fund to the general funds of the corps.

The question now raised by this originating summons was whether the abovementioned gift to the corps was a valid gift.

Norton, *K.C.*, and *Marcy*, for the testator's legal personal representatives.

Rowden, *K.C.*, and *Maugham*, for the residuary legatee.—The gift in this case cannot be construed as a gift to individuals. The testator had in view the permanent improvement of the corps, and did not intend the gift for the benefit of the members of the corps at his death. The gift is void for uncertainty if it is to be applied in ways which cannot be ascertained.

Further, the corps is not a charity. The institution is in no sense one for the maintenance of disabled soldiers. The fact that there is a fund which may be eleemosynary does not make the corps a charity. The test is, What is the central idea of the corps? The existence of the officers' endowment fund and of the barracks, which are assisted from outside, is not sufficient to make the corps a charity. If the main organisation is not in its general purposes charitable the fact that part of it is assisted does not make it a charity—*Theobald on the Law of Wills* (5th ed.), pp. 106 and 107. Poverty is not an essential qualification for membership of the corps. It is not a charity within the preamble of the statute of Elizabeth (43 Eliz. c. 4)—*Clark's Trusts, In re* [1875],[1] which was approved in *Cunnack* v. *Edwards* [1896],[2] is indistinguishable from the present case. The gift here cannot be construed as a gift for various alternative purposes, and it fails for uncertainty, notwithstanding the discretion given to the donees—*Hunter* v. *Att.-Gen.* [1899].[3] If this is not a gift to individuals, and the corps is not a charity, the gift is bad as tending to a perpetuity, for the corps has no express power to divide up or alienate its property, and permanency is contemplated by the gift—*Amos, In re; Carrier* v. *Price* [1891],[4] *Carne* v. *Long* [1860],[5] *Dutton, In re; Peake, ex parte* [1878],[6] and *Thomson* v. *Shakespear* [1860].[7]

Stamp, for the testator's next-of-kin.—I adopt the last argument. The preliminary direction given by the will is not charitable—*Att.-Gen.* v. *Haberdashers' Co.* [1834].[8] Every trust must have a definite object, and there must be somebody in whose favour the Court can decree performance—*Morice* v. *Durham* (*Bishop*) [1804].[9] Any member of the corps would be entitled to an account if this is a charity. The members have no

(1) 45 L. J. Ch. 194; 1 Ch. D. 497.
(2) 65 L. J. Ch. 801; [1896] 2 Ch. 679.
(3) 68 L. J. Ch. 449; [1899] A.C. 309.
(4) 60 L. J. Ch. 570; [1891] 3 Ch. 159.
(5) 29 L. J. Ch. 503; 2 De G. F. & J. 75.
(6) 48 L. J. Ex. 350; 4 Ex. D. 54.
(7) 29 L. J. Ch. 276; 1 De G. F. & J. 399.
(8) 1 Myl. & K. 420; affirming, 2 L. J. Ch. 33.
(9) 9 Ves. 399.

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contract with one another, but only with the governors of the corps, and their rights are strictly limited by such contract. They have no control whatever over the funds.

Levett, K.C., and *Stewart-Smith*, for the Corps of Commissionaires and the executive committee.—The gift is a good one irrespective of the question whether the corps is a charitable institution or not—*Cocks* v. *Manners* [1871].[10] It is similar to a gift to a club. In every one of the cases relied on there was some fetter on alienation. There is nothing in the rules of the corps to prevent the division of this gift amongst all its members. The Attorney-General might come in and say that the institution was a charity, but otherwise no member of the public has anything to do with it. The society might be dissolved and the assets divided if all the members desired it. There is consequently no perpetuity. In *Clark's Trusts, In re*,[1] the question was not whether the gift was bad, but as to what was to happen when the society stopped. The society there was not a charity, and there could be no *cy-près* application. *Cunnack* v. *Edwards*[2] has no application. There was no suggestion that the fund for widows in that case was bad *ab initio* as a perpetuity, and as there were no more widows left the only question was as to what was to become of the fund. In *Dutton, In re*,[6] there was a trust for a library, and the only point was who were the *cestuis que trust*. In *Amos, In re*,[4] the fund belonged to a trade union, and could not be divided. In *Carne* v. *Long*[5] the property could not be divided so long as there were ten members, and when there were less than ten members there might be a sale, but no division. But although the corps may not be what is commonly called a charitable institution, it is within the legal definition of a charity. The original intention was to benefit wounded sailors and soldiers. A charitable institution does not cease to be such merely because it employs its members in profitable labour. Here there is a convalescent fund, which is clearly charitable, for the men's railway fares to the seaside, and lodging, fuel, and light are paid out of it.

G. Cave, for a beneficiary, did not take any part in the argument.

Rowden, K.C., in reply, referred to *Tyssen on the Law of Charitable Bequests*, p. 65.

Cur. adv. vult.

May 7.—BYRNE, J.—The question is whether or not a gift in the will of the testator is good or void as creating or tending to create a perpetuity. [His Lordship read the words of the gift, and continued:] It is common ground that if the legacy is one to or in favour of a charity it is good. Although the original intention of the founder, Sir Edward Walter, as stated by him in a letter printed in the rules and regulations of the corps, appears to have been to found a charity, I do not think that as subsequently and as at present constituted the corps can be so considered. It is a voluntary association, with a somewhat special constitution for the benefit of ablebodied and disabled soldiers and sailors alike, mainly supported by the subscriptions of the members, and intended for their benefit. There are funds appropriated to the benefit of the corps, which, taken separately, may be considered as charities, but I am unable to say that the corps is a charity within the legal meaning of that expression. The constitution of the corps is given in the affidavit of the adjutant as follows: [His Lordship read the affidavit, which in effect stated the facts as above stated, and continued:] It is, I think, established by the authorities that a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be, Will the legacy, when paid, be subject to any trust which will prevent the existing members of the association from spending it as they please? If not, the gift is good. So, also, if the gift is to be construed as a gift to or for the benefit of the individual members of the association. On the other hand, if it appears that the legacy is one which by the terms of the gift, or which, by reason of the constitution of the association in whose favour it is made, tends to a perpetuity, the gift is bad.

(10) 40 L. J. Ch. 640; L. R. 12 Eq. 574.

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CLARKE, IN RE.

In opposition to the validity of the gift two cases were especially relied on—*Dutton, In re*,[6] and *Amos, In re*.[4] *Dutton, In re*,[6] was a case of an athenæum and mechanics institution, and the gift was "unto the trustees for the time being of the Tunstall Athenæum Mechanics Institution, to be applied by them towards the building fund in connection therewith." One of the rules of the association was that "The Institution shall not be dissolved without the consent of nine tenths in number of the members present at a general meeting to be specially called for that purpose, such consent to be confirmed by a like majority at a further special general meeting, to be called within not less than one or more than three calendar months from the passing of such first resolution." Mr. Arthur Charles, who argued the case for some of the next-of-kin, in reply referred to the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), which, by section 30, provided that upon the dissolution of such an institution as that the members would receive no profit, but the fund would go to some other institution. Chief Baron Kelly, referring to the rules, says, "When, however, we look to the rules which set out at great length the objects of the institution, we find that it is in reality a species of club in which a number of persons come together for literary purposes and mutual improvement. Under these circumstances the case of *Clark's Trusts, In re*,[1] is applicable, where Vice-Chancellor Hall deals with this question and decides that an institution for mutual benefit is not a charity." Then, after referring to the case of *Carne* v. *Long*,[5] which I will mention presently, and quoting the words which occurred in that case, he says, "Those are certainly stronger words than appear in this bequest, but looking to the rules and constitution of this society, it appears to me that it need not come to an end, so that though this bequest does not contain the strong words of that in *Carne* v. *Long*,[5] the principle of that case must apply." Then he cites a passage from the judgment of the Lord Chancellor in that case, and refers to *Thomson* v. *Shakespear*.[7] Baron Huddleston, in giving judgment, says: "We were referred to the rules of the institution, and it was said there was nothing to prevent the dissolution of the society and the division of the property, so that the case would resemble the case of *Cocks* v. *Manners*,[10] where there was a bequest to a voluntary association of ladies for pious and charitable purposes. This argument, however, if well founded, was met by the contention that under the Literary and Scientific Institution Act, 17 & 18 Vict. c. 112, s. 30, that could not be done. That Act seems to shew that the money could not be appropriated among the members. On the whole, I am of opinion that this bequest does tend to a perpetuity and is void." That is a case where clearly by the constitution of the legatee society it was obvious that a perpetuity was intended.

Amos, In re,[4] was a case of a gift to a trade union registered under the Trade Unions Act, 1871; and in that case there is a gift which is referred to by Mr. Justice North as follows: "'I give, devise, and bequeath unto Thomas Price the property known as 27, Bath Terrace, the conditions to be as follows:—that the property be left to him for his life and for the life of his heir, after which it becomes the property of the Boiler Makers and Iron Ship Builders Society.' Then two other houses are given to two other persons in substantially identical words, the only difference being that the first house is leasehold and the other two houses are freehold. The conditions in each case are exactly the same as those which I have read. Then comes this, 'That each of the above,' that is, each devisee, 'keep the property held by them in good repair, and shall pay to the trustees the sum of 4*s*. per week, until the whole of the mortgage be paid.' . . . The will goes on, 'And that the further sum of 3*l*. 6*s*. 8*d*. each per annum be paid by them to be disposed of as follows: viz., 5*l*. per annum to the Boiler Makers Benevolent Fund, and 5*l*. per annum to the executors. Should either of the parties refuse or fail to comply with the foregoing conditions they shall forfeit all rights to the property, and the executors shall cause the same to be handed over to the Boiler

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Makers Society forthwith.'" Then his Lordship says a little lower down: "The society, therefore, take in remainder after the estate given by the previous words. The effect of the final clause is, that, the *interim* estate having come to an end, the remainder to the Boiler Makers Society is accelerated." Then, after considering the gift to the Boiler Makers Society, his Lordship says: "construing the ultimate gift first, what is meant by the property being 'handed over to the Boiler Makers Society'?" Then he refers to the fact that it is a trade union registered under the Act, but not a corporation, and he says: "In my opinion the devise and bequest in remainder to the Boiler Makers Society cannot have any effect at all. In the first place, independently of the Act, what is the meaning of it? It is, beyond question, in my opinion, a perpetuity, or a gift tending to a perpetuity. It is not intended for the benefit of the particular individuals constituting the society at the time. It was suggested in argument that the gift might have the effect of vesting the property in all the existing members as joint tenants or tenants in common. But, in my opinion, that is not the effect of the gift. Such a construction would be entirely contrary to the testator's intention, because, instead of the property being administered by the executive body of the Boiler Makers Society for the purposes of the society, it would belong to a number of individuals as their common property, so that any one of them might at any moment commence an action for partition or sale, thus taking the control away from the society altogether, and simply dividing the property among themselves for their own benefit. That was not the intention of the testator. The only alternative construction is, that it is a gift to the society for the purposes of the society. Beyond all question that is a perpetuity; *Carne* v. *Long*,[5] and the observations of Vice-Chancellor Hall in *Clark's Trusts, In re*,[1] are conclusive on the point." It is to be observed that the gift in that case was a gift directly to a trade union registered under the Trade Union Acts, 1871 and 1876, and it was a gift, too, which could not under any circumstances be divided among the members. His Lordship, as I understand, thought that from the constitution of the body and from the terms of the gift a perpetuity was intended.

Now, the *dictum* of Vice-Chancellor Hall in *Clark's Trusts, In re*,[1] is one of considerable authority, having been approved of in subsequent cases, including one case at least in the Court of Appeal, and it was relied upon as conclusive by Mr. Justice North in *Amos, In re*.[4] The gift in *Clark's Trusts, In re*,[1] was of 500*l*., "to be laid out and kept invested in some or one of the public stocks or funds of Great Britain in the names of such persons as shall be nominated from time to time to be trustees thereof by the friendly society called the Ringwood Friendly Society, lately held at the Red Lion Inn, but now held at the Crown Inn in Ringwood aforesaid, upon trust to apply the dividends and income thereof in aid of the funds of the said society." The learned Judge says, though it was not necessary for the determination of the case, "The gift was, I think, invalid, as aiming at creating a perpetuity, in which respect it is like the case of *Carne* v. *Long*.[5] The society being dissolved, and the fund not being claimed by the trustees, who are the respondents to the petition, it and any dividends in Court must be transferred and paid to the petitioner as representative of the executor and residuary legatee of the testator." It is to be observed that the gift there was a trust, not of the capital or anything of that sort, but to apply the "dividends and income" in aid of the funds of the society, and it is obvious that the *corpus* could not have been disposed of in accordance with the terms of the trust in that case.

Now the two leading cases on this subject-matter from this point of view are *Thomson* v. *Shakespear*[7] and *Carne* v. *Long*.[5] In *Thomson* v. *Shakespear*[7] there had been a trust deed whereby certain property was to be held by trustees "to the end and intent that the same premises may for ever go along and be enjoyed with and as appurtenant to Shakspeare's birthplace." Then the settlor by his will gave 2,500*l*. to his trustees and executors to be laid out by them as they should think fit, with the concurrence of the

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trustees of Shakespeare's house already sanctioned by him, "in forming a museum at Shakspeare's house, in Stratford, and for such other purposes as my said trustees in their discretion shall think fit and desirable for the purpose of giving effect to my wishes. I direct, moreover, that, out of the rents of the Langley Priory estate, the sum of 30*l.* half-yearly, namely, on the 24th day of June and on the 24th day of December of each year following my decease be applied to the wages of a keeper or guardian." The Lord Chancellor in giving judgment in that case finds an intention expressed on the face of the will that the museum "should exist *in sæcula sæculorum*"; and he says, "when you come to look at that part in which he charges the estate with 60*l.* a year for a custodian, it is quite clear that was to be perpetual; and if you look to the intention of the testator, to be gathered from the will, then his intention was that this should be laid out upon a building that was to stand and be perpetual in memory of Shakspeare." In the case of *Carne* v. *Long*[9] the words were very strong for shewing the intention to create a perpetuity. That was the case of a public library at Penzance, and rule 29 of the rules governing the institution provided that "The institution shall not be broken up as long as ten members remain; but whenever the number shall be reduced below ten, all donations shall be returned to the donors, or their representatives, who may claim the same; and the remaining books and other articles shall be forthwith sold by public auction, and the proceeds appropriated to the foundation or support of some scientific institution in the town of Penzance, to be determined by a majority of the remaining members." The Lord Chancellor in the course of his judgment says: "If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity."

In support of the validity of the gift, the leading case, which has been frequently recognised as good law, is that of *Cocks* v. *Manners*[10] before Vice-Chancellor Wickens, where there was a gift in the following words: "the residue of my disposable property I leave equally between the following religious institutions," one of those institutions being "the Dominican convent at Carisbrook (payable to the superior for the time being)." It was found that that institution was one consisting of Roman Catholic females living together by mutual agreement in a state of celibacy under a common superior; and it was held that it was not a charity. The Vice-Chancellor in giving judgment says: "the gift to the Dominican convent is not, in my opinion, a gift on a charitable trust. The question remains whether the gift to the Dominican convent, which seems to me not charitable, is void for perpetuity. It is argued that it is a gift in trust for the purposes of a perpetual institution, and, therefore, on a perpetual trust, and *Carne* v. *Long*[9] is relied upon. That case does not, I conceive, decide that a gift to a perpetual institution not charitable is bad—for instance, a gift to a club, or to a limited company; but merely that the gift in question there was a gift which the trustees could only give effect to by holding the property (which seems to have been all real estate) for ever, and applying the income according to the rules. Nothing of that sort is directed here; the gift is ordered to be paid to the superior for the time being; and the superior, when she receives it, will be bound to account for it to the convent—to put it, so to speak, into the common chest; but when there it will be subject to no trust which will prevent the existing members of the convent from spending it as they please. It would, I conceive, be an extreme stretch of the rule against perpetuity to hold that it applies to a gift of this sort," and the Vice-Chancellor held that the gift was good.

Now, there are several Irish cases, three of which I ought to mention, because, in reference to gifts to convents, the question has frequently been considered in the Irish Courts. The first of these cases is *Morrow* v. *M'Conville* [1883],[11] and the passage I wish to refer to is at page 249 of the report. The learned

(11) 11 L. R. Ir. 236.

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Judge refers to the case of *Cocks* v. *Manners*,[10] and distinguishes it from the case before him, and then he says: "Here the testator, in the first place, gives all his property to his wife for life, determinable on her marrying again. After her death he directs his executors to let his property, by which in this place he plainly means the property known as Murray's-Place in Lurgan, and to apply the profit-rent to the three purposes the first of which I am now considering. This, in my opinion, indicates an intention that this property, which consisted of houses built on ground held by him for the residue of a term of 999 years, should be retained *in specie*. The Trust is treated as a continuing one, to be performed by his executors in the first instance, but with power to appoint successors, not in the executorship, which could not be, but in the trusteeship, from time to time, during the term of his lease, showing that he desired the trust to continue during all that period." That makes a distinction between a case of that class and a case like *Cocks* v. *Manners*.[10] Then there is a case of *Wilkinson's Trusts, In re* [1887],[12] where there was a bequest of 1,000*l.* to S., "Superioress of the Convent of Mercy at K., to and for the purposes solely of the said convent, or to such other person as may be superioress of said convent at my" (the testator's) "decease." It was held by the Court of Appeal that, whether it was good or not as a charitable gift, it was valid as a bequest to the person who should be superioress of the convent at the testator's death, "and that it was not the less so by reason of the direction to apply it solely to the purposes of the convent." Lord Ashbourne, L.C., refers to a number of authorities—especially *Cocks* v. *Manners*[10]—and he also refers to a case of *Delany's Estate, In re* [1882],[13] and he holds, on a similar ground to that mentioned by Vice-Chancellor Wickens in *Cocks* v. *Manners*,[10] that the gift was a good gift to this person for the benefit of the convent, and that there was nothing to prevent the disposition of the property. The Lords Justices agree with him upon that, and they fully establish *Cocks* v. *Manners*[10] as a good authority. The last case I refer to is that of *Bradshaw* v. *Jackman* [1887].[14] There there were three or four bequests: 1. A bequest to M., Superioress of the St. Anne's Convent of Mercy, in trust for the community of the said convent. 2. A bequest of bank stock to J., Provincial of the Franciscan missionaries of Merchant's-Quay, in the city of Dublin, or to the provincial of the said missionaries at the time of the testatrix's death, for the offering of Masses for the repose of the soul of the testatrix. 3. Bequest of 100*l.* to the Marist Sisters of the Convent of C. 4. Bequest of the residue of real and personal estate to G., Superioress of the Convent of D., in trust for the support and maintenance of the said D. Convent. It was held that the legacy No. 2 to the provincial of the Franciscan missionaries was a gift to him individually for the offering up of Masses, and as such was valid. It was held "that the community of a convent means the persons at the time members of the convent, and that the legacies Nos. 1, 3, and 4 were valid bequests to the respective legatees as individuals, and therefore did not transgress the rule against perpetuities." There is a long judgment of the Master of the Rolls in that case in which he again deals with *Cocks* v. *Manners*[10] and with *Carne* v. *Long*,[5] and cites again from the decision of Vice-Chancellor Wickens.

Now it seems to me, what I have to do in the case before me is this: first of all I look at the constitution of this association and, apart from the funds which, as I have said, may be construed as charities, I do find upon the face of the rules and regulations an intention that it shall be permanent—that is to say, there are expressions used with reference to rendering it permanent, and shewing that the founder or the framer of the rules hoped that it would be permanent. Precisely the same thing occurs, although it may not be put down in words, in the rules of a club. When a club is established it is intended to continue for a

(12) 19 L. R. Ir. 531.
(13) 9 L. R. Ir. 226.
(14) 21 L. R. Ir. 12.

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long series of years—to be permanent in the fullest sense of the word; so it does not appear to me that that is a sufficient reason for holding that a gift to an institution of that kind is one void for perpetuity. The form of the gift here is to the committee for the time being of the Corps of Commissionaires to aid in the purchase of their barracks. Now it is true enough that "to aid in the purchase of their barracks" rather points to something that is to last for a considerable time. I do not think I need go into the question whether the fund for the creation of the barracks is in fact itself a charitable fund or not. I think there is considerable room for argument, but it does seem to me that a society constituted as this one is, could, if they so pleased and unless the fund for the building of the barracks be a charity, deal with it just as they please. If it is a charity they could not deal with it as they please, but then the gift is perfectly good. If it is not a charity they could deal with it as they please, because there is nothing to prevent all the members joining together subject to certain equities between themselves as to the disposal of the barracks. That, however, I do not go into, and I do not think it necessary to dwell upon that matter.

Then the gift goes on "or in any other way beneficial to that corps." That gives a discretion to the committee for the time being, when they get the money, as I read it, to apply the fund as they shall consider to be beneficial. They may put it into the building fund or into the general funds of the corps, or they may deal with it in any way they please for the benefit of the corps. When once it forms part of the funds of the corps it may be dealt with by the governing body of the corps in any way they may think best for the benefit of the corps.

It appears to me that the real solution of the question is this: If and so far as any of the objects of this institution may be considered to be charitable the gift is good on that ground. If and so far as the objects are not charitable the gift is good, because within the meaning of the authorities I have referred to it does not tend to a perpetuity. I hold, therefore, that the gift is good.

Solicitors—H. J. North; Tyrrell Lewis, Lewis & Broadbent; Soames, Edwards & Jones; Spencer, Chapman & Co., agents for Kinneir & Co., Swindon.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

WRIGHT, J. 1901. May 15. } CRICHTON'S OIL CO., *In re.*

Company — Voluntary Winding-up — Surplus Assets—Arrears of Dividends on Preference Shares—Profit on One Year's Trading—Previously Existing Debit on Profit-and-Loss Account—Declaration of Dividend—Application of Profit.

There is no rule of law that the profit on one year's trading of a company cannot be divided merely because on the profit-and-loss account there is a debit balance in respect of the trading of former years, but it does not follow that such profit is necessarily to be treated as available for dividend.

By the memorandum of association of a company incorporated in 1889 *the capital was divided into preference and ordinary shares, and it was declared that the preference shares should confer on the holders a right to a fixed accumulative preferential dividend of* 5 *per cent. per annum on the capital paid up thereon, "subject to the provisions of the company's articles of association." The articles, amongst other things, provided for the payment of the cumulative preference dividend, and that in the event of winding-up the surplus assets should be distributed between the holders of preference and ordinary shares according to the amount paid up thereon; that the directors should have power to set aside out of the profits of the company or otherwise such sums as they should think proper as a reserve fund to meet contingencies, &c., or for such other purposes as they should in their absolute discretion think conducive to the interests of the*

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CRICHTON'S OIL CO., IN RE.

company; that profits from time to time available for dividends should, subject to the provisions thereinafter contained, be applicable—first, to the payment of the fixed cumulative preferential dividend on the preference shares; and secondly, that the surplus should be applicable to the payment of dividends on the ordinary shares, but that the whole or any part thereof might be carried to reserve or otherwise dealt with; that the company in general meeting might declare a dividend, and that no larger dividend was to be declared than should be recommended by the directors. The whole of the preference and ordinary shares issued were fully paid up. Dividends on the preference shares had been paid up to February, 1896, *but no dividend had since been declared. The balance-sheet made up in March*, 1899, *shewed a debit balance on profit-and-loss account of upwards of* 4,000*l. In July*, 1900, *the company sanctioned an agreement for the sale to a proposed new company of all the vendor company's assets, except any undivided net profits of the business appearing in the balance-sheet for the year ending March* 31, 1900, *which was to be settled and certified by the auditors of the vendor company on the same basis as the previous balance-sheets. On August* 7, 1900, *the auditors certified a balance-sheet that shewed a profit of* 1,675*l. on the trading for the year ending March* 31, 1900. *On the following day the resolution for voluntary winding-up was confirmed. The sale-moneys were insufficient to repay to the shareholders the amount paid up on their shares*:—Held, *that the preference shareholders were not entitled to have the sum of* 1,675*l. applied in payment of the arrears of dividends on their shares; that it was not sufficient for them to shew that the money might have been made available for dividend, but that they ought to have shewn that it had actually been made so available, and that as they had failed to do so the money must be applied in repaying the capital paid up on the preference and ordinary shares.*

Odessa Waterworks Co., *In re* (32 L. J. N.C. 608; W. N. (1897), 166), *discussed.*

Crichton's Oil Co., Lim., was on March 21, 1889, registered under the Companies Acts, 1862 to 1886. By clause 5 of the memorandum of association it was provided that "The capital of the Company is 40,000*l.* divided into 400 preference shares of 10*l.* each and 3,600 ordinary shares of 10*l.* each. The said preference shares shall confer on the holders the right to a fixed accumulative preferential dividend at the rate of 5 per cent. per annum on the capital paid up thereon, subject to the provisions of the Company's articles of association; and any new capital may be issued with any preferential, deferred, or special rights and privileges which may be assigned thereto, by or in accordance with the regulations of the Company for the time being."

By clause 6 of the articles of association it was provided (*a*) that the holders of the preference shares for the time being should "be entitled to a cumulative preferential dividend at the rate of 5*l.* per centum per annum, payable half-yearly, on the 1st September and the 1st March. (*b*) Provided always that in the event of the winding up of the company, the surplus assets shall be distributed between the holders of preference shares and ordinary shares, according to the amount paid up thereon."

By clause 103 (14) the directors were empowered "from time to time to set aside out of the profits of the company, or otherwise, such sums as they think proper as a reserve fund to meet contingencies, or for equalising dividends, or for repairing, improving, and maintaining any of the property of the company, for redeeming debenture stock, and for such other purposes as the directors shall in their absolute discretion think conducive to the interests of the company, and to invest the several sums so set aside upon such investments as they think fit subject to clause 4 hereof" (which forbade the company to purchase its own shares) "and from time to time deal with and vary such investments, and dispose of all or any part thereof for the benefit of the company, and to divide the reserve fund into such special funds as they think fit, with full power to employ the assets for the time being constituting the reserve fund in the business of the company, and that without being obliged to keep the same separate from the other assets of

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the company. But so much only of the reserve fund as represents profits shall be applicable to the payment of dividends."

The other clauses, so far as material, were as follows:

"108. The profits of the company from time to time available for dividends shall, subject to the provisions hereinafter contained, be applicable: First, to the payment of the fixed cumulative preferential dividend on the preference shares in the original capital; secondly, the surplus shall be applicable to the payment of dividends on the other shares in proportion to the capital paid up thereon, but the whole or any part thereof may be carried to reserve or otherwise dealt with as the directors with the sanction of the company in general meeting may from time to time determine."

"110. The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits and may fix the time for payment."

"111. No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend."

"112. No dividend shall be payable except out of the profits arising from the business of the company. . . ."

"113. The directors may from time to time pay such monthly or interim dividends as in their judgment the position of the company justifies. . . ."

"139. If the company shall be wound up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall, subject to clause 6 (*b*), be distributed so that as nearly as may be the losses shall be borne by contributories in proportion to the capital paid up or which ought to have been paid up on the shares in respect of which they are contributories at the commencement of the winding-up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

The whole of the preference shares and 1,804 of the ordinary shares had been issued, and were fully paid up. Dividends on the preference shares had been paid up to February 28, 1896, but no payment had since been made in respect of such shares.

At an extraordinary general meeting of the company held on June 7, 1900, the following resolution was passed, and was subsequently duly confirmed: "That the Board be authorised to realise the whole of the assets of the company on the basis of a payment to each of the shareholders, preference and ordinary, of a sum equal to 7*l.* per share."

A draft agreement between the company and a trustee on behalf of a new company intended to be formed was thereupon prepared, and it provided that the company should sell to the new company all its undertaking and assets "as of the 31st March—1st April, 1900," except (among other things) "any undivided net profits of the business of the vendor company appearing in the balance sheet for the year ending March 31, 1900." The amount of such net profits was not stated, but the draft agreement provided that "The purchasing company shall be entitled to receive and get in and collect the net profits" and other things "excepted as aforesaid out of the sale and shall, as soon as conveniently may be after the balance sheet of the vendor company as at the 31st March 1900 shall have been finally settled and audited on the same basis as the previous balance sheets by Messrs. Monkhouse Goddard & Co., [the auditors of the vendor company] return to the vendor company as representing and in lieu of the said excepted profits such sum as shall appear by such certified and audited balance sheet to be the amount of the aforesaid undivided net profits of the vendor company." The consideration for the sale was to be the sum of 15,428*l.* or such less sum as should "appear by the balance sheet of the vendor company as of the 31st March 1900 when settled and audited as aforesaid to be the net value of the property and assets of the vendor company after deducting therefrom the liabilities of the vendor company and any undivided net profits of the business of the vendor company appearing upon the balance sheet for the year ending the 31st March 1900," but adding thereto the sum of 334*l.* 3*s.* The sale-moneys consequently

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were insufficient to repay to the shareholders the amount paid up on the shares.

On July 23, 1900, the vendor company passed resolutions that the draft agreement should be confirmed, and that the common seal of the company should be affixed thereto, and on the same day the vendor company passed a resolution for voluntary winding-up.

On August 3, 1900, the agreement was executed. A profit-and-loss account and balance-sheet had been made out on March 31, 1899, which shewed a debit balance on profit-and-loss account of 4,346*l.* 3*s.* on that date, and the same had been unanimously adopted at the ordinary general meeting of the vendor company on August 9, 1899. A further profit-and-loss account and balance-sheet were prepared and certified by the auditors on August 7, 1900, from which it appeared that the profit for the year ending March 31, 1900, was 1,675*l.* 6*s.* 11*d.* This amount was shewn on the credit side of the balance-sheet, and was there deducted from the sum of 4,346*l.* 3*s.*, the debit to profit and loss above mentioned.

On August 8, 1900, the resolution for voluntary winding-up was confirmed as a special resolution.

The sale to the new company was completed and a claim was made on behalf of a preference shareholder in the vendor company that the sum of 1,675*l.* 6*s.* 11*d.* should be applied in the payment of a dividend on the preference shares as from February 28, 1896.

This originating summons was taken out by the liquidators in the voluntary winding-up of the vendor company for the determination of the question whether the sum of 1,675*l.* 6*s.* 11*d.*, being the amount of the profit appearing by the books to have been made by the company on its trading for the year ending March 31, 1900, or any and what part of such sum, ought (notwithstanding the previously existing debit to profit and loss) to be distributed in the liquidation as dividend amongst the holders of preference shares, or how otherwise such sum ought to be dealt with. A representation order having been made, the summons was adjourned into Court.

A. R. Kirby, for the liquidators.

Dunham, for the preference shareholders.—The sum of 1,675*l.* 6*s.* 11*d.*, the profit on the trading for the year 1899, was available for dividend on the preference shares under clause 108 of the articles of association, and might have been so applied whilst the company was a going concern, notwithstanding that the capital lost in previous years had not been recouped—*National Bank of Wales, In re; Cory's Case* [1899].[1] This money ought to be dealt with as if the company were a going concern. The whole of the assets were sold to the new company for a sum sufficient to make a return to both classes of shareholders *pari passu*, but this amount of undivided profits was excepted from the sale in order that it might be applied according to the constitution of the company. If the intention had been that the money should be applied not as income, but in making up capital losses in previous years, there would have been no reason for keeping it separate from the other assets.

Under the memorandum and articles of association the preference shareholders are entitled to a cumulative preferential dividend out of profits, and consequently to all arrears of dividend, and the fact that the company is now in liquidation makes no difference in their rights—*Bishop* v. *Smyrna and Cassaba Railway* [1895].[2]

Cassel, for the ordinary shareholders.—Having regard to the memorandum and articles of association of this company, nothing can be distributed as profit applicable for the payment of dividends until there has been a declaration of dividend under article 110, and, inasmuch as no such declaration had been made previous to the winding-up, it is now too late to make it. This case is within the principle of *Odessa Waterworks Co., In re* [1897].[3] There Byrne, J., distinguished *Bishop* v. *Smyrna and Cassaba Railway*,[2] on the ground that in that case the memorandum of association itself conferred the right to the preferential dividend irrespective of the provisions of the articles. In the

(1) 68 L. J. Ch. 634; [1899] 2 Ch. 629.
(2) 64 L. J. Ch. 617; [1895] 2 Ch. 265.
(3) 32 L. J. N.C. 608; W. N. (1897), 166.

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present case the rights conferred on the preference shareholders in the memorandum are made expressly "subject to the provisions of the company's articles of association." According to article 108 the profits "shall, subject to the provisions thereinafter contained, be applicable," first, in paying the cumulative preferential dividend. These words are not imperative like "shall be applied," but confer on the company a discretion to apply the "whole or any part" of the profits in payment of dividends or otherwise. Further, by article 110 the company may declare a dividend, and such a declaration is a condition precedent to payment of such dividend. But even if the company had continued to exist, the amount in question would not necessarily have been distributed in the payment of dividends, for it might have been set aside as a reserve fund under article 103 (14), or applied in making good the previous losses in respect of capital.

Here there is an express provision in article 139 as to the way in which surplus assets are to be dealt with in the winding-up. "Surplus assets" within the meaning of that clause are, having regard to the other articles, any moneys which have not been declared available for dividend whilst the company was a going concern, and such moneys must be distributed among both classes of shareholders proportionately to the amounts paid up on the shares. There was no such article of association either in *Bishop* v. *Smyrna and Cassaba Railway* [2] or in *Bridgewater Navigation Co., In re* [1891],[4] and those cases have no application.

But, apart from the special articles of association of this company, no reported case has decided that where there has been a debit on the profit-and-loss account the profits in any particular year can in the winding-up be distributed and dealt with as profits.

In *National Bank of Wales, In re*,[1] the Court considered the practice was a reprehensible one.

[He also referred to *Buckley on the Companies Acts* (7th ed.), p. 562.]

Dunham, in reply.—*Odessa Waterworks Co., In re*,[3] was a very different case. The dispute in that case was as to profits arising from a sale of the concern in the winding-up, and, moreover, no rights were expressly conferred on the preference shareholders.

WRIGHT, J.—The simple question in this case is whether the sum of 1,675*l.* 6*s.* 11*d.*, which is in effect excepted as the profits of one year's trading from the sale to the new company, is shewn to be a fund belonging to the preference shareholders of the selling company, divisible amongst them in satisfaction of their right to a fixed accumulative preferential dividend. I do not think that there is any rule of law that profit on one year's trading cannot be divided merely because on the profit-and-loss account there is a deficit over on the balance of former years; but it does not follow from that that the amount of the profit of one year is necessarily to be treated as available for dividend. What the preference shareholders here have to make out is that this was a sum available for dividend, and I do not think that is made out. I do not understand that the decision of Mr. Justice Byrne in *Odessa Waterworks Co., In re*,[3] is directed exactly to the same point as that which has been argued in the present case. There the preference shareholders, as I understand it, claimed preference dividends for a number of back years. That is not primarily the question here. Mr. Justice Byrne said that, under the constitution of that company, they could only claim dividends that were declared, and that as there had not been any dividends declared at all there was nothing they could claim. That seems plain. I do not know that he intended to say anything that would help us in this case. Here there has been no declaration of dividend for the year in question, and there has been no recommendation by the directors of a dividend for the year in question. The directors have not brought their minds to the consideration of how much of this sum of 1,675*l.* 6*s.* 11*d.*, if anything, ought to be carried to the reserve fund under article 103, nor has any one on behalf of the company considered in what way the large sum of over 4,000*l.* standing to the

(4) 60 L. J. Ch. 415; [1891] 2 Ch. 317.

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debit of profit-and-loss account ought to dealt with. There must, first of all, be a profit, and secondly, there must be a profit available for dividend before the preference shareholders have a right to come in. Profit is not an automatic thing, nor is a divisible profit an automatic thing. To my mind, it is most improbable that if the company had continued to be a going concern the entire 1,675*l.* 6*s.* 11*d.* would ever have been treated as available for dividend. It is not clear that the directors, in view of the deficit on the profit-and-loss account, ever would have recommended any dividend at all. It is far from clear; and it is impossible now to shew what part of the 1,675*l.* 6*s.* 11*d.* would have been treated as available for dividend, or whether any part of it would have been so treated. I should think it is in the highest degree probable that no part would have been divided. That it might have been divided is, to my mind, not enough; I think it must be shewn not merely that it might have been made available for dividend by certain action of the directors, but that it was actually made available for dividend, and that I think is not proved, and cannot be proved. Therefore, it seems to me, the claim of the preference shareholders fails, and that the amount which has been mentioned is not available for distribution amongst the preference shareholders, but will drop into the ordinary assets and be divided accordingly. All costs ought to come out of the fund.

Solicitors—Ashurst, Morris, Crisp & Co., agents for Stanton, Atkinson & Hudson, Newcastle-upon-Tyne, for liquidator and ordinary shareholders; Geo. Reader & Co., agents for Hoyle, Shipley & Hoyle, Newcastle-upon-Tyne, for preference shareholders.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

[IN THE HOUSE OF LORDS.]

1900. July 26, 30, 31. { PAYTON AND CO. *v.* SNELLING, LAMPARD AND CO.*

Trade Name—Label—Colourable Imitation—Calculated to Deceive—Evidence—Question for the Court.

Where an action is brought to restrain a colourable imitation of the make-up of goods, it must be proved beyond question that the goods are so got up as to be calculated to deceive. No general rule can be laid down, and each case must be judged by its own circumstances.

Whether a customer would be likely to be deceived is not a proper question to put to a witness, for it is for the Court (and not for the witness) to decide, after inspection of the exhibits and paying regard to the evidence, whether a customer would be likely to be deceived by the make-up of goods. It is not sufficient to shew that by a trick or device a retail trader might be able to pass off the goods of one for those of another.

Appeal from a decision of the Court of Appeal (Lindley, M.R., Sir F. H. Jeune, and Romer, L.J.) reversing a decision of Byrne, J.[1] In this House the decision of the Court of Appeal was affirmed and on the same grounds.[2] The questions were purely of fact, and the case is only here reported because it has been thought by some members of the profession that the observations of Lord Macnaghten and Lord Davey may be useful.

The action was brought by the appellants, wholesale dealers in coffee, who had sold their goods for many years under the name of "Royal Coffee." The respondents were in the same trade, and since 1897 had sold their coffee under the name of "Flag Coffee." The appellants, alleging that the canisters in which the respondents' coffee was packed bore labels and colours which were calculated to deceive purchasers into the belief that they were buying the appellants' goods, brought an action for an injunction.

* *Coram*, Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Brampton, and Lord Robertson.

(1) 16 Rep. Pat. Cas. 283.

(2) 17 Rep. Pat. Cas. 48, 628.

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Byrne, J., after hearing witnesses on both sides, treated the matter as "a pure question of fact," and granted the injunction, which was dissolved by the Court of Appeal.

Warmington, Q.C., and *John Cutler, Q.C.* (*Sebastian* with them), for the appellants.

Swinfen Eady, Q.C., *Birrell, Q.C.*, and *Micklem, Q.C.*, for the respondents, were not heard.

LORD MACNAGHTEN.—To my mind this is a very plain case, and there is very little to be said about it. The appellants (who were the plaintiffs) and the defendants were both wholesale dealers in coffee, and the appellants seek to restrain the defendants from passing off their goods as and for the goods of the plaintiffs, and they also seek an injunction to restrain the defendants from selling their goods in tins or canisters so got up as by colourable imitation or otherwise to lead the public to suppose that the coffee contained in those tins is the plaintiffs' coffee.

Now, in the mass of evidence which to a very great extent, in my opinion, is absolutely irrelevant, there are three things which stand out clearly. In the first place, the defendants did not, as it seems to me, pass off or attempt to pass off their goods as the goods of the plaintiffs. I think—and I say so in consequence of some remarks which were made by the learned counsel who addressed us last—the defendants are perfectly honest traders, and I do not see the slightest ground for suspecting them of any intention or design or wish to steal the trade of the plaintiffs.

In the next place, it is perfectly clear that no human being has been deceived. There is not a single instance of any person wishing to buy "Royal Coffee" buying "Flag Coffee" instead through any mistake of any sort. Counsel for the appellants accounted for that by saying, "Oh, we were bound to institute proceedings at the earliest possible moment"; but if persons come to the Court under an apprehension of that sort they are still bound to make out their case. It will not do to say, "We were frightened by what might happen, and therefore you must stop the thing *in limine*."

The third thing which is perfectly clear on the evidence is this: that as regards the plaintiffs' goods, if they have acquired a title and denomination in the market, the only title and denomination which they can have acquired is that of "Royal Coffee"; while as regards the defendants' goods, if they have acquired or should acquire a title in the market, it will be the title of "Flag Coffee."

Now, when a person comes forward to restrain a colourable imitation of this sort in a case like this, and when he cannot prove that the defendants have tried to steal his trade, he has to make out beyond all question that the goods are so got up as to be calculated to deceive. The principle is perfectly clear—no man is entitled to sell his goods as the goods of another person. The difficulty lies in the application, and, when it is a case of colourable imitation, I think it is very desirable to bear in mind what Lord Cranworth said on one occasion—that no general rule can be laid down as to what is a colourable imitation or not; you must deal with each case as it arises, and have regard to the circumstances of the particular case.

Having said that, I really think I have said enough. I know there are differences between the tins of the plaintiffs and the tins of the defendants. There are some minor differences; but the main difference is that one is distinctly labelled "Royal Coffee," and the other is distinctly labelled "Flag Coffee." The minor differences I do not propose to go into. They satisfy me that the defendants had no intention of stealing the plaintiffs' trade. Beyond that I do not think it worth while to refer to them. The main distinction, as I have said, is between "Flag Coffee" and "Royal Coffee." Nobody has been deceived, and I do not think any one will be deceived. Suppose a person goes into a shop with a vague idea of having seen something pretty and attractive at some time or other, if you could trace the history of that impression on his mind back to the very first moment it got there, it may be you would find that it was derived from "Royal Coffee," and not from "Flag Coffee"; but if he chooses to take

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"Flag Coffee" instead of "Royal Coffee," there is no deception on the part of the defendants that I can see at all.

One word with regard to the evidence I should like to say. I think, as I have said before, that a great deal of the evidence is absolutely irrelevant, and I do not myself altogether approve of the way in which the questions were put to the witnesses. They were put in the form of leading questions, and the witnesses were asked whether a person going into a shop as a customer would be likely to be deceived, and they said they thought he would. But that is not a matter for the witness; it is for the Judge. The Judge, looking at the exhibits before him, and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness whatever.

Then there is another remark I should like to make on the evidence. The witnesses were over and over again asked whether, considering the get-up of the "Royal Coffee" and the "Flag Coffee" was somewhat similar, or very similar, it would not enable a dishonest trader to pass off the one for the other, and the witness said, "Oh yes—it could be done very easily; he could wrap it up in paper and put his hand over it." Now, in the first place, I do not see why these wholesale traders should accuse retail traders of a fraud of that sort, or why one retail trader should impute to other retail traders fraud of that kind. And for fraud of that kind the defendants are not responsible. I think the whole of that evidence may be put on one side, because we know what would happen if a man came into a shop and asked for "Royal Coffee" and the tradesman had no "Royal Coffee" upon his shelf; he would not take down "Flag Coffee" and wrap it up in paper, passing his hand over it so as to conceal that he did so. What he would do would be to say, "I have not got 'Royal Coffee,' but I have some coffee quite as good; will you take 'Flag Coffee' at just the same price, or a very little dearer? It is quite as good or perhaps a little better." In ninety-nine cases out of a hundred the customer would take it. There is no deception there.

I do not think I need go through what has been put forward as evidence. I entirely agree with the judgments in the Court of Appeal. I move that this appeal be dismissed with costs.

LORD DAVEY.—I so entirely agree with what my noble and learned friend has said as to the judgments in the Court of Appeal that I merely wish to point out the position in which this case comes before us.

For many years the defendants have used three colours—red, blue, and green—with paper labels for a particular kind of French coffee which they call their "Le May's Coffee"; they have used red, blue, and green labels for the purpose of wrapping up their goods in them. The plaintiffs have the same range of colours, but they are rather differently arranged: I think the defendants' first is green, and the plaintiffs' red. So far as the colours are concerned there cannot be the slightest ground for saying that the defendants have in any way imitated the range of colours of the plaintiffs. It is unnecessary to say more, because there is not, in my opinion, a scintilla of evidence to be found in this case of anything like intentional or conscious deception on the part of the defendants.

Now, in order to see the sort of case that is put forward, I want to look for one moment at the evidonce by which this case of "calculated to deceive" is supported. I think it will be found, if examined closely, that it all turns upon the colours. For instance, I take a witness whose name is Boraston. He is asked, "Do you think if they had been accustomed to fetch coffee in blue tins without asking for 'Royal' coffee, that a dishonest salesman could give them 'Flag' coffee when they thought they would have got the 'Royal' coffee"? The answer is, "Yes, I do; and in the case of a child or a servant very probably, if the mistress discovered it when they got it home, they would not trouble to take it back again."

Now I take the witness Poole. In the course of his examination-in-chief he is asked by the learned Judge, "That would apply, whatever the pattern was, so long as it was the red and white tin"? He says, "I do not think the public would

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stop long enough to look at the window—as long as it was red and white they would go in and say, 'I want another tin.'" Then he is asked, "That applies, then, whatever the pattern of it was, as long as it was red and white"? His answer is, "Red and white, and the design." "(*Q.*) And so with the blue. If they got the blue they would look at it and see it was blue and white? (*A.*) Yes, my Lord. (*Q.*) What you have been telling us would apply to any pattern which was upon it as long as they took the general colours? (*A.*) The colours and the design and the lettering. (*Q.*) I thought you told me just now that they would not notice it as long as it was red and white? (*A.*) Red and white. (*Q.*) The particular pattern or device they would not notice? (*A.*) They would not notice them." And then at the end of this gentleman's cross-examination, he is asked the question to which Lord Brampton drew attention: Suppose "a person came into your shop and asked for the 'Royal,' he would not then be satisfied with the 'Flag'? (*A.*) If he had had the 'Royal' before, and if I happened to reach the 'Flag' down and then wrapped it up, he would take it, and just notice the colour and go away."

That is a sample, and I think not an unfair sample, of the kind of evidence by which in this case the apprehended deception or passing off of goods is supported. I agree entirely with my noble and learned friend, and with the learned Judges in the Court below, that it is utterly insufficient to make out any such case.

LORD JAMES OF HEREFORD, LORD BRAMPTON, and LORD ROBERTSON concurred.

Appeal dismissed.

Solicitors—Seymour Salaman, Townroe & Co., for appellants; E. Flux & Leadbitter, for respondents.

[*Reported by J. Eyre Thompson, Esq., Barrister-at-Law.*

JOYCE, J.
1901.
Feb. 20. April 17, 18. May 23.

DU BOCHET, *In re*; MANSELL *v.* ALLEN.

Will—Construction—Class Gift to Children—Illegitimate Children Alive at Date of Will—Reputation—Surrounding Circumstances—Extrinsic Evidence—Illegitimate Child Born after Date of Will—Reputed Child—Exclusion.

Under a class gift to the children of the testatrix's nephew A, and of her nieces B and C, where A's children, although believed by the testatrix to be legitimate, are in fact illegitimate, but evidence of surrounding circumstances is given shewing a strong probability of the testatrix's intention to include such children in the gift, then such of the illegitimate children as have, at the date of the will, acquired the reputation of being A's children are entitled to take along with the legitimate children of B and C.

Holt *v.* Sindrey (38 L. J. Ch. 126; L. R. 7 Eq. 170) *and* Hill *v.* Crook (42 L. J. Ch. 702; L. R. 6 H.L. 265) *followed.*

An illegitimate child of A born after the date of the will, and about the fact of whose paternity there is no question or dispute, is not entitled to share under the gift, notwithstanding the fact that such child also has acquired the reputation of being A's child long before the death of the testatrix, and has always, equally with each of A's other illegitimate children who do take, been believed by the testatrix and her family generally to be the child of A born in lawful wedlock.

Bolton, *In re*; Brown *v.* Bolton 55 L. J. Ch. 398; 31 Ch. D. 542), *adopted and applied.* Occleston *v.* Fullalove (43 L. J. Ch. 297; L. R. 9 Ch. 147); *and* Goodwin's Trust, *In re* (43 L. J. Ch. 258; L. R. 17 Eq. 345), *not followed.*

Adjourned summons.

By her will dated July 17, 1876, Julia Elizabeth Du Bochet directed that her trustees should invest three fifths of her residuary estate and should hold the same "in trust equally for all such of the children (being daughters) of my

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nephew Richard Du Bochet, my niece, Alice Allen, wife of Josiah Allen, of Ripley, Derbyshire, and my niece Julia Hall, wife of George Hall, as shall live to attain the age of twenty-one years or marry under that age, and each child shall be paid her share on attaining that age, or marrying under it." And the testatrix empowered her trustees to apply towards the maintenance, education, or other benefit of each child, being under age and unmarried, the income arising from her presumptive share for the time being.

The testatrix died on July 2, 1883, and her will was duly proved by the executors and trustees named in the will, of whom the plaintiff was the survivor.

At the time of the testatrix's death there were living three children of Richard Du Bochet — namely, Gertrude, born October 11, 1873, Alice Emma, born March 4, 1875, and Jessie, born after the date of the will, on April 8, 1879; two children of Alice Allen—namely, Alice Mary and Charlotte Maud, aged fifteen and eleven respectively; and two children of Julia Hall—namely, Charlotte Madeline (wife of Justin Ferdinand Landguist) and Jessie Annie Sophia, aged twenty-two and twenty respectively, the former having attained the age of twenty-one in August, 1882.

In January, 1900, the plaintiff was arranging for the final distribution of the trust fund, and then for the first time discovered that the before-mentioned children of Richard Du Bochet had not been born in wedlock, and that their father had only married their mother on February 12, 1890.

The three-fifths share of residue amounted to 1,285*l.* 17*s.* 8*d.*

In the circumstances, the plaintiff took out the present summons against Charlotte Maud Allen and Gertrude Du Bochet for the determination of the question whether the defendant Gertrude Du Bochet, or any other daughters of Richard Du Bochet (whether already born or to be born in future) were entitled to share under the above-mentioned gift of residue, or whether the daughters of Alice Allen and Julia Hall, living at the testatrix's death, and having attained the age of twenty-one or being married, were alone entitled under such gift.

Evidence was filed and read on behalf of the three children of Richard Du Bochet to shew that the testatrix gave them presents and always believed that her nephew Richard Du Bochet was lawfully married, and his children born in wedlock, and letters to him from the testatrix, all subsequent to the date of the will, were exhibited and read, in which she constantly alluded to his "wife" and "little girls" or "little ones," and in one of which, dated March 16, 1877, she said, referring to the above-mentioned will, "my will is made, and your girls remembered in it. God bless them and their parents." On the occasion of the birth of the third daughter, Jessie, Richard Du Bochet's sister wrote a letter to him in which she referred to his "good little wife and very dear little children," and to the infant as Alice's "tiny sister." The testatrix also in her letters subsequent to Jessie's birth alluded to "the poor children" and "the little ones," and at Christmas, 1880, she wrote sending "a kiss to the baby"—that is, Jessie—"and greetings to all."

Marcy, for the plaintiff, stated the case.

Badcock, *K.C.*, and *E. Ford*, for the children of Richard Du Bochet.—First, with regard to the two elder children who were born before the date of the will, evidence is admissible to shew that the testatrix uses the word "children" in a secondary sense. Extrinsic evidence is admitted if it can in any way be made ancillary to the right interpretation of a testator's words; for the words of a testator tacitly refer to the circumstances by which he is surrounded—*Wigram on Extrinsic Evidence* (2nd ed.), Props. III. and V. (par. 76). In the present case the letters and other evidence shew clearly that the testatrix believed these children to be the legitimate children of her nephew, and that she knew these children well and was fond of them, and it is impossible to escape the conclusion that it was these very children who were the objects of her bounty. Even letters written after the date of the will are

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admissible—*Vaughan, In re; Scott* v. *British and Foreign Schools Society* [1901].[1] Where the intention is clear the Court must give effect to it without insisting upon any technical interpretation of words. Recent cases shew that the Courts are not inclined to make any presumption in disfavour of illegitimate children—*Holt* v. *Sindrey* [1868],[2] *Jodrell, In re; Jodrell* v. *Seale* [1890],[3] *Haseldine, In re; Grange* v. *Sturdy* [1886],[4] *Deakin, In re; Starkey* v. *Eyres* [1894],[5] and *Jeans, In re; Upton* v. *Jeans* [1895].[6] *Dorin* v. *Dorin* [1875][7] is distinguishable, because, looking at this will in the light of the surrounding circumstances, there would be repugnancy and inconsistency in reading "children" in the strict primary sense. Secondly, with regard to the third child born after the date of the will, she also is entitled to share. It is doubtful whether the rule against provisions for illegitimate children ought to be applied to wills at all—*Wilkinson* v. *Adam* [1813][8]; and certainly it is the date of the death and not of the will which is to be regarded—*Occleston* v. *Fullalove* [1874].[9] In the present case one of the class of children was over twenty-one at the testatrix's death, so that the class was closed and the will could not operate in favour of any after-born children whether legitimate or illegitimate.

Ashton Cross, for the defendant Charlotte Maud Allen.—This is an attempt on the part of Richard Du Bochet's children to bring in evidence of the testator's intention under the guise of bringing in evidence of the surrounding circumstances. That is a very different thing from making a dictionary of the surrounding circumstances. Even although Richard Du Bochet at the date of the will had only illegitimate children, and although at the testatrix's death there was no possibility of any other children, yet these illegitimate children cannot take—*Dorin* v. *Dorin*.[7] *Hill* v. *Crook* [1871][10] lays down that there are only two classes of cases where the *prima facie* interpretation is departed from—namely, where it is impossible from the position of the parties that they can have legitimate children, and where the class has been defined by the testator's own dictionary, as in *Jodrell, In re*.[3] In *Dorin* v. *Dorin*[7] Lord Cairns refers to and confirms *Hill* v. *Crook*.[10] The first class has no application to this case, nor has the testator made his own dictionary, and this extrinsic evidence to shew that these were the persons whom the testatrix intended to benefit is not admissible.

Badcock, K.C., replied.

Cur. adv. vult.

JOYCE, J.—In this case the testatrix, by her will made in the month of July, 1876, bequeathed her residuary estate in trust equally for all such of the children (being daughters) of her nephew Richard du Bochet, her niece Alice, wife of Josiah Allen, and her niece Julia, wife of George Hall, as should live to attain the age of twenty-one years, or marry under that age, each child to be paid his or her share on attaining that age or marrying under it; and there was a provision for the maintenance of each child out of the income of her presumptive share. The testatrix died on July 2, 1883, before which date a daughter of her niece Alice Hall had attained the age of twenty-one years, so that the number of the class was then fixed, so far, at least, as to be incapable of increase after the death of the testatrix—*Hawkins on Wills*, pp. 75, 76. Richard du Bochet, the nephew, was then, as he had been for many years previously, living with a lady known as Mrs. Du Bochet, reputed and believed by the testatrix and the rest of the family to be his lawful wife; and there was issue of this union three daughters—namely, Gertrude and Alice, both born before the date of the will, and Jessie, born in April, 1879, nearly three years afterwards.

Recently the time arrived to make a

(1) 17 Times L. R. 278.
(2) 38 L. J. Ch. 126; L. R. 7 Eq. 170.
(3) 59 L. J. Ch. 538; 61 ib. 70; 44 Ch. D. 590; [1891] A.C. 304.
(4) 31 Ch. D. 511.
(5) 63 L. J. Ch. 779; [1894] 3 Ch. 565.
(6) 72 L. T. 835.
(7) 45 L. J. Ch. 652; L. R. 7 H.L. 568.
(8) 1 V. & B. 422.
(9) 43 L. J. Ch. 297; L. R. 9 Ch. 147.
(10) 40 L. J. Ch. 216; 42 ib. 702; 46 ib. 119; L. R. 6 Ch. 311; 6 H.L. 265; 3 Ch. D. 773.

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final distribution of the estate. Then, to the surprise of everybody (except of course Richard and Mrs. Du Bochet themselves) it was elicited, in answer to enquiries made by the trustees for the usual formal evidence of the title of the claimants, that Richard Du Bochet had not been in fact married to his reputed wife until the year 1890, although upon the evidence it is clear that the testatrix had always regarded them as lawfully married. She spoke of and treated Mrs. Du Bochet as her nephew's wife, and her three daughters as their children—that is to say, legitimate children—for there was no suspicion of illegitimacy. Upon the facts properly admissible in evidence and proved, I do not, nor, as I believe, does any one else, entertain the smallest doubt that the testatrix died in the full belief that these three girls were included—as children being daughters of Richard Du Bochet—in the class among whom she had directed her residuary estate to be divided. It is now contended that they are not so included and that none of them takes a share.

In *Holt* v. *Sindrey*[8] "A testator bequeathed an annuity to trustees, upon trust during the life of his 'daughter M., the wife of J. L,' for her life for her separate use; and after her death, for 'all and every the child and children of his said daughter M. L, begotten or to be begotten.' The testator was not aware when he made his will that his daughter M. L. was not the wife of J. L.; and that four children then borne by her to J. L. were illegitimate. The testator had always treated his said daughter and J. L. and their children as if the parents had been married and their children lawfully begotten. After the date of the testator's will M. L. bore three other children to J. L, which also were illegitimate. A sum of 703*l.* 13*s.* 1*d.* Bank 3*l.* per cent. annuities had been appropriated to answer the bequest to M. L. and her children. M. L. died without having had any other than the aforesaid seven children:—*Held*, that the four children born before the date of the will were, although illegitimate, sufficiently described in it as legatees of, and therefore entitled to, the fund in Court." I have read the headnote from the report of the case in the *Law Journal Reports*, for the headnote to the report of the case in the *Law Reports* is imperfect and erroneous, as pointed out by Lord Selborne when delivering his judgment in *Occleston* v. *Fullalove*.[9] As appears from the report in the *Law Journal*, Mr. Hinde Palmer admitted that the three children born after the date of the will could not claim any part of the fund. This decision is an undoubted authority. It has never been overruled, nor, so far as I am aware, questioned, and in numerous cases it has been implicitly if not expressly recognised. *Hill* v. *Crook*[10] is reported in the Court of Appeal (*sub nomine Crook* v. *Hill*[10]), and also in the House of Lords. I think that the headnote in the *Law Reports* is hardly accurate in either report. With regard to the headnote to the report in the House of Lords, it is, I think, not only inaccurate, but misleading. The facts were as follows: A testator gave a legacy to his "son in law J. C," and gave leaseholds to trustees, upon trust during such part of the testator's term and interest therein as his "daughter Mary, the wife of the said J. C," should happen to live, to pay the rents to her for her separate use "independently of her present or any after taken husband"; and after her decease he directed that the premises should go, remain, and be upon such trusts for such one or more of the children of his said daughter Mary Crook in such manner as his daughter Mary Crook should by will appoint; and in default of appointment as in the will mentioned. The testator died on March 22, 1859. The marriage between John Crook and Mary Crook, which had taken place with the testator's sanction in 1854, was, to the knowledge of the testator, void, John Crook having been the husband of Mary Crook's deceased sister. They had two children born in the testator's lifetime who were recognised by the testator as his grandchildren. At the date of the will Mary Crook was *enceinte* of a third child, born after the testator's death and named Robert Crook, and subsequently she had another—that is, a fourth child. Mary Crook died in 1868, having by will exercised her

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power of appointment in favour of such of her four children as being sons should attain twenty-one, or being daughters should attain that age or marry. The two eldest children of Mary Crook filed a bill against the trustees and executors, making their brother Robert Crook also a defendant, praying to have it declared that the plaintiffs and—if the Court should be of such opinion—the defendant Robert Crook were intended by the testator's will to take as children of his daughter Mary Crook. It was not suggested that the fourth child had any interest. The executors demurred, and the demurrer was allowed by Vice-Chancellor Stuart. The plaintiffs appealed. The Lords Justices reversed his Honour's decision. The case then went to the House of Lords, when the decision of the Lords Justices was affirmed. The gift there in question was not (as I understand the case) that set out between inverted commas in the headnote in the *Law Reports*, 6 House of Lords, but the one which preceded it, and is not set out; and the decision was not that there was a sufficient designation of the children of Mary as the intended objects of the testator's bounty, but that there was such a designation of the two children of Mary, who were born before the date of the will of the original testator. Lord Cairns in concluding his judgment says distinctly, "I do not go over what has been said . . . . as to the impossibility of providing for future illegitimate children; that is out of the question here. The question here is, whether these children who have filed this bill, and who were born before this will was made, can take under this will, and in my opinion they can." And Lord Justice Mellish at the end of his judgment in the Court of Appeal said: "I consider that we are bound to say, according to the principle laid down in the authorities, that the two children who were born before the date of the will are entitled to take under the gift. We are not called upon to decide whether the third child, who was *en ventre sa mère* at the date of the will, and at the testator's death, is entitled to participate." The third child was ultimately held entitled to participate, as appears by the report of the case upon further consideration before Vice-Chancellor Hall, in 1876. In the report of *Hill* v. *Crook*[10] Lord Justice James says: "The question, then, resolves itself into this: whether, having regard to the language of this will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed or better advised, but taking into consideration the whole of the will and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions, though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include, or not to exclude, the children in question, as that a contrary intention cannot be supposed?" Applying that test to the present case, I hold upon the facts proved and appearing by admissible evidence (and in my opinion no rational person can doubt) that the testatrix when she made her will intended the two girls then in existence—whom she knew and regarded with affection—to be included in the class among whom her residuary estate was to be divided, subject to their attaining the age of twenty-one years or marrying. In other words, there is so strong a probability of it being the intention of the testatrix to use in her will the words "children being daughters of" her nephew Richard Du Bochet as including the two children Gertrude and Alice Du Bochet that a contrary intention cannot be supposed. I am of opinion, therefore, that at all events the children Gertrude and Alice must be treated and share as daughters of Richard Du Bochet in the distribution of the residuary estate of the testatrix under this will, notwithstanding that they take as members of a class with the legitimate children of other persons.

But with respect to the youngest child Jessie, who, though born in the lifetime of the testatrix and fully recognised by her, was not in existence at the date of the will, there is a serious difficulty, she not having been a reputed child of Richard Du Bochet at the date of the

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will. *Hill* v. *Crook*,[10] as I have shewn, is no authority for admitting her to share. In *Occleston* v. *Fullalove*[9] a testator made a bequest to his reputed children C. and E. and all other children whom he might have or be reputed to have by M. L. (his deceased wife's sister) then born or thereafter to be born. A third child was born in the testator's lifetime, but after the date of the will. It was held by Lord Justice James and Lord Justice Mellish, reversing the decision of Vice-Chancellor Wickens (*dissentiente* Lord Selborne), that this third child was entitled to share. In *Goodwin's Trust, In re* [1874],[11] Sir George Jessel says, "The principle of the decision in *Occleston* v. *Fullalove*,[9] as I understand it, is this, that a gift by a testator or testatrix to one of his or her children by a particular person is perfectly good if the child has acquired the reputation of being such child as described in the will before the death of the testator or testatrix." In *Bolton, In re; Brown* v. *Bolton* [1886],[12] the appellant, who was the testator's only illegitimate child, was *en ventre sa mère* at the time of the testator's death, which occurred eighteen months after the date of his will by which he gave his residuary estate after the death or remarriage of his reputed wife to all and every his "child and children," and it was held by the Court of Appeal, affirming the decision of Mr. Justice Kay, that the appellant could not take. In that case Lord Justice Cotton says: "*Occleston* v. *Fullalove*[9] was much relied on, but in my opinion that case does not cover this, and leaves untouched the rule that there cannot be a valid gift to a future illegitimate child described only by reference to paternity. In that case the gift was to two reputed children whom the testator named, and all other the children which he might have or be reputed to have by Margaret Lewis, then born or thereafter to be born. The Court thought that a description sufficient to include an illegitimate child of which Margaret Lewis was *enceinte* when the will was made. It was urged on behalf of the appellant that the present is the same case, for that, under the circumstances, the testator must by 'children' have meant reputed children. But you cannot treat 'child' as denoting a man's reputed child, unless a particular child is referred to. To ascertain whether this child is the testator's child we should have to enquire into circumstances which the law does not permit to be enquired into. The argument really comes to this, that the testator's description of the woman as his wife carries with it the same consequences as to children born during the cohabitation as if there had been a valid marriage. *Hill* v. *Crook*[10] is quite different from the present case, and I am unable to come to a conclusion in favour of the appellant." He then proceeds to record his dissent from the view expressed by Sir George Jessel in *Goodwin's Trust, In re*.[11] Moreover, in *Occleston* v. *Fullalove*[9] Lord Justice James points out the great practical difference between a gift to the future illegitimate children of a male and a gift to the future illegitimate children of a female, as in *Hastie's Trust, In re* [1887].[13] I should have been glad to have held the gift in the present case to have been equivalent to a gift to all the children being daughters which my nephew Richard Du Bochet may be reputed to have by his reputed wife. But after much consideration, and with great regret, I do not in the face of the decision of Mr. Justice Kay and the three Lords Justices in *Bolton, In re*,[12] affirming Mr. Justice Kay, see my way to admitting the daughter Jessie, born and begotten after the date of the will, to any share under the residuary gift.

Solicitors—Tucker, Lake & Lyon, agents for Gem, Docker & Tarleton, Birmingham, for plaintiff and children of Richard Du Bochet; Eley & Winch, for defendant C. M. Allen.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

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(11) 43 L. J. Ch. 258; L. R. 17 Eq. 345.
(12) 55 L. J. Ch. 398; 31 Ch. D. 542.
(13) 56 L. J. Ch. 792; 35 Ch. D. 728.

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KEKEWICH, J.
1901.
June 5, 13.

CARY AND LOTT'S CONTRACT, *In re.*

Vendor and Purchaser—Title—Incumbrance—Executors—Conveyance to Testamentary Devisees—Charge for Payment of Moneys which Executors are "liable to pay"—Unknown Liabilities—Statutory Advertisements—Law of Property Amendment Act, 1859 (22 & 23 *Vict. c.* 35), *s.* 29—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, 2, *and* 3.

Where executors have issued statutory advertisements for creditors pursuant to the Law of Property Amendment Act, 1859, *and have subsequently conveyed real estate to the testamentary devisees of their testator, with a declaration, in accordance with section* 3 *of the Land Transfer Act*, 1897, *that it was "subject to a charge for the payment of any money which the personal representatives of the testator are liable to pay," such a charge will not render the land liable, in the hands of a purchaser from the devisees, for claims against the testator's estate which were unknown to the executors at the date when they so conveyed.*

There is nothing in the Land Transfer Act, 1897, *which creates a right in creditors to follow real assets in the hands of a purchaser.*

Adjourned summons under the Vendor and Purchaser Act, 1874.

The property in question, which was the subject of a contract for purchase, formed part of the estate of Mr. R. S. S. Cary, at Torquay. By his will and a codicil made in 1878, after bequeathing certain legacies, R. S. S. Cary devised his freehold estate to the use of his brother, L. F. B. Cary, and A. H. Dymond in fee (subject to the life estate of his wife in the mansion-house) upon certain trusts, and gave them a power of sale and mortgage; and he bequeathed his personal estate to his executors, C. J. Stonor and A. H. Dymond.

The testator died in 1898, and the executors issued the usual statutory advertisements in accordance with the provisions of the Law of Property Amendment Act, 1859, s. 29.

By a conveyance dated September 29, 1899, the executors conveyed to the testamentary devisees the property devised to them by the will. This conveyance recited that the executors had issued the usual statutory notices requiring creditors to send in their claims against the estate before January 31, 1899, and that the executors had paid all expenses, duties, and debts which had come to their knowledge. The conveyance also contained a declaration that the whole of the hereditaments thereby expressed to be granted "were so granted subject to a charge for the payment of any money which the personal representatives of the testator are liable to pay," with a proviso that nothing therein contained "shall alter or affect the order in which the testator's assets would have been applicable for the payment of the last-montioned moneys if these presents had not been executed."

On February 28, 1901, Jessie Mary Ellen Lott entered into a contract with L. F. B. Cary and A. H. Dymond for the purchase, free from incumbrance, of the freehold reversion of No. 36 Union Street, Torquay, which formed part of the testator's property.

An abstract of title was delivered, and by the eighth requisition the purchaser referred to the declaration in the conveyance of September 29, 1899, as above set out, and required as follows: "The vendors must give to the purchaser proper indemnities against all the outstanding debts and liabilities of the testator, and all moneys which, at the date of the said conveyance, the said representatives were liable to pay, and which moneys still remain unpaid and unsatisfied."

To this the vendors replied: "The abstract discloses all the liabilities which were known to the executors at the time of executing the conveyance to the testamentary trustees, and shews that . . . they have all been discharged. The vendors have not since the date of the said conveyance to them received notice or otherwise acquired knowledge of any other incumbrances or liabilities affecting the scheduled hereditaments. They therefore decline to give any indemnity."

The purchaser then delivered the following observation:

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CARY AND LOTT'S CONTRACT, IN RE.

"Having regard to the form of the charge mentioned in the requisition, the purchaser insists on the vendors giving an indemnity in respect of claims against the testator's estate of which the executors had no notice at the date of the conveyance of September 29, 1899."

On April 27, 1901, the vendors issued an originating summons under the Vendor and Purchaser Act, asking for a declaration that the eighth requisition and further requisition of the purchaser had been sufficiently answered, and that the purchaser was not entitled to any indemnity in respect of claims against the estate of R. S. S. Cary, of which the executors had no notice at the date of the conveyance.

Warrington, K.C., A. J. Mackey, and *M. Romer*, for the summons.—The proper statutory advertisements having been issued by the executors, under the Law of Property Amendment Act, 1859, there is no liability upon this property in respect of debts of which the executors had no notice. The conveyance of September 29, 1899, gives a statutory charge, but the question is, what is the meaning of the words of the Land Transfer Act, 1897, which declare what the charge is to be? [1]

Under section 2, sub-section 3, the real estate of a testator is to be administered in the same manner as personal estate, and section 3, sub-section 1, states the extent of the charge which is to be imposed on the real estate—namely, "for any money which the personal representatives are liable to pay." Before the Land Transfer Act it was well settled that if a devisee of real estate sold to a purchaser, such purchaser would take free from the debts of the ancestor, or testator—*Spackman* v. *Timbrell* [1837],[2] *Richardson* v. *Horton* [1843],[3] *Pimm* v. *Insall* [1849],[4] and *Dilkes* v. *Broadmead* [1860].[5] The same law applies to chattels real. It is now said that the Land Transfer Act, 1897, has altered the existing law; if so, the result would be extraordinary, as it would defeat the object for which it was passed—namely, to facilitate the transfer of land. Such a change was never contemplated by the Act. The charge in section 3 means such moneys as the executors are liable to pay having regard to the provisions of the Law of Property Amendment Act, 1859. All that the executors are "liable to pay" are the

(1) The sections of the Land Transfer Act, 1897, bearing upon the question, are as follows:

Section 1, sub-section 1: "Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him."

Section 2, sub-section 1: "Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate."

Sub-section 2: "All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, . . . and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him. . ."

Sub-section 3: "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate. . ."

Section 3, sub-section 1: "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance."

(2) 6 L. J. Ch. 147; 8 Sim. 253.
(3) 13 L. J. Ch. 186; 7 Beav. 112.
(4) 19 L. J. Ch. 1; 1 Mac. & G. 449.
(5) 29 L. J. Ch. 310; 2 De G. F. & J. 566.

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claims of which they had notice at the date of the conveyance.

T. H. Carson, K.C., and *Greenland*, for the purchaser.—The purchaser has bought free from incumbrances, and is entitled to the indemnity claimed. The words of charge in section 3 of the Land Transfer Act, 1897, mean "all moneys which the executors were liable to pay at the date of the conveyance, whether known or unknown." The rights of creditors as against a purchaser from a devisee under the old law are stated in *Price* v. *Price* [1887].[6] It was the intention of the Land Transfer Act, 1897, that the creditors should have a continuous security. In the case of personal estate the executor remains liable for known liabilities under the old Act, and now the real estate may be liable for unknown liabilities under such a charge as this, even though the executors may not be liable.

Warrington, K.C., in reply.—The liability of the executors ceases upon the execution of the conveyance by virtue of section 3 of the Land Transfer Act. The object of that Act was to facilitate the machinery of the transfer of land, not to give further rights to creditors.

Cur. adv. vult.

June 13.—KEKEWICH, J., delivered the following written judgment: The testator devised the freeholds in question to certain persons upon certain trusts which are immaterial. They can be conveniently referred to as the trustees. After the expiration of a year from the death of the testator, his executors, by deed of September 29, 1899, conveyed the freeholds to the trustees "subject to a charge for the payment of any money which the personal representatives of the testator are liable to pay."

The trustees have sold the freeholds, or a part of them, and the purchaser has made a requisition that the vendors must give him "proper indemnities against all the outstanding debts and liabilities of the testator, and all moneys which, at the date of the said conveyance, the said representatives were liable to pay, and which moneys still remain unpaid or unsatisfied." I have quoted the requisition in its own words, but it does not well express the objection to the title which was intended to be raised thereby, and on which the Court is now asked to adjudicate. It is admitted that the estate has been fully and properly administered, and that there remains unpaid no debt of the testator of which the executors have had notice. The purchaser's objection is that there may be other debts of which the executors have not had notice, and that by reason of the charge contained in the deed of conveyance, these debts, if any, are an incumbrance on the freeholds. That the purchaser is willing to accept an indemnity is of no moment, the real objection being that there is, or may be, a charge on the property, and that this is a blot on the title. It is beyond doubt that such an objection, if made with regard to freeholds devised by the will of a testator dying before January 1, 1898 (the day when the Land Transfer Act, 1897, came into operation), would have been untenable, and I approach the consideration of that Act with a strong and, I believe, thoroughly sound opinion that I ought not to regard it as altering a settled rule of law, and disturbing the recognised practice of conveyancers, unless convinced that this alteration is clearly expressed, or is so necessarily implied in the provisions of the Act, that it is impossible to give reasonable effect to those provisions on any other footing.

The neat question then is whether, if it be hereafter discovered that there are debts unpaid, of which the personal representatives of the testator have no notice, such debts will be money charged on the freeholds. I have thus stated the question because, although the deed says generally "any money which the personal representatives are liable to pay," yet, it being common ground, as above mentioned, that there is nothing now remaining unpaid to the knowledge of the executors, that is really what I have to decide. Study of the Act for the purpose of determining this particular question has disclosed numerous and great difficulties of construction, and of the application to the new statutory provisions of old rules; and having regard to these difficulties, and to the danger of indicating

(6) 56 L. J. Ch. 530; 35 Ch. D. 297.

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an answer to any question which has not been argued, and the equal danger of suggesting questions which, after all, may not require solution, I think it better to decide the point actually before me on as simple grounds as circumstances permit, and with a statement of as few reasons as are compatible with judicial decision.

The Act undoubtedly introduces a new element into the administration of estates in making real property assets for the payment of debts. That this is so is clear from sub-section 3 of section 2. The same sub-section says that "real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate." There is nothing here making the executors liable for moneys, for which they would not otherwise have been liable, but only the assets available for satisfaction of the liabilities are increased, and it is reasonable to conclude that if, apart from this increase of assets, the executors are under no liability, such increase was not intended to create one. Before considering whether, under such circumstances as we have here, there is any liability on the part of the executors, it is well to notice section 3, because it justifies the language of the conveyance making the freeholds subject to a charge "for any money which the personal representatives are liable to pay." Those are the words of the Act, and they have been taken from the Act and put into the conveyance. One therefore looks at the Act for an indication of what was intended to be charged, but observe that the Act only permits the conveyance to be made subject to a charge, leaving it optional to the executors whether they will require that or not, and, in consequence, it is the conveyance and not the Act which creates the charge, if any there be. I do not think section 3 in any way helps one to determine what the charge is. Prior to the Law of Property Amendment Act, 1859, an executor remained liable to creditors notwithstanding all precautions on the executors' part, and want of notice of claims, and indeed absolute safety could only be obtained under an administration judgment. That Act, however, provided (section 29) that where an executor has given notices such as would have been directed by the Court in an administration suit, then, at the expiration of the time named in such notices, he shall be at liberty to distribute the assets, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor shall not have had notice at the time of the distribution of such assets, or part thereof, as the case may be. In this case the executor has given notices of the character contemplated by the Act, and they are, in my opinion, such as would have been given by the Court in an administration suit. Therefore, so far as the personal estate is concerned, the executors remain under no liability if they distribute the assets on the footing of there being no claims of which they have received notice. Applying this as, having regard to section 2, sub-section 3 of the Land Transfer Act, 1897, I ought to apply it to real estate, the exemption from liability is complete also as regards that. But it remains to be observed that section 29 just quoted concludes with a proviso that nothing in that Act contained "shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively." If the result of the two Acts together is, as regards real estate, merely to exempt the executor from liability, but to leave the real estate charged, the purchaser's objection still stands good; but, as already stated, real assets could not have been followed in the hand of a purchaser before the Land Transfer Act, 1897, and there is nothing in that Act to create a right in creditors to follow them. The proviso to section 29 of the Law of Property Amendment Act, 1859, is not therefore applicable to real estate, the law respecting which is in this particular intact.

I will declare, as asked by the summons, that the eighth requisition, and the further requisition of the purchaser, have been sufficiently answered by the vendors, and that the purchaser is not entitled to any indemnity in respect of claims against the testator's estate, of which the execu-

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tors had no notice at the date of the conveyance, and the purchaser must pay the costs.

Solicitors—Robbins, Billing & Co., agents for A. H. Dymond, Exeter, for vendors; Wood, Bigg & Nash, agents for Kitsons, Mackenzie & Hext, Torquay, for purchaser.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

Joyce, J. 1901. May 6, 7, 8, 9, 21. } DAMPER *v.* BASSETT.

Easement — Private Right of Way— Servient and Dominant Tenement — Unity of Possession — Yearly Tenant — Prescription Act, 1832 (2 *& 3 Will.* 4. *c.* 71), *ss.* 2, 3, *and* 4.

Unity of possession by a yearly tenant of the alleged dominant and servient tenements for the twenty years, or for twenty-three out of the forty years, immediately preceding an action in which a claim to a private right of way is sought to be established, is fatal to such a claim under section 4 *of the Prescription Act*, 1832.

Onley *v.* Gardiner (8 L. J. Ex. 102; 4 M. & W. 496) *and* Bathishill *v.* Reed (25 L. J. C.P. 290; 18 C. B. 696) *followed.*

This was an action of trespass by the plaintiff Sarah Rachel Damper, the owner in fee-simple of Springhill Farm, in the parish of Penshurst, Kent, and the plaintiff Alice Gibbons, the tenant of the farm, against the defendant Elizabeth Bassett, the owner or part owner of an adjoining farm known as Holt's Farm, to restrain her from driving any horse and cart on or through the fields numbered 441 and 436 on the tithe map, which fields adjoined the defendant's field numbered 669 and formed part of the plaintiffs' farm, and for other incidental relief.

The action was commenced on May 28, 1900.

The defendant alleged in paragraph 4 of her defence that "for upwards of 40 years prior to the commencement of this action the defendant and her predecessors in title and persons employed by and serving them respectively have uninterruptedly and as of right passed and repassed with cattle horses wagons carts and carriages and on foot for all purposes along and over the roadway" which the defendant alleged to exist across the plaintiffs' fields numbered 441 and 436.

It appeared that in the year 1860 Springhill Farm had been let to one George Ashby for a term of fourteen years, and that after the determination of that lease he continued in occupation as tenant from year to year. In 1880 Holt's Farm was also let to him, and thenceforward he continued in occupation of both farms until his death in 1898, after which his representatives remained in possession until Michaelmas, 1899. The owners of the freehold of Springhill Farm, therefore, were not in a position during Ashby's occupation of Springhill Farm to interfere with any exercise of the alleged right of way, if it were in fact attempted, which, on the evidence, the learned Judge thought was doubtful. His Lordship also found as a fact that they never had the slightest knowledge, information, or notice whatsoever of the claim to or any attempted exercise of the alleged right of way.

In their reply the plaintiffs gave the defendant full notice of the legal objection, on the ground of unity of possession, to the defendant's claim.

At the trial much conflicting evidence as to the user of the alleged right of way was given on behalf of the plaintiffs and defendant.

Hughes, K.C., and *Boxall*, for the plaintiffs.—The plaintiffs' interests in the property having been established, the onus falls upon the defendant to prove her right of way. There was unity of possession of the alleged servient and dominant tenements all the time that Ashby was tenant of both farms, and therefore the conditions of section 4 of the Prescription Act, 1832, have not been fulfilled; and therefore the defendant

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cannot succeed, inasmuch as during the last twenty years this alleged right of way cannot have been enjoyed as of right—*Bright* v. *Walker* [1834],[1] *Monmouthshire Canal Co.* v. *Harford* [1834],[2] *Onley* v. *Gardiner* [1838],[3] and *Bathishill* v. *Reed* [1856].[4]

Younger, *K.C.*, and *C. G. Church*, for the defendant.—This right of way can be made out under section 2 of the Prescription Act, 1832. *Bright* v. *Walker*[1] and *Onley* v. *Gardiner*[3] do not support the plaintiffs' proposition, and are not applicable to this case, for there the condition precedent—namely, twenty years' user without reckoning any period of unity of possession—was not fulfilled. *Bathishill* v. *Reed*[4] was wrongly decided, and was not followed in *Simper* v. *Foley* [1862],[5] where unity of ownership was held only to produce a suspension of the easement. There is no distinction to be drawn between a right of way and a right of light on the ground that one must be enjoyed as of right and the other not. The provisions of section 4 of the Act apply to section 3. The Act has not suspended the common law—*Thomas* v. *Thomas* [1835].[6] This was not an adverse interruption within the meaning of the Act—*Ladyman* v. *Grave* [1871][7] and *Hollins* v. *Verney* [1884].[8] If we have failed to make out our right of way under section 2 of the Act, then we ask for leave to amend the defence by claiming, in addition to the claim under the Prescription Act, 1832, a title to this right of way by virtue of a lost grant and immemorial user.

[They also referred to *Gale on Easements* (7th ed.), pp. 165, 166, 209, and 210.]

Hughes, *K.C.*, in reply.—Under sections 2 and 4 of the Act the user of the right must be proved, and it must be a user as of right for forty years before the writ in some action—*Wright* v. *Williams* [1836][9] and *Richards* v. *Fry* [1838].[10] *Onley* v. *Gardiner*[3] and *Bathishill* v. *Reed*[4] are good law and direct authorities for the plaintiffs' proposition. *Simper* v. *Foley*[5] and *Ladyman* v. *Grave*[7] are cases of right of light and come under section 3, and do not apply here. *Bathishill* v. *Reed*[4] was cited in argument, but not noticed in the judgment in *Simper* v. *Foley*,[5] because it was of no real use on a question of light. Unless section 4 does not apply to section 3, that judgment cannot be supported. It will not do to prove a user from fifty years down to four or five years before action brought—*Parker* v. *Mitchell* [1840].[11] Even on the defendant's evidence it is clear that from 1877 to the present time there has been no user as of right of the easement; and apart from the question of unity of possession there is no evidence of actual user since 1885 or 1886. The real point at issue was duly raised by the pleadings, and the defendant should not now have leave to amend, for it will alter the whole nature of the case which the plaintiffs have to meet.

Cur. adv. vult.

May 21.—JOYCE, J.—This is an action of trespass by owners of Springhill Farm against the defendant, as owner or part owner of Holt Farm, in driving a horse and cart from Holt Farm across two meadows numbered respectively 441 and 436 on the tithe map of the parish of Penshurst, in the county of Kent, and forming part of Springhill Farm, to the highway leading to Penshurst by Collarsland Bridge over the Medway. The defence is that the act complained of was done in the exercise of a private right of way which is thus pleaded in paragraph 4 of the defence: [His Lordship read the paragraph as above set out, and continued:] This I understand to be a plea of a right of way under the Prescription Act, 1832, and the defendant contended, while the plaintiffs disputed, that the existence of the alleged right of way could be made out under the provisions of section 2 of that Act; and this was the issue which the plaintiffs came to the trial prepared to meet, and which was tried accordingly.

(1) 3 L. J. Ex. 250; 1 Cr. M. & R. 211.
(2) 4 L. J. Ex. 43; 1 Cr. M & R. 614.
(3) 8 L. J. Ex. 102; 4 M. & W. 496.
(4) 25 L. J. C.P. 290; 18 C. B. 696.
(5) 2 J. & H. 555.
(6) 4 L. J. Ex. 179; 2 Cr. M & R. 34.
(7) L. R. 6 Ch. 763.
(8) 53 L. J. Q.B. 430; 13 Q.B. D. 304.
(9) 5 L. J. Ex. 107; 1 M. & W. 77.
(10) 7 L. J. Q.B. 68; 7 Ad. & E. 698.
(11) 9 L. J. Q.B. 194; 11 Ad. & E. 788.

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DAMPER *v.* BASSETT.

This action was instituted on May 28, 1900. It appeared that from the year 1877 until his death in 1898 one Ashby, as tenant, was in occupation not only of Springfield Farm but of Holt Farm, and his representatives remained until Michaelmas, 1899—in other words, for the twenty years, and for twenty-three of the forty years immediately preceding the action there was unity of possession of the alleged servient and alleged dominant tenements, so that the private right of way alleged, if it ever existed, could not during the last twenty-three years have been enjoyed as of right as an easement. This being so, the plaintiffs insisted on the provisions of section 4 of the Act, and the decisions in *Bright* v. *Walker*,[1] *Onley* v. *Gardiner*,[3] and *Bathishill* v. *Reed*,[4] as being fatal to the defendant's claim to have acquired a right of way under the Prescription Act, 1832. I understood the defendant's counsel to contend that the two last-mentioned decisions have been overruled or ought not to be followed, relying upon certain *dicta* that have fallen from the Court in cases where the easement in question was the right to the access of light, which, it is well settled, stands, as compared with other easements, upon a special and peculiar footing under the provisions of section 3 of the Prescription Act, 1832.

I do not consider myself entitled, nor, indeed, do I see any reason why I should desire, to hold myself not bound by the decision of the eminent Judges who decided the cases I have mentioned, and in particular *Onley* v. *Gardiner*[3] and *Bathishill* v. *Reed*.[4] They have not either of them been overruled, or, so far as I am aware, expressly disapproved of, and I must therefore follow them. But at all events the case of *Baxter* v. *Taylor* [1832][12] shews that the user of the alleged right of way, if any, at any time during the last forty years, would, under the circumstances, be no evidence of right as against the owner of the freehold of Springhill Farm—that is to say, against the present plaintiffs. As a matter of fact, it does not appear that at any time during Ashby's possession of the two farms the alleged way or right of way was actually used in any sense whatever. For all necessary purposes of communication between the two farms, Ashby, at least for many years before his death, made use of an opening in the boundary fence at an entirely different place from that at which it is now alleged that the right of way existed.

In the circumstances stated, I consider that the claim of the defendant to a right of way under the provisions of section 2 of the Prescription Act, 1832, fails, as well by reason of the fact that there cannot possibly have been any continuous user of the kind recognised by the Act for either twenty years or forty years next before the action, as also because the enjoyment, if any, during either of those periods would not, in my opinion, have been effectual as against the plaintiffs.

It must not, however, be understood that in the absence of these legal objections I should, upon the facts proved, have decided in favour of the alleged right of way. The evidence was most conflicting, and, apart from the objections I have just mentioned, I doubt whether the defendant could be taken to have succeeded in discharging the onus of proof which lay upon her even for the period between 1860 and 1880 and the commencement of the action.

Upon the fourth and last day of the trial, however, after all the evidence had been taken, the defendant's counsel, in concluding his address, and when, in fact, it remained only for the plaintiffs' leading counsel to reply, asked for leave to amend by claiming, in addition to the claim under the Prescription Act, 1832, a title to the alleged right of way by virtue of a lost grant and immemorial user.

The plaintiffs naturally objected, insisting that if they were bound to meet such a case they would desire to make further enquiries and investigation, probably to adduce additional or other evidence. It was suggested that it might be possible to shew that within the time of legal memory there had been unity of seisin, which I consider by no means improbable—for instance, the two farms might well have both formed parts of the common lands of the same manor. Upon consideration, I have come to the

(12) 2 L. J. K.B. 65; 4 B. & Ad. 72.

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conclusion that I ought not to accede to this proposal to amend and practically direct a fresh trial, even upon the terms, I suppose, of the defendant's paying the costs hitherto incurred. The reply delivered on behalf of the plaintiffs gave full notice of the legal objection to the defendant's claim, and the application for leave to amend ought to have been made much earlier, if at all. In my opinion, the evidence adduced on behalf of the defendant at the trial would not support either of such claims as are sought at the last moment to be introduced by amendment. There is not a particle of documentary evidence in support of the defendant's claim. The present appearance of the *locus in quo* on both sides of the boundary is altogether against it; and, in my judgment, the evidence, such as there is, of user of the alleged right of way upon any occasions prior to the year 1860 is not sufficient, either in quality or quantity, to lead me to the conclusion that such way was used as of right, or by persons claiming right thereto, for the period of twenty years prior to the commencement of Ashby's occupation of Springhill in 1860. In fact, I do not in my own mind believe that the alleged right of way ever existed.

[His Lordship then proceeded to examine the evidence at length, and ultimately granted the plaintiffs an injunction as asked, awarded them one shilling damages, and gave them the costs of the action.]

Solicitors—Starling & Wright, for plaintiffs; Prior, Church & Adams, agents for Gorham, Warner & Sons, Tonbridge, for defendant.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

KEKEWICH, J. 1901. June 5.

MADDOCK, *In re*; LLEWELYN v. WASHINGTON.

Will—Administration—Insufficient Personalty for Debts, &c.—Specific Bequest—Secret Trust—Estate Duty—Appointment by Will—Incidence of Duty.

Where residuary personalty has been given by will, and a specific part of it is bound in the hands of the residuary legatee by a secret memorandum of trust not executed as a will, the property comprised in the memorandum does not pass by way of specific bequest, but dehors the will, and must therefore bear its proportion of the debts of the testator rateably with the other residue.

The estate duty on a fund appointed by a will made in execution of a testamentary power of appointment must be borne by the appointed fund, and not by the residue.

Treasure, *In re*; Wild *v.* Stanham (69 L. J. Ch. 751; [1900] 2 Ch. 648), *followed in preference to* Moore, *In re*; Moore *v.* Moore (*ante*, p. 321; [1901] 1 Ch. 691).

This was a summons taken out by the plaintiff Frederick William Llewelyn, as one of the executors and trustees of the will of Sarah Brundrett Maddock, to have it determined—First, whether or not, having regard to the fact that the residuary personal estate of the testatrix was insufficient for the payment of debts, estate duty, and costs, the deficiency was payable out of the funds passing under a memorandum made by the testatrix and the real estate of the testatrix, rateably, according to their values, or how such deficiency should be borne; and secondly, whether the estate duty payable in respect of a sum of 6,000*l.* appointed by the will, was payable out of the appointed fund, or out of what other funds.

The testatrix made her will in 1897, and after appointing the defendants Susan Annette Washington and John Francis Maddock and the plaintiff to be trustees and executors, she appointed and bequeathed to them one third share of a sum of 18,000*l.* over which she had a testamentary power of appointment under the will of her father, and directed that

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the trustees should hold the money to be received in respect of such share upon trust for investment and to pay the income to S. A. Washington for her own use during her life, and upon her death to divide the principal of such share between eight specified charitable objects; and the testatrix devised all her real estate and bequeathed all the residue of her personal estate to S. A. Washington absolutely.

Subsequently to the date of her will the testatrix signed a memorandum, dated January 17, 1897, in the following terms: "It is my request that Miss Hannah Barker, daughter of the late George Barker, Barthomley Road, Alsager, should receive the interest arising from all the money I have saved, after being invested by my trustees, and paid half yearly to her. This I leave with my will.

(Signed) Sarah Brundrett Maddock.

"And after death to go to my nephew John Francis and his children. Witness, Susan Annette Washington."

The testatrix died on December 14, 1898, possessed of money, shares, furniture, and a freehold house known as Brooklyn House.

A question arose as to what property of the deceased passed under the memorandum.

By an order made on March 14, 1900, upon a summons, it was declared that all the testatrix's property belonging to her at her death, except Brooklyn House, and two other specified parts of the property, was bound by the memorandum, and passed as therein directed.

The present originating summons was issued on January 30, 1901, and one of the eight charities mentioned in the will was added as a defendant by amendment.

E. Ford, for the executor and trustee.

Warrington, *K.C.*, and *T. H. Carson*, *K.C.*, for Miss S. A. Washington.—On the first question raised by the summons this memorandum constituted a secret trust or obligation which affected the conscience of the legatee. That is admitted by Miss Washington. It is not, however, a bequest, and the title of the persons named in the memorandum is not testamentary. There is no decision precisely upon this point, but there is a valuable *dictum* of Lord Westbury in the case of *Cullen* v. *Att.-Gen. for Ireland* [1866],[1] where he says that the title of a person claiming under a secret trust is a title *dehors* the will, and cannot be correctly termed testamentary.

That case lays down the principle applicable to secret trusts which are constituted by equity, but which cannot be proved. Here there is no intention expressed by the testatrix in her will; the executor has nothing to do with the memorandum.

The rights of parties claiming under a secret trust arise from a bargain which the devisee makes with the testator. It is either an inference from the silence of the devisee, or a reliance upon his promise—*Wallgrave* v. *Tebbs* [1855].[2] The debts and duty are therefore payable out of the residuary estate as a whole, and the property passing under the memorandum of trust must bear a rateable part.

Renshaw, *K.C.*, and *Vaughan Hawkins*, for those entitled under the memorandum.—This property is exonerated. The case of *Cullen* v. *Att.-Gen. for Ireland*[1] does not apply; that was entirely a decision upon the construction of certain Acts. There is a particular property here specified in the memorandum, and it passes to the beneficiaries as a specific bequest.

KEKEWICH, J.—This is a new point, and nobody has pretended to say that it is in the slightest degree covered by any decision. Plaintiff's counsel has cited to me a *dictum* of Lord Westbury in the case of *Cullen* v. *Att.-Gen. for Ireland*.[1] Defendants' counsel truly says that the case before the House of Lords does not touch the present, as in the case cited it was a question whether duty was payable under certain Acts of Parliament, and it was disposed of on the construction of those particular Acts. Therefore, what Lord Westbury said in the passage quoted was only a *dictum*, and not necessary for the decision of the case before him, and therefore does not carry the weight of a

(1) L. R. 1 H.L. 190, 198.
(2) 25 L. J. Ch. 241; 2 K. & J. 313.

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decision. But it is a weighty remark nevertheless, and entitled to the greatest respect, though the Judge does not pretend to say that it had reference to the particular case before him. Lord Westbury lays down a general principle, and one about which there can be no doubt, in these words—he says: "the title of the party claiming under the secret trust, or claiming by virtue of that personal confidence, is a title *dehors* the will, and which cannot be correctly termed testamentary."

I accept that as an exposition of the law upon that particular point, and it carries one some way, although not all the way. The argument on behalf of those who claim to have the whole of this fund paid to them without any deduction for funeral and testamentary expenses and debts is that it is a specific bequest. The fallacy of that argument seems to me to lie in the use of those two words conjointly. It is specific; there is no question about that. The testatrix says in this memorandum, "all the money I have saved" is to be held for certain purposes; and that has been defined by the Court, and, whether defined or not, it is obviously a specific description. The testatrix is in this memorandum endeavouring to dispose of a particular part of her property. It is specific, but not a bequest. That is where the argument breaks down. If it had been a specific bequest, there is no doubt what the result would have been. But it is not contained in a will, or a testamentary instrument which could be proved with the will. If there had been a specific bequest of all the money she had saved to Miss Washington, the result would have been, of course, that the trust which she has hereby declared, and which is enforceable against Miss Washington, would have operated as regards that specific thing. But she has given Miss Washington not a specific thing, but the residue; and then she has declared this particular trust of some part of the residue. The law does not allow her, except by a testamentary instrument, to declare a trust of part of the residue specifically and separately from the rest in that way. The title of these claimants under the instrument is, as Lord Westbury said, "*dehors* the will." It is the conscience of the original donee, who is constituted a trustee, which is affected, and with reference to that which she receives, not to that which she does not receive. It must operate in that way; she cannot be compelled to make good to the *cestuis que trust* any property which she does not get. She is only accountable for that which comes to her under the gift of the residue, and which represents, when the accounts are properly taken, "the money I have saved." If the testatrix had given, for instance, "all my real and all my personal estate" to Miss Washington, and had then constituted a secret trust of "all my real estate" or of "all my personal estate," the claimants under that instrument could not have insisted upon having their property kept clear for their benefit, and not have the administration in the ordinary course. All they would have been entitled to would have been what was left when the estate had been properly administered, and possibly in some rateable proportion, if one or other of them had been drawn upon or used for the purpose of administration. Miss Washington is accountable for what she receives out of the "money I have saved," but she only gets it as residuary legatee, and she must ascertain what proper proportion of the residue which she receives represents "money I have saved." As I understand it, in this particular case there will be no necessity for going through that form, because some part of this money will itself be used with all the rest of the residuary estate. That is the way in which I think it must operate—namely, that the trust is declared so as to affect her conscience, and it would be declared by the Court if she had not submitted to it, but only concerning that which reaches her hands, and not concerning that which was owned by the testatrix.

E. Ford, on the second question, with regard to the estate duty payable in respect of the appointed fund.—The question is whether the decision in *Treasure, In re; Wild* v. *Stanham* [1900],[3]

(3) 69 L. J. Ch. 751; [1900] 2 Ch. 648.

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is to be followed, or that of Buckley, J., in *Moore, In re; Moore* v. *Moore* [1901].[4]

Renshaw, K.C., relied on *Treasure, In re*.[3]

P. S. Stokes, for a charity.

KEKEWICH, J.—On this point I must follow my own considered decision in *Treasure, In re*,[3] and leave the Court of Appeal to set me right if I am wrong. There will be an order that the estate duty comes out of the appointed fund.

Solicitors—Ridsdale & Son, agents for Heaton & Son, Burslem; Hicklin, Washington, & Pasmore.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

COZENS-HARDY, J. 1901. March 25, 26.

WEBB *v.* KNIGHT; HEDLEY *v.* WEBB.

Local Government — "Sewer" or "Drain"—Trespass on Neighbour's Land —Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4 *and* 13.

In considering whether a culvert for conveying the drainage from more than one house is a "sewer" or a "drain" within the definition clause (section 4) *of the Public Health Act*, 1875, *the test is whether the houses do in point of fact constitute one building only, or more than one.*

Query, *whether a sewer carried across a neighbour's land by trespass does or does not vest in the local authority under section* 13 *of the Public Health Act*, 1875. Semble *not.*

In the year 1890 W. J. Tomlinson put up for sale in lots by auction land of which he was the owner in fee. Two plots, numbered 113 and 114 on the sale plan, were purchased by R. G. Marchant and conveyed to him in fee-simple in possession, together with a moiety of the road called Park Hill Road, in front of the two plots, and upon which they abutted. These two plots and the moiety of the road were ultimately conveyed in fee-simple in possession to Hedley, as nominee for T. Knight. At the same sale in 1890 F. Shapley purchased a plot, numbered 112 on the plan, adjoining Hedley's two plots. Plot 112, and a moiety of the Park Hill Road upon which the plot abutted, was conveyed to Shapley in fee-simple in possession, and by him conveyed for the same estate to Webb.

Knight, who was the defendant in the first action, had constructed under Park Hill Road a main sewer, which terminated opposite plot 113, and short of 112. Webb, who had erected two semi-detached houses upon plot 112, constructed a culvert from each of them to a man-hole on his own land. He connected the system, which from this point became a combined system for the two houses, with the main sewer under the Park Hill Road. To enable this to be done he had to carry the connecting pipes under plot 113, and had trespassed thereon in effecting this object.

The two actions were heard together, but the only points of importance arose in the second action, which was brought for—first, a declaration that Webb was not entitled to drain his houses through the plaintiff's adjoining plot; secondly, an injunction to restrain Webb from permitting the drains and pipes, so far as the same were under the plaintiff's property, to be used as such, or to remain in or under the same, and an order upon Webb to take up and remove the same; or, alternatively, thirdly, a declaration that such drains and pipes, so far as aforesaid, were the property of Hedley, and that he was entitled to remove the same.

Of the defences raised by Webb it is only necessary to notice the following: First, that the main sewer in Park Hill Road was vested in the local authority, and that Webb had a right to connect his drains therewith, laying his pipes under the roadway in front of 113. Further, that if his drain-pipes were vested in Hedley they were vested in him subject to an easement for the benefit of Webb and the owners and occupiers of the

(4) *Ante*, p. 321; [1901] 1 Ch. 691.

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WEBB v. KNIGHT.

houses built on plot No. 112 to the use of the same for the passage of soil and water therefrom. Lastly, that the pipes connecting his premises with the main sewer under Park Hill Road were sewers within the meaning of the Public Health Act, 1875.

Eve, K.C., and *S. O. Buckmaster*, for Webb.—It cannot be disputed that as regards the sewer under the road there is an absolute right to connect with it—*Ferrand* v. *Hallas Land and Building Co.* [1893] [1] and *Brown* v. *Dunstable Corporation* [1899].[2] In the next place, from the point of junction on Webb's land that which was a "drain" became a "sewer" within section 4 of the Public Health Act, 1875,[3] and by section 13 of the same statute vested in the local authority—*Acton Local Board* v. *Batten* [1884],[4] *Travis* v. *Utley* [1893],[5] *St. Martin-in-the-Fields Vestry* v. *Bird* [1894],[6] *Kershaw* v. *Taylor* [1895],[7] and *Eastbourne Corporation* v. *Bradford* [1896] [8] It is not open to Knight, who stood by while we expended money, to obtain an injunction—*Swaine* v. *Great Northern Railway* [1863].[9]

[COZENS-HARDY, J.—That was a case of nuisance. Different considerations apply in cases of trespass—*Eardley* v. *Granville* (*Earl*) [1876].[10]]

(1) 62 L. J. Q.B. 479; [1893] 2 Q.B. 135.
(2) 68 L. J. Ch. 498; [1899] 2 Ch. 378.
(3) By section 4 of the Public Health Act, 1875, "'Drain' means any drain of or used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed: 'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act."
(4) 54 L. J. Ch. 251; 28 Ch. D. 283.
(5) 63 L. J. M.C. 48; [1894] 1 Q.B. 233.
(6) 64 L. J. Q.B. 230; [1895] 1 Q.B. 428.
(7) 64 L. J. M.C. 245; [1895] 2 Q.B. 471.
(8) 65 L. J. Q.B. 571; [1896] 2 Q.B. 205.
(9) 33 L. J. Ch. 399. The report in the contemporaneous series, 3 N. R. 109, was referred to. The decision of Wood, V.C., was affirmed by the Lords Justices on another ground.
(10) 45 L. J. Ch. 669; 3 Ch. D. 826.

Micklem, K.C., and *E. Clayton*, for Knight and Hedley, commented on the cases cited on behalf of Webb, and referred to the following authorities: *Pilbrow* v. *St. Leonard, Shoreditch, Vestry* [1895],[11] *Bateman* v. *Poplar Board of Works* [1887],[12] *Meader* v. *West Cowes Local Board* [1892],[13] and *Kinson Pottery Co.* v. *Poole Corporation* [1899].[14] The proper remedy is an injunction—*Goodson* v. *Richardson* [1874] [15] and *Mayfair Property Co.* v. *Johnston* [1894].[16]

Eve, K.C., in reply, referred to *Beckenham District Council* v. *Wood* [1896].[17]

COZENS-HARDY, J., after stating the facts, continued: Now *prima facie* what Webb has done is a trespass; but it is sought to justify his acts in several ways. It is said first of all that Marchant acquiesced. Well, of that there is absolutely no evidence. That part of the case breaks down. It is then said that the culvert (to use a neutral term) from the pair of houses to the manhole is not a drain, but a sewer within the meaning of section 4 of the Public Health Act, 1875, and has vested in the local authority, and if it is a sewer from the houses to the manhole it is certainly also a sewer from the manhole to the main sewer under Park Hill Road, and the plaintiff would have no right to interfere with that part of the public sewer which passes through his land. Now, how does that stand? To consider whether this is a sewer within the Public Health Act, 1875, it is necessary to look at the definition clause. [His Lordship then read the definition of drain and sewer contained in section 4 of the Public Health Act, 1875,[3] and continued:] Now, apart from authority, I should have thought that when they talk of the drainage of "one building only," it is a matter of fact to be considered in each case—aye or no, is that one building? It may be one building, although occupied by a great number of people, as in the

(11) 64 L. J. M.C. 130; [1895] 1 Q.B. 433.
(12) 57 L. J. Ch. 579; 37 Ch. D. 272.
(13) 61 L. J. Ch. 561; [1892] 3 Ch. 18.
(14) 68 L. J. Q.B. 819; [1899] 2 Q.B. 41.
(15) 43 L. J. Ch. 790; L. R. 9 Ch. 221.
(16) 63 L. J. Ch. 399; [1894] 1 Ch. 508.
(17) 60 J. P. 490.

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case of tenement houses or flats. But in each case the test to be applied is not whether the thing used is a house only, but whether it is one building; and I think the authorities when looked at bear out that view. Indeed, the very point that a semi-detached house may be—I do not say necessarily, but may be—one building only, was, in the view I take, affirmed by the Divisional Court, and also by the Court of Appeal in the case of *Kershaw* v. *Taylor*.[7] That was a very peculiar case. A builder erected four houses, which he, contrary to the direction of the sanitary authority, caused to be drained into one drain. He subsequently sold the houses to different purchasers, and the local authority sought to compel the purchaser of the premises in which the drain which received the drainage of the four houses was situate to repair such drain, so as to abate a nuisance arising from its defective condition. Both the Divisional Court and the Court of Appeal said, in language which seems to me to be plain: "It is a drain down to the point of junction, and it is a sewer from below that point. It is a drain down to that point because it applies to one building only, and it is a sewer from that point because it applies to more than one building." In *Acton Local Board* v. *Batten*[4] there were houses on each side of the road, and in *St. Martin-in-the-Fields Vestry* v. *Bird*[6] there were houses on both sides of the Lowther Arcade, and in *Travis* v. *Utley*[5] there were three houses in a row. In those three cases the Judges held, as a matter of fact, it was not a drain but a sewer. But here, on the best consideration, I think this pair of houses which have been erected in accordance with this plan forms but one building, and none the less because it is used severally by two parties. That being so the culvert is not a sewer in so far as it goes over Webb's own land.

But even if it were a sewer there would be a very difficult question upon which, as at present advised, my view is adverse to the defendant. Can a man who has made a sewer on his own land, by continuing that sewer through his neighbour's land wrongfully and without the consent of that owner, make it a sewer so as to vest the property in the local board and constitute it a public sewer within the meaning of the Public Health Act? Upon that point I think the decision of Mr. Justice Chitty and the Court of Appeal in *Meader* v. *West Cowes Local Board*[13] is an authority which applies to the present. The facts are thus concisely stated by the late Lord Justice Chitty: "the plaintiff built five pairs of houses with drains from the backs of the houses leading into a set of earthenware pipes, the diameter of which was six inches. In the course of that which I will dignify, according to the language of the Act of Parliament, with the name of a sewer, namely, the set of pipes, they crossed a pit 4 ft. 6 in. in diameter, and 6 ft. 8 in. in depth, and the depth of the bottom of the pit below the bottom of the pipes is some 4 ft. 6 in. or 8 in. After the pipes had reached the pit they were continued on by the plaintiff, who constructed the work entirely on his own land until he came to the land of Mr. Atkey, and there, without any title, he carried on his pipes until the sewage, brought down along the course of them, emptied itself into a place called the Deep Water Sink, which was at the mouth of the river Medina where the tide flowed. Latterly, Mr. Atkey, acting entirely within his rights, has stopped up the pipes, so that the sewage no longer flows into the river, and the effect is to cause the sewage to back, and the result is, as admitted both by the plaintiff and the defendants, a nuisance." As I read that passage it seems to me that in the view of the learned Judge no title could be maintained to the continuance of a culvert, although within the statutory definition of a "sewer," where originally laid under circumstances which involved a trespass upon the lands of another. Upon the appeal this expression of opinion was confirmed by Lord Coleridge and Lord Justice Lopes. What Lord Coleridge says is this: "it seems to me that we must entirely reject from the consideration of the case so much of the sewer (if we may so call it) as was carried through land which did not belong to the plaintiff, and which he had no licence from the owner to use, so that carrying the pipes through it was an act of trespass so clear that Mr. Levett . . . did not and could

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not deny that Mr. Atkey, in stopping the outlet, was acting clearly within his right. In my judgment so much of the sewer (so to call it) as was put without any sanction or licence on the land of another person, and which that other person had a right at any moment to stop, cannot be part of a sewer within the meaning of the Act of Parliament, and cannot have been intended by the Legislature to vest in the local board." And Lord Justice Lopes said: "So much of the alleged sewer as lies between the cesspit and the Medina must be thrown out of the case. What was done between those two points was an unjustifiable trespass on the part of the plaintiff, and I think that to shew what the effect of it is it is sufficient to ask this question—Can it be said that a right *in alieno solo* can be conferred on a local authority by the wrongful act of a third party?" Applying that here, even if it was, contrary to my view, a sewer down to the boundary of Webb's own land, I do not think it would by his wrongful trespass on Marchant's land make that portion between the boundary of his own land and the public sewer, a public sewer. Then, unless there is something separate and apart from the language of the Public Health Act, 1875, there is no defence to this action. [His Lordship then dealt with other matters not calling for a report, and concluded:] In the second action I must make a declaration in the terms of paragraphs 1 and 3 of the prayer, and grant an injunction in the terms of paragraph 2, and I give Mr. Hedley the costs of action.

Solicitors—Shirley W. Woolmer; John Bartlett.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

KEKEWICH, J. 1901. June 20.

WALKER AND OAKSHOTT'S CONTRACT, *In re.*

Vendor and Purchaser — Trustees — Power of Sale—Leasehold Property—Sale in Lots—Assurance—Underleases to Purchasers—Duty of Trustees.

Trustees, who are assignees of leasehold property held under one lease, cannot, in exercise of an ordinary power of sale, carry out a sale of such property in lots by retaining in themselves the original term and granting underleases for the whole term less one day to the purchasers of the respective lots at apportioned rents, for by adopting such a method of assurance the trustees do not perform their duty and get rid of their liability by privity of estate to the lessor.

Vendor and purchaser summons.

The vendors, Frederick Walker and Archibald William Stirling, were trustees with power of sale of freehold and leasehold property under an indenture of settlement dated September 14, 1883, and made upon the marriage of Albert Joseph Ridgway Bodley and Mary Eleanor Reade. The settlement empowered the trustees to grant leases of the freehold or leasehold hereditaments and premises for the time being subject to the trusts of the settlement for any terms of years not exceeding twenty-one years.

Part of the property subject to the settlement consisted of leasehold property held under one lease dated December 26, 1866, to Murray Gladstone, the original lessee, for a term of ninety-five years from December 1, 1865. This leasehold property was on August 13, 1900, put up for sale by auction in three lots—namely, lots 11, 12, and 13. The conditions of sale provided (*inter alia*) that the title should commence with the above-mentioned lease, and that the sale of each one of such lots (or of any two of them if two were sold to the same purchaser) should be carried out by the vendors granting to each purchaser an underlease of such one or two of those three lots as were purchased by him, for the residue of the term granted by the said lease except the last

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day thereof, at the apportioned ground-rent, or total of the two apportioned ground-rents, stated in the particulars of sale for each such lot or for such two lots, as the case might be. Each such underlease and the counterpart thereof to be prepared by the vendor's solicitors at the expense of the purchaser in the usual way, and to contain covenants and conditions similar to those in the said lease of December 26, 1866, so far as the same might be applicable and altered to make them suitable to such underlease, and such other covenants and conditions as should be necessary or proper to insert in such underlease. Neither the particulars nor conditions of sale stated that the vendors were trustees or were selling under a power of sale.

The respondent, Thomas William Oakshott, became the purchaser of lots 12 and 13, and paid deposits of 53*l.* and 19*l.* in respect thereof. On examining the title to the property the purchaser took the objection that the proposed underlease was not a proper exercise of the power of sale, and that the sale to him should be by way of assignment for the whole residue of the term at an apportioned rent with cross-covenants and cross-powers of distress. To this the vendors did not consent, but offered to assign the three lots to him subject to an underlease to be granted by him to the purchaser of lot 11. The respondent did not accept that offer, and ultimately, after unsuccessful attempts to agree upon a mode of assurance, the vendors took out the present summons asking for a declaration that the purchaser's requisition or objection had been sufficiently answered, and that a good title to the premises had been shewn.

Warrington, *K.C.*, and *C. G. Church*, for the vendors.—This is merely a question of machinery. *Evans* v. *Jackson* [1836][1] does not really apply, for that case decided that trustees with a power of sale could not grant leases. There was no sale at all in that case. The question here is whether trustees with a power of sale can carry out that sale by means of an underlease. In *Webb, In re; Still* v. *Webb* [1896],[2] this point arose indirectly on a question of taxation, and Stirling, J., called it "a sale carried out by an underlease," and said it was a well-known conveyancing expedient to avoid the difficulty with the superior landlord about apportionment of rent. This is a good sale, and the vendors ought to have a declaration in their favour.

P. O. Lawrence, *K.C.*, and *S. O. Buckmaster*, for the purchaser.—This is a power of sale in the ordinary form. When trustees have specific duties to perform, with a specific power of sale and a specific power to lease for twenty-one years, they cannot underlease for fifty-nine years, for by so doing they do not get rid of the liability incident to the original term, and consequently commit a breach of trust. The purchaser will not be able to make a title to this property without at once disclosing this blot. This is a stronger case than *Evans* v. *Jackson*,[1] for there the proposed lessors were executors who might have had power to grant long leases, whereas here the vendors are trustees with no such extensive powers. The purchaser will not get a clean title unless he gets an assignment. If his objection prevails, he asks for an order similar to that made in *Higgins and Percival, In re* [1888][3] — namely, for rescission of the contract, and for a return of the deposit with interest at 4*l.* per cent., together with the costs of the summons, including the costs of investigating the title.

Warrington, *K.C.*, in reply.—The form of the transaction must be looked at. Are the vendors exercising their power of sale or their power of leasing? Clearly their power of sale. The fact that the vendors will remain liable to the lessor by privity of estate does not hurt the purchaser or his title, nor does it hurt the *cestui que trust* by reducing the purchase-money or damaging the trust estate.

KEKEWICH, J.—The vendors are trustees selling leasehold property comprised in one lease under an ordinary power of

(1) 6 L. J. Ch. 8; 8 Sim. 217.

(2) 66 L. J. Ch. 163; [1897] 1 Ch. 144.

(3) 57 L. J. Ch. 807.

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sale, and they have adopted a device which has been found by conveyancers to be the best means of selling in lots leaseholds so held. There is one method of effecting such a sale—namely, by means of an assignment of the lease to one of the purchasers subject to a condition that he shall grant underleases to the other purchasers at apportioned rents. The trustees, however, have adopted the alternative device of retaining the term themselves and granting underleases to the several purchasers—a device which the industry of conveyancers has introduced and experience has found to work satisfactorily. The objection has been taken that there is a power of sale only, and not a power of granting long underleases like this, and that, therefore, the transaction cannot be carried out in this manner. My attention has been called to the fact that this marriage settlement contains both a power of sale and a power of leasing, but only for twenty-one years; and it has been argued that therefore this transaction cannot come within the power of leasing. I am not impressed with that. I must examine the transaction and see whether it is a sale or not. In my opinion it is a sale. A similar case was dealt with by Mr. Justice Stirling in *Webb, In re; Still* v. *Webb*,[2] which was a case of taxation of a bill of costs, and the Judge had to consider whether the proper scale charge was the charge applicable to leases or to conveyances in fee. He says: "Now, the first question is, Can this transaction be treated as a conveyance within the meaning of Part II. Schedule I.? I answer, No, because it is not a conveyance in fee or for any other freehold estate. Then, is it a lease? In a sense, no doubt, it is a lease, but in truth it is a sale. It is described as a sale in the conditions of sale, and it is so described in the plaintiff's bill of costs. It is a sale carried out by an underlease, which is a well-known conveyancer's expedient, where the property sold is held with other property under one lease, to avoid an apportionment of the rent, about which there might be a difficulty with the superior landlord." This is a sale, and not a lease in the sense in which those terms are distinguished one against the other. But although it is a sale in fact, it is a lease in form, and, unfortunately, in one sense it is also a lease in substance. The head lease was not granted to the vendors, and the result, therefore, is that they will be able to get rid of their liability if they assign the lease. If they do not do that they will remain liable. They may grant underleases, and take covenants for payment of the several rents, and for the observance and performance of the various covenants contained in the head lease; but nevertheless they will remain liable as trustees and assignees for the performance of the covenants in the head lease by virtue of their privity of estate with the lessor under the lease. That seems to me to be an objection to a sale in this manner. I hold the transaction to be in fact a sale by way of a sublease, but I cannot hold it to be a sale within their ordinary power of sale. It does not get rid of their liability, and that seems to me to be the duty of trustees selling leasehold property under a power of sale, and I do not think they ought to keep themselves liable. On that ground I regret, if I may say so, that I have to uphold the objection of the purchaser. From that point of view *Evans* v. *Jackson*[1] has no application. What the Vice-Chancellor there held was that an express trust that executors should sell a house was *prima facie* inconsistent with a grant by them of a lease of the house. That case does not touch the point in this case.

Now, what is the relief which must be given? The purchaser has succeeded, and he asks for an order rescinding the contract, and for a return of the deposit, with interest at 4*l.* per cent. from the time of payment, with the cost of the summons, including the costs of investigating the title. Counsel for the vendor took exception to that; and the purchaser's counsel then produced to me the case of *Higgins and Percival, In re*,[3] in which Mr. Justice Kay considered this question on a vendor's summons, and the vendor was held accountable for the return of the deposit, with interest and the costs of the summons and of investigating the title. Mr. Justice Kay went into the

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question on that occasion, and made the order. I shall follow that decision, and make a similar order in this case.

Solicitors—Fredk. Walker & Pettitt, for vendors; Hugh C. Godfray, agent for Oakshott, Baxter & Chevalier, Liverpool, for purchaser.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

KEKEWICH, J. 1901. June 14, 19.

REDMAN, *In re*; WARTON *v.* REDMAN.

Friendly Society—Life Policy—Non-Assignability—Nominations—Equitable Mortgage by Deposit—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *ss.* 8 (1), 15 (*a*), 18, *and* 27—*Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *ss.* 41 *and* 56.

Policies of life insurance issued by a friendly society constituted under the Friendly Societies Acts, 1875 *to* 1896, *are not assignable otherwise than by nomination according to the provisions of those Acts.*

The mere deposit of policies to secure a loan, unaccompanied by the nomination of the lender or his nominee, will not create a valid charge on the policy-moneys.

Caddick *v.* Highton (68 L. J. Q.B. 281) *followed.*

Adjourned summons.

This was a summons raising the question whether policies effected with a provident society, registered under the Friendly Societies Acts, were assignable otherwise than by nomination as provided by the statute and the rules of the society.

In the years 1876 and 1881 J. H. Redman, the above-named testator, effected two policies of insurance on his life for 100*l.* each in the Brighton and Sussex Mutual Provident Society, registered under the Friendly Societies Acts. Both policies were expressed to be subject to the regulations and payments expressed in the rules and tables duly certified according to law.

The rules of the society provided by rule 40 for the grant by the society to persons above the age of ten years of insurances on their own lives for any sum not exceeding 200*l.*, and rule 43 provided as follows: "Any member, not being under the age of sixteen years, may, by writing under his or her hand delivered at or sent to the registered office of the Society, nominate any person (not being an officer or servant of the Society, unless such officer or servant be the husband, wife, father, mother, child, brother, sister, nephew, or niece, of the Nominator), to receive any monies payable by the Society on the death of such member, not exceeding 100*l.*: such nomination being entered in a book kept by the Secretary, who shall give a duplicate of the same; and such member may from time to time revoke or vary such nomination."

In July, 1900, the respondent Elizabeth Beatrice Frost, widow, advanced 200*l.* to J. H. Redman upon the security of his promissory note for 200*l.*, and the deposit of the above-mentioned policies and certain title-deeds. A letter accompanying the policies and deeds and alluding to the loan was sent to Mrs. Frost's solicitors by J. H. Redman, but he never nominated Mrs. Frost or any one on her behalf to receive the policy-moneys (to the extent of 100*l.*) in compliance with the rules of the society. No notice of the deposit of the policies was given to the society until after J. H. Redman's death, which occurred on October 9, 1900. By his will he appointed his widow Ellen Redman sole executrix. His estate was insolvent, and was being administered by the Court under an order dated November 19, 1900, made in the above-mentioned creditor's administration action, in which Ellen Redman was defendant.

At the time of the testator's death the moneys secured by the policies with bonuses amounted to 301*l.* 6*s.* 11*d.*, and in pursuance of an order of February 28, 1901, made with the consent of Mrs. Frost, who submitted to the jurisdiction, the

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REDMAN, IN RE.

Brighton and Sussex Mutual Provident Society paid into Court the balance of such moneys, amounting to 295*l.* 0*s.* 11*d.*, to a special account subject to her claim. The defendant Ellen Redman then took out the present summons in the action, asking for a declaration that the moneys in question formed part of the personal estate of the testator; and that Mrs. Frost was not entitled to the same or any part thereof, and for an order barring her claim thereto and directing the fund to be carried over to the general credit of the action.

G. B. Freeman, for the executrix.—Nomination is the only method recognised by the rules of this society and by the Friendly Societies Act, 1875, s. 15 (3), and the Friendly Societies Act, 1896, s. 56, by which policies such as these can be assigned by the assured during his life, and 200*l.* is the limit which a nominee can take under the Acts—Act of 1875, s. 27, and Act of 1896, s 41. In this case rule 43 limits the amount to 100*l.* These policies are not assignable or alienable otherwise than by nomination—*Caddick* v. *Highton* [1899] [1] and *Bennett* v. *Slater* [1898],[2] and in this case the deposit of these securities cannot give Mrs. Frost a good charge.

Eastwick, for Mrs. Frost, the mortgagee.—Nomination is not the only method of assigning these policies. *Caddick* v. *Highton*[1] does not support the proposition for which it was cited. There the bargain between the assured and the society precluded every one but "nearest of kin, executors, administrators, or legal nominees" from getting the money on the member's death. Here the bargain has not narrowed down the terms of the Acts. The definition clause of the Act of 1875 says that the phrase "persons claiming through a member" includes the heirs, executors, administrators, and assigns of a member, and also his nominees where nomination is allowed. The Act clearly contemplates assignment, and an assign is, by virtue of the Act, entitled to the benefit of the policy up to 200*l.* on the death of the assured without any nomination at all. The later Act provides that, unless a contrary intention appears, the expression "persons claiming through a member" shall include the nominees of the member where nomination is allowed. Assignment is not expressly excluded, and therefore, where there is no nomination, an assignment is valid and effective. *Bennett* v. *Slater*[2] does not really affect this case. These policies are for the general benefit of the member, and are not meant to be merely in favour of his wife and children—see sections 8 (1), 15, and 18 of the Act of 1875. This mortgage gave Mrs. Frost a valid charge.

G. B. Rooke, for creditors, adopted the argument of the executrix.

G. B. Freeman replied.

KEKEWICH, J., in giving judgment, said: The case of *Caddick* v. *Highton*[1] has been relied upon by the applicant as supporting the broad proposition that policies granted by friendly societies under the Acts of 1875 and 1896 are not assignable otherwise than by nomination, as provided by those statutes. This point undoubtedly was raised in that case, and it was not a bye-point. What Mr. Justice Phillimore said on the subject cannot possibly be treated as being a mere *obiter dictum*, or as not necessary for the purpose of the decision in that case. The learned Judge, I think, decided the point quite plainly and clearly, and without any hesitation or doubt, so far as I can see. No doubt the bargain in this case was not exactly similar to the bargain in *Caddick* v. *Highton*.[1] Here I have different rules; but I think it is admitted by counsel on both sides that the rules do not help me. When Mr. Justice Phillimore, in giving judgment, referred to the bargain in that case, I do not think that he meant that the bargain, as expressed in the rule with which he was there dealing, really affected the point of law which he was deciding. I regard him as having decided the clean point that a policy issued by a friendly society constituted under these statutes is not assignable otherwise than by nomination according

(1) 68 L. J. Q.B. 281.
(2) 68 L. J. Q.B. 45; [1899] 1 Q.B. 45.

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to the provisions of these Acts. He did, no doubt, refer to *Bennett* v. *Slater*[2]—not on this point, however, but on the other point which was raised in *Caddick* v. *Highton*,[1] and with which I am not now concerned. Although some cases were cited in the argument in that case, I think counsel were right in saying that the point was a new one when it first came before Mr. Justice Phillimore. He decided the point of law cleanly two and a-half years ago. Nobody suggests that the point has been before the Court since, or that there has been any other decision upon it. Now, that being so, what is my duty? It is a very interesting question, and is a matter of very great importance to friendly societies, and also to the members of friendly societies, as well as to others who might be brought into contact with these matters, either by nomination, or by loans of money, or by what purport to be charges on the policies. I think that, on the whole, it is better for me not to go further and say that I agree or disagree. I must not be understood as in any way expressing an opinion. I have a decision of a learned Judge, which was evidently a well-considered one, delivered two and a-half years ago; and I think my duty is to follow that, and to hold that this assignment is bad.

Solicitors—Keith & Humphries, for applicant; Black & Moss, agents for Nevinson & Barlow, Malvern, for Mrs. Frost; Booke & Sons, for creditors.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

KEKEWICH, J. 1901. June 6. } SHARMAN, *In re*; WRIGHT *v.* SHARMAN.

Revenue—Estate Duty—Will—"Testamentary expenses"—Real Estate—Finance Act, 1894 (57 & 58 *Vict. c.* 30)—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 1.

The estate duty payable in respect of realty is not a "testamentary expense" and must be borne by the real estate and not by the personalty, notwithstanding that the will contains a bequest of the residue of personal estate "after payment thereout of all my just debts, funeral and testamentary expenses."

Adjourned summons.

By his will made in 1899 John Sharman devised his real estate to trustees upon trust to pay the net rents and profits thereof to his nephew, the defendant John Sharman, for his life, and after his death upon trust for sale and distribution as therein mentioned; and after giving certain pecuniary legacies, the testator bequeathed all the residue of his personal estate, "after payment thereout of all my just debts, funeral and testamentary expenses," to his trustees, upon trust for his six nephews and nieces.

The testator having died on April 18, 1900, a question was raised, upon an originating summons, whether the estate duty payable on the decease of the testator in respect of the real estate ought to be borne by the real estate or be paid out of the residuary personal estate.

G. R. Northcote, for the trustees of the will.

Hole Bethell, for the devisee of the real estate.—The estate duty is a "testamentary expense" to be borne by the personal estate. The decision in *Clemow, In re; Yeo* v. *Clemow* [1900],[1] is applicable here. That was followed in *Treasure, In re: Wild* v. *Stanham* [1900].[2] Under the Land Transfer Act, 1897, s. 1, real estate vests in the personal representatives of a

(1) 69 L. J. Ch. 522; [1900] 2 Ch. 182.
(2) 69 L. J. Ch. 751; [1900] 2 Ch. 648.

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testator, and therefore the executors are liable for the payment of this duty.

Borthwick, for a residuary legatee.—Under the Finance Act, 1894, the executors may pay the duty on real estate, but they are not bound to do so. *Clemow, In re*,[1] was a decision as to personal estate only, and does not touch the present. The precise point was decided by Joyce, J., in the case of *Jolley, In re; Neal* v. *Jolley* [1901].[3] The case of *Palmer, In re; Palmer* v. *Rose-Innes* [1900],[4] decided that section 9, sub-section 1 of the Finance Act, 1894, must be construed with reference to the law as it stood at the time, before the passing of the Land Transfer Act, 1892. The duty is payable out of the real estate.

Dunham, for another residuary legatee.

Mossop, for other parties interested.

KEKEWICH, J.—The neat point to be decided here is whether the expression "testamentary expenses" includes the estate duty payable in respect of real estate. If it does, then this duty should be paid out of the residuary personal estate. In the case of *Clemow, In re*,[1] to which I have been referred, the only question that arose was in respect of personal estate, and with respect to the estate duty which it was necessary for the executors to pay in order to obtain probate of the will. Again, in the case of *Treasure, In re*,[2] there was only personal estate in question. It is not necessary for the executors of a testator to pay the duty on real estate. They may do so if they like; but inasmuch as the duty is made a first charge upon the property by virtue of the Finance Act, 1894, they can obtain probate without paying it. The point must have been considered by Mr. Justice Joyce in the case of *Jolley, In re*,[3] though he seems to have been dealing specially with the particular facts of that case when giving his decision, and did not lay down any general law. I observe that he again and again refers to the particular words in the instrument as having a particular meaning. But, so far as it is an authority upon the point before me, it is an authority in favour of the real estate bearing its own estate duty, notwithstanding a direction to pay the testamentary expenses. Applying that to the present case, which is entirely different from *Clemow, In re*,[1] where only personal estate was in question, I must hold that "testamentary expenses" do not include the estate duty payable in respect of real estate.

Then another point was taken on behalf of the devisee of the real estate, which, no doubt, deserves some consideration. It is said that since the passing of the Land Transfer Act, 1897, real estate passes to the executors as such, and therefore the executors are bound to pay the duty, and such duty is one of the "testamentary expenses," and must fall within that description and the consequences which result from it. Counsel for the residuary legatees has called my attention on this point to the case of *Palmer, In re; Palmer* v. *Rose-Innes*,[4] where Mr. Justice Buckley decides this point exactly. He says "that the language of section 9, sub-section 1, of the Finance Act, 1894, must be construed with reference to the law as it stood at that time, and not in accordance with the provisions of the Land Transfer Act, 1897. Therefore, the real estate did not 'pass to the executor,' and it was charged with a rateable part of the estate duty." That case is only reported as a note at present, and I take it that now it will not find its way into any more permanent report; but it is very plainly stated by the learned Judge, and I think it my duty to follow it without question.

On both grounds, therefore, I must hold that the estate duty must be borne by the real estate, and is not a "testamentary expense" payable out of the general residue.

(3) 17 Times L. R. 244.
(4) 35 L. J. N.C. 48; W. N. (1900), 9.

Solicitors—Oldman, Clabburn & Co., agents for Willders & Son, Holbeach; Mossop & Rolfe.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

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[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

BYRNE, J.
1901.
May 3.
RIGBY, L.J.
COLLINS, L.J.
June 12.

GRAHAM *v.* WROUGHTON.

Nuisance — Drain for Surface-Water and Slops—Discharge into Drain of Solid Sewage—Liability of Occupiers—"Sewer" — Notice to Local Authority — Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 4, 21, *and* 299.

A person who commits a nuisance at common law by draining fæcal matter into a sewer of the local authority, through which it passes on to the plaintiff's land, cannot justify himself under the Public Health Act, 1875, *s.* 21, *without shewing that he has fulfilled the requirements imposed on him by that section.*

Per BYRNE, J.—*An owner or occupier has no right under section* 21 *of the Public Health Act*, 1875, *to pass fæcal matter into a drain used only for the purpose of carrying off rain and slop-water, although it may be a "sewer" of the local authority within the meaning of section* 4.

Kinson Pottery Co. *v.* Poole Corporation (68 L. J. Q.B. 819; [1892] 2 Q.B. 41) *followed by* BYRNE, J.

The plaintiff in this action, a widow lady, was the occupier and trustee for her infant son, the owner, of a house and grounds called "Greenbank," at Wetherall in Cumberland. Up to the present time no regular system of drainage had been adopted for the village of Wetherall, which was situate on the banks of the river Eden, and had about 800 inhabitants, closets with cesspools and, in very many cases, earth closets only being in use; but the Court held that there was no evidence that there was not an adequate system of drainage for fæcal matter. For many years there had existed in the village a covered drain which ran along one side of the high road in an easterly direction from a point near the post-office, and which, after crossing the high road, passed under the plaintiff's garden, and emptied itself by a fall of about eighty feet into an old disused quarry also belonging to the plaintiff and adjoining her garden. This drain was originally vested in the highway authority, and in 1886 the drain had been taken up by the then highway authority, and had been re-laid by them with gratings so as to permit the rain or surface water from the high road to run into it. In 1894 the control of the highway was taken over by the local authority under the Local Government Act, 1894 (56 & 57 Vict. c. 73). The covered drain had for a long time been used solely for the purpose of conveying surface-water and slop-water from some of the houses in the village adjoining the high road; but recently the defendants Wroughton and Platt, and for some time past the defendant Hendry, had discontinued the use of cesspools, and now discharged solid sewage matter into the drain, and thereby caused an intolerable nuisance to the plaintiff.

The plaintiff brought this action against the three defendants, claiming damages from them for discharging water-closet drainage and filth upon the land of the plaintiff from the houses in their respective occupation through the covered drain, and an injunction restraining the defendants from continuing to cause or suffer such discharge upon the plaintiff's land through the drain. The plaintiff now moved for an interim injunction.

The nuisance was not denied, and the main question was whether the plaintiff was legally justified in taking proceedings against the defendants instead of against the local sanitary authority under section 299 of the Public Health Act, 1875.

No notice had been given to the local authority by the defendants of their intention to drain fæcal matter into the sewer. It was stated that no by-laws had been made requiring any particular notice to be given under section 21 of the Public Health Act, 1875,[1] but the Court

(1) Public Health Act, 1875, s. 21: "The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and

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GRAHAM *v.* WROUGHTON, App.

held on the evidence that the defendants were aware that the assent of the local authority would have been refused if it had been asked.

Levett, K.C., and *S. G. Lushington*, for the plaintiff.

F. H. Maugham, for the defendant Wroughton.

P. S. Stokes, for the defendant Platt.

Norton, K.C., and *A. Glen*, for the defendant Hendry.

BYRNE, J.—In this case an action is brought by a lady who is the owner of a house at Wetherall, in Cumberland, against three defendants, Dr. Wroughton, Mr. Platt, and Mr. Hendry, who are the owners of tenements in the neighbourhood. The house in question belonging to the plaintiff, called "Greenbank," has a short distance from it and adjoining the garden, almost upon the bowling-green, a quarry—an excavation caused by quarrying operations some time ago. There is down the main road leading from Scotney, passing "Greenbank" and passing between "Greenbank" and the houses of the defendants, an old drain which was, until about the year 1886, a drain obviously intended and meant for carrying off surface-water and not intended for carrying off fæcal matter and things of that kind. The mere carrying off of surface-water and such matters as were allowed to pass in caused a nuisance, and at the present time it is admitted that what passes into the quarry is of such a nature as to create an intolerable nuisance.

This is not an information brought by the Attorney-General, and I have nothing to do with the question of public nuisance; but what this lady complains of is that recently the defendants have made use of this drain, which was and was intended to be used in its origin only for surface-water, and which has for some years been used for the purpose of carrying off of liquid slop-water (and other matters of that kind, including what passes from lavatories and kitchen and other sinks), for other purposes—namely, for the passage of drainage from their w.-c.'s.

With reference to one of the defendants (Mr. Hendry) there are questions of fact to be determined, and it is undoubted that for some years past he has had a communication from a water-closet to this drain. On an interlocutory motion I could not grant an injunction against him to restrain him from doing what he has been doing for so many years. There will be questions of fact to be dealt with on the trial which may or may not result in an injunction being granted against him also.

But the question is whether I ought to grant an injunction against the other two defendants, connections with whose water-closets have been quite recently made into the drain—within the last few months. The parties were anxious that I should determine this point on the interlocutory motion, because possibly it may save them time, trouble, and expense hereafter.

Now the matter stands in this way: Dr. Wroughton's house when he became a tenant of the house, which he holds on a yearly tenancy, contained both lavatory sink and an outside privy, with no water-closet, and consequently whatever did pass into this drain was only liquid matter—liquid matter of a more or less offensive kind; but nothing in the shape of refuse from a water-closet passed into it. And the same thing applies to the other defendant. Now it is sought to justify the discharging of solid sewage-matter into the drain under section 21 of the Public Health Act, 1875.[1]

I will assume that the original connection with the drain I have spoken of from those houses was lawfully made for the purpose of carrying off liquid matter of such a kind as was carried down the drain prior to the date of the erection of the water-closets. Then I may say this further: the drain in question is, within the definition of the Public Health Act, 1875, undoubtedly a sewer. It is said,

subject to the control of any person who may be appointed by that authority to superintend the making of such communications.

"Any person causing a drain to empty into a sewer of a local authority without complying with the provisions of this section shall be liable to a penalty not exceeding 20*l.*, and the local authority may close any communication between a drain and sewer made in contravention of this section, and may recover in a summary manner from the person so offending any expenses incurred by them under this section."

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first, that no connection has been made between the drains and the sewer by what has been done in reference to these water-closets, because it has been merely a question of making a small drain pass into the old drain which carried the liquid matter into the sewer. I cannot accept that. It appears to me that it is none the less causing the drains to empty into the sewer because you join your new drain to an old drain which already empties into the sewer. But, passing that by, I think that the question that really arises in the present case is this: Are private owners who have lawfully (and I must take it for the present purpose that they have lawfully) caused their drains to empty into this sewer, for the purposes for which it was used prior to the erection of these water-closets, justified in causing the emptying of drains so as to carry off fæcal solid matter coming from the water-closets? It really resolves itself into a question whether, if a sewer is used for the purposes of carrying off any kind of sewage, that necessarily involves a right to use that sewer for the purposes of carrying off all other kinds of sewage. The argument which has been extremely well and forcibly urged on me by counsel for the defendants is this: No authority can be found to say that where a sewer has been used for one kind of sewage the persons entitled so to use that sewer may not pour sewage of any description into the same drain. I do not know whether they would limit it so as to say that it must be drainage from houses to entitle them to do so.

A case has been recently before the Divisional Court of *Kinson Pottery Co.* v. *Poole Corporation* [1899].[2] [His Lordship read the headnote and continued:] Now there, what had been allowed to pass into the drain was surface-water; and in the present case more than surface-water—namely, liquid refuse from the houses—had been allowed to pass into the drain; but with that exception the reasoning of the learned Judges seems to form a complete guide in the present case. The Justices there were of opinion that the drain in question, being constructed by the respondents for the sole purpose of receiving the surface-water from the highway, could not lawfully be used by the appellants to carry off scullery and slop water from their houses, and that the appellants had created the nuisance in the open ditch, into which the surface-water discharged. I find the facts thus stated: "The respondents, as the highway authority for the borough, had previously to 1892 laid down, at the side of the highway upon which the appellants' houses abutted, a drain, for a distance of 123 yards or thereabouts, for the purpose only of receiving the surface water from the highway, which surface water was by means of the drain conveyed to, and emptied into, an open ditch by the side of another highway, about forty-nine yards distant from the appellants' houses." Mr. Justice Darling says: "I agree that for certain purposes the surface-water drain was a sewer, but it is contended that therefore the appellants have a right to turn into it any refuse they please, and then it is for those who own the sewer to deal with the state of things so caused. In my opinion that is not the law. Section 21 of the Public Health Act, 1875, entitles an owner to cause his drains to empty into the sewers of a local authority, on giving notice, and complying with the local authority's regulations; but that does not entitle an owner to empty all kinds of filth into a small roadside drain, and leave the local authority to deal with it as best they can, and moreover here no notice was shewn to have been given. To hold otherwise would lead to an absurd result; and, whether notice has been given or not, I do not think that the appellants had a right, under the general law, independently of the permission referred to in the case, to turn into the surface-water drain even rain water, and still less had they a right to turn into it slop and scullery water, as to which no permission had been given." Mr. Justice Channell says: "It is contended that this surface-water drain was a sewer, and I think it was for some purposes. It was intended to carry off mere surface water, yet it was a 'sewer,' within the words of the definition contained in section 4 of the Public Health Act, 1875. But to entitle the appellants to succeed, it would be

(2) 68 L. J. Q.B. 819; [1899] 2 Q.B. 41.

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necessary to go further, and shew that it was a sewer which the appellants had a right to use as they did. If they had any such right, it could only be by section 21, which requires notice to be given. I do not wish to say that if notice had been given in pursuance of that section, there would have been a right to empty the slop and scullery water into this surface-water drain, for I agree that it is unnecessary to decide that question; but here no notice was given. I think the appellants cannot lawfully empty sewage into a mere water sewer. It is said that there was default on the part of the sanitary authority"; and then he deals with another matter that I need not trouble about here.

Looking again at the present case, here was a drain which, when it came into the control of the present authority, had been used for a surface-water drain, and had either before or after it came under their authority been allowed by them, either expressly or tacitly, to be used for carrying other liquid and deleterious matter, some of which, at all events, might come within the general name of sewage, though not being sewage within the meaning applied to it in ordinary parlance. But nothing more had been allowed, so far as the evidence before me goes, and no notice was given under section 21 of an intention to cause the drain to empty this other matter into the sewer.

The case, then, resolves itself into this: If a public authority, being the owner of a sewer, has allowed that sewer to be used for certain specific purposes, one of those purposes being the carrying off of liquid drainage-matter, does that justify its user for these other matters to which I have referred? I think in principle the case of *Kinson Pottery Co.* v. *Poole Corporation*[2] really is a governing authority in the present case, and I think it would be drawing too refined a distinction (which I am not justified in drawing) if I were to say it was not such a governing authority.

I think, therefore, that as against two of the defendants the plaintiff is entitled now to the injunction which she asks. Of course I shall allow a reasonable time for putting matters in order.

The defendant Wroughton appealed.

A. Glen and *Maugham*, for the appellant.—The drain is a "sewer" within section 4 of the Public Health Act, 1875, and though it is suggested that it was originally made for highway purposes only, in 1894 it became vested in the local authority (under section 13 of the Public Health Act, 1875) by virtue of the Local Government Act, 1894, s. 25. Sections 15, 16, and 19 of the Public Health Act, 1875, give special powers to the local authority; and section 21,[1] which is the material one in this case, gives power to owners or occupiers to drain into the sewers of the local authority. Section 23 gives the local authority power to enforce the drainage of undrained houses, and section 24 gives the local authority power to alter the system of drainage. Section 27 gives the local authority power to dispose of sewage. Section 94 gives power to abate nuisances, and section 299 gives a statutory remedy to the person injured by a nuisance, under which section we contend that the plaintiff ought to have proceeded. This is not the case of an abuse of an easement, but a mere question of the appellant's right under the statute. By section 21 he has an absolute right to drain into the sewer—*Ferrand* v. *Hallas Land Co.* [1893],[3] *Eastwood Brothers* v. *Honley Urban Council* [1901],[4] and *Brown* v. *Dunstable Corporation* [1899].[5] There is no distinction in the Public Health Act, 1875, which justifies the contention that section 21 can be limited to any particular class of sewage or refuse; nor is the suitability of the sewer for the reception of night soil material—*Kirkheaton Local Board* v. *Beaumont* [1888],[6] *Molloy* v. *Gray* [1889],[7] *Ainley* v. *Kirkheaton Local Board* [1891],[8] *Kirkheaton District Local Board* v. *Ainley* [1892],[9] and *Fordom* v. *Parsons* [1894].[10] The local authority are entitled to use a watercourse as a sewer—*Wheatcroft* v.

(3) 62 L. J. Q.B. 479; [1893] 2 Q.B. 135.
(4) *Ante*, p. 313; [1901] 1 Ch. 645.
(5) 68 L. J. Ch. 498; [1899] 2 Ch. 378.
(6) 52 J. P. 68.
(7) 24 L. R. Ir. 258.
(8) 60 L. J. Ch. 734.
(9) 61 L. J. Q.B. 812; [1892] 2 Q.B. 274.
(10) 64 L. J. M.C. 22; [1894] 2 Q.B. 780.

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Matlock Local Board [1885][11] and *Falconar* v. *South Shields Corporation* [1895].[12] Clean-water drains may be used as sewers unless within the exceptions in section 13 of the Public Health Act, 1875—*London and North-Western Railway* v. *Runcorn Rural Council* [1898],[13] *Croysdale* v. *Sunbury-on-Thames Urban Council* [1898],[14] and *Sykes* v. *Sowerby Urban Council* [1900].[15] The case of *Kinson Pottery Co.* v. *Poole Corporation*,[2] on which Byrne, J., relied, is inconsistent with these authorities and was wrongly decided, and further is distinguishable from the present case. By the Public Health Acts Amendment Act, 1890 (53 & 54 Vict c. 59), s. 17, chemical refuse or the like is expressly forbidden to be passed into sewers. That assumes that under section 21 of the Public Health Act, 1875, the right previously existed.

[COLLINS, L.J.—Suppose the local authority has two sewers—one for clean water, the other for sewage—can the owner choose into which he will drain his sewage?]

Perhaps not—see section 24; besides, the local authority could prevent such a case under section 21.

Another ground on which Byrne, J., relied is that the appellant had not complied with the requirements of section 21; but that ground is inapplicable in the present case, because the appellant made no new communication with the sewer, but made the water-closet in the first instance run into his own drain. Secondly, no notice was necessary, the local authority having been informed immediately afterwards of what the appellant had done and having raised no objection—*Metropolitan Board of Works* v. *London and North-Western Railway* [1881].[16] Further, it is not shewn that the local authority prescribed any notice to be given; and if so, no notice appears to be required—*Ainley* v. *Kirkheaton Local Board*,[8] *per* Stirling, J. Even if a third person is entitled to rely on this objection, the onus is on him to shew that the appellant has not complied with the provisions of section 21.

[COLLINS, L.J.—If a person committing a common-law nuisance seeks to justify himself under the statute he must shew that the statutory conditions have been fulfilled.]

Levett, K.C., and *S. G. Lushington*, for the respondent.—Prior to 1894 this drain was not a sewer, being vested in the highway authority and excepted from the definition in section 4. In that condition the appellant had a right to discharge water and slops through it over the respondent's land, which was in the nature of an easement. That right could not be increased so as to throw an additional burden on the respondent's land by the mere passing of the Act of 1894. The question, therefore, is whether under section 21[1] of the Public Health Act, 1875, the appellant can now say, because there was a previous communication, therefore he is free from responsibility. The onus lies on him to shew why he may increase the burthen on the respondent's land. He cannot justify the nuisance under the statute without shewing that he has complied with the formalities of section 21. If the local authority has not imposed any particular requirements as to the notice to be given, then the common-law doctrine of reasonable notice applies. Section 21 shews that the local authority is to have control over what may be proposed to be done. Notwithstanding the wide meaning of "sewer" under section 4, there is a difference between one used for surface drainage and sewage drainage—*Kinson Pottery Co.* v. *Poole Corporation*.[1]

[They were stopped.]

A. Glen, in reply, referred to the Public Health Act, 1875, s. 157.

RIGBY, L.J.—I think this appeal must fail. I think that the order made is quite right, and that no grounds have been shewn upon which we can set aside the judgment.

COLLINS, L.J.—I am of the same opinion. This case has travelled over a wide area upon the question of sewers and drains under the Public Health Act,

(11) 52 L. T. 356.
(12) 11 Times L. R. 223.
(13) 67 L. J. Ch. 324; [1898] 1 Ch. 561.
(14) 67 L. J. Ch. 585; [1898] 2 Ch. 515.
(15) 69 L. J. Q.B. 464; [1900] 1 Q.B. 584.
(16) 50 L. J. Ch. 409; 17 Ch. D. 246.

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1875, but I think that when we come to the narrow point which has actually to be decided in this case it will not be necessary to deal in any detail with the cases which have been referred to. The point arises shortly in this way: There is in the village to which this case relates, for anything that appears to the contrary, an adequate system of drainage so far as fæcal matter is concerned. It seems that the practice there has been to deal with that matter by privies and a cesspool, and in one case a private water-closet; but from anything that appears to the contrary in this case the general scheme which now exists there is perfectly adequate. There is also running along the highway a drain which it is admitted—at all events it is not denied, and the evidence is in favour of it—was originally simply a highway drain, and belonging as such to the highway authority, which was not then the local authority. That drain was as far back as 1886 improved at the expense of the vestry, which was still the highway authority; and persons occupying houses along that highway had no doubt, with possibly the tacit assent of the highway authority, connected their houses with it for the purpose of sending down slops and that class of water. Such state of things continued until this local authority came into existence and took over the control of the highway in 1894, and so things went on until 1900, when the appellant in this case, without any notice whatever to the local authority, made a water-closet on his land and connected it with a communication which he already had with the highway drain, and which had been used for sending soapsuds and that class of liquid down the drain.

The appellant contends that he is justified in doing what he did by virtue of the Public Health Act, 1875, s. 21 [1]; but what he has to meet in the first instance is this: The matter which he sends from his water-closet passes directly through the channel I have described into the bottom of a disused quarry, which is part of the plaintiff's premises, and, as I understand, immediately adjoins the plaintiff's garden and bowling-green. The effect of that is to create, as the learned Judge held, an intolerable nuisance. It is true that the plaintiff had to submit to an inconvenience which may have amounted to a nuisance from the accumulation of soapsuds and that class of liquid in the quarry at the bottom of her garden; but what the appellant has done is to make that a nuisance of a very aggravated character by the passing down of fæcal matter from his water-closet directly into the quarry at the bottom of the plaintiff's garden; and supposing he had done that, without any communication with the drain of the local authority, no one could question that he had committed a tort for which an action at the suit of the owner of the garden would lie against him. "But," he says, "I do not deny for a moment that a nuisance in which I have taken a part is created on the land of the plaintiff, but I am entirely discharged from any personal liability in respect of the matter, inasmuch as the channel by which I have conveyed that nuisance on to the land of the plaintiff partly consists of this highway drain, which, I say, is a sewer of the local authority." In order to get the immunity that he claims under the Act of Parliament, he must at least shew that he has conformed to the conditions of the Act of Parliament; and he claims to have done so, and says that he comes under section 21 of the Public Health Act, 1875. But the conditions of that section are these: [His Lordship read the section, and continued:] The appellant says, "True it is I did not consult this local authority upon the matter at all. I knew, or might have known"—because it was in evidence that in that small community other persons had tried to make similar communications and assent had been refused—"that their assent would be refused, and I did not ask them. I had no reason to suppose that they would assent to it. The statute obliges me to give them notice. I did not do it, and yet I claim immunity under the statute for creating an intolerable nuisance on the land of the plaintiff." That seems a strong thing to say, and in order to bring himself within the section the appellant has first of all to shew that the channel into which he has sent this fæcal matter is a sewer of the local authority. Counsel's contention goes to

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this extent—that, if a highway drain had been made simply for the purpose of collecting rain-water, to be used for drinking purposes afterwards, and although there was an efficient system for dealing with fæcal matter in the neighbourhood, a person might nevertheless pass his fæcal matter down into this channel which existed for the purpose of collecting and it may be distributing rain-water for drinking purposes. That seems an extravagant construction of the statute, and one which I should shrink from unless driven to it by the absolute wording of the section. Although there may be drains which come within the definition of a "sewer" under the meaning of the Act, I think that it was not this class of sewer to which the provisions of the Public Health Act apply enabling any person to pass the fæcal matter of his household into it. I do not think it necessary to decide that point as a matter of law in this case; but I should certainly be very reluctant to throw any doubt upon the views taken by the learned Judge on this question. The question, however, does not arise in this case for this reason—that even if this were a sewer into which the appellant had a right under the conditions of the statute to pass fæcal matter, he has not performed the conditions imposed upon him by the Act of Parliament, and therefore it seems to me that he stands naked against the action that the plaintiff has brought. On those grounds I think the appeal should be dismissed.

Appeal dismissed.

Solicitors—Foulger, Robinson & Miller, agents for H. F. Leavers, Carlisle, for appellant; Ullithorne, Currie & Jennings, agents for C. B. Hodgson, Carlisle, for respondent; Chester & Co., agents for I. H. Mawson, Carlisle, and for Wright, Brown & Strong, Carlisle, for defendants Platt and Hendry in the Court below.

[*Reported by W. A. G. Woods and A. Cordery, Esqs., Barristers-at-Law.*

Buckley, J. 1901. June 11, 12.

W. H. CHAPLIN AND CO. v. WESTMINSTER BOROUGH.

Metropolis — Highway — Statutory Powers—Obstruction—Rights of Adjoining Owners—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 130.

The owner of premises abutting on a highway has, as a private right, a right of access to the highway, and any obstruction which interferes with the exercise by him of that right is an infringement of his private right. His right, however, as regards the user of the highway itself is one which he enjoys in common with the rest of the public, and is not a private right.

Att.-Gen. *v.* Thames Conservators (1 H. & M. 1), Lyon *v.* Fishmongers Co. (46 L. J. Ch. 68; 1 App. Cas. 662), *and* Fritz *v.* Hobson (49 L. J. Ch. 321; 14 Ch. D. 542) *followed.*

The defendants, a public authority, in the exercise of their statutory obligation to light streets, erected a lamp-post on a highway in a place which it was proved was most convenient for the public. The plaintiffs, the owners of premises abutting on the highway, complained that the lamp-post interfered with the carrying on by them of their business:—Held, *that the plaintiffs had no right to restrain the defendants from exercising their statutory authority to obstruct the highway by the erection of lamp-posts where they thought it necessary.*

Trial of action.

Action to restrain the defendants from placing or erecting and permitting to remain erected any structure or post on the west side of Villiers Street, Strand, in such a position as to cause an obstruction to the plaintiffs as occupiers of No. 10 Villiers Street, and certain cellars under Villiers Street and under and on either side of Craven Passage, in the parish of St. Martin-in-the-Fields.

The writ was issued on November 8, 1900, against the Vestry of St. Martin-in-the-Fields and the Charing Cross and Strand Electricity Supply Corporation, Lim.; but on a motion for an injunction coming on before Farwell, J., on November 9, it appeared that the powers of the

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vestry had ceased at twelve o'clock on that morning, and had passed to the Aldermen and Borough Council of Westminster; and the Judge thereupon gave leave to amend the writ by dismissing the then defendants, and substituting the new borough council as defendants.

In 1899 the Corporation of Westminster, or their predecessors, the Vestry of St. Martin-in-the-Fields, determined to light, by electricity, Villiers Street, and for that purpose they erected certain standards or lamp-posts to hold the lights. Villiers Street was a street which ran north and south immediately on the eastern side of Charing Cross Railway Station. The plaintiffs, who were wine and spirit merchants, were lessees of certain cellars running for a considerable distance along Villiers Street both to the north and, to a slight extent, to the south of a passage-way which ran east and west from Villiers Street under the Charing Cross Station, and their offices were situate on the western side of Villiers Street, immediately to the south of Craven Passage. The frontage of the plaintiffs' premises to Villiers Street, measured from the middle of the party-wall at the southern extremity of their premises to the northern front of the northern wall of their premises, was 37 ft. 6 in. Craven Passage was 30 ft. wide. For the purpose of lighting Villiers Street the defendants proposed to erect one of their standard lamp-posts in the middle of Craven Passage opposite the centre of the passage way on the western side of the street. The plaintiffs objected to the defendants so doing, and brought the present action.

The plaintiffs had a large business, and a large number of vans were daily discharging or receiving goods from their cellars and premises, and, in substance, they claimed a right to have this particular portion of the highway so kept that they might be easily able to have three vans loading or unloading at one time opposite their premises. Villiers Street was on a considerable slope, and it was said that the gradient was comparatively little at the southern end of the street up to about the northern boundary of the plaintiffs' offices, and then it became much steeper. The vans which received or discharged goods at the plaintiffs' premises were, in substance, of three characters. There were vans which came to receive empties, and the empties went out through a door at the southern end of the plaintiffs' offices. The vans for that purpose would naturally stand there for the greatest convenience. Then there were large waggons or drays, which came with wine in casks; these were pipes or butts of wine weighing as much as 15 or 16 cwt. To discharge these it was necessary to attach to the tailboard of the dray a slide, or what in the trade is called a pulley, down which the cask was slid into the road; and the plaintiffs contended that in order to do that, having regard to the gradient of Villiers Street, the tailboard of the dray must be uphill, otherwise the impetus of the cask as it left the dray down the pulley, if it were discharged downhill, would be such that the cask would get out of hand and the men would not be able to control it, and accidents would result. They alleged that the dray that did this particular work ought to be the middle one of the three; the waggon for empties would be the southernmost, and the dray to discharge the casks would be next to the north. They further alleged that they always had used, and ought to be able to use, a third waggon or conveyance further to the north containing wine in cases which would be carried by hand, and that, having regard to that arrangement of three vans for the purpose of discharging into their premises, the particular post which the defendants proposed to erect would be so placed as to be just at the point where the slide or the pulley of the dray which was discharging the casks would come, and that the position of the men who were engaged in the operation known as striking the casks—that is, discharging the vans with the load—would be such that there might be danger, because they might become pinned between the cask as it fell and the post.

Certain communications took place between the plaintiffs and the defendants, and the plaintiffs suggested that the lamp, if one was to be erected in that position, should be suspended from a bracket from the plaintiffs' premises, and they offered

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to give facilities for that purpose. defendants, however, refused to act this suggestion.

H. Terrell, K.C., *W. Hatfield Green*, and *E. J. M. Chaplin*, for the plaintiffs.—The plaintiffs are entitled to the injunction which they ask. Where an Act of Parliament authorises a corporation or undertakers to do a particular work, specifying the work, such as the making of a railway in a particular place, then if, in doing that work, a public or a private nuisance is created no action will lie either at the suit of the Attorney-General or by a private individual. If the Legislature authorises works, the doing of which must of necessity cause a nuisance or private injury, no action will lie; but if the Legislature directs works to be done, the doing of which must cause a public nuisance, but not necessarily a private injury, then if a private injury is done an action will lie. Here there is nothing in the Metropolis Management Act, 1855, s. 130, which authorises the defendants to commit a public nuisance or to do anything which would interfere with the plaintiffs' private right. It is clear upon the evidence that the erection of the proposed post would interfere with the plaintiffs' private right to use the highway for the purpose of unloading their vans. The case is covered by the decision in *Vernon* v. *St. James, Westminster, Vestry* [1880].[1]

[BUCKLEY, J., referred to *Baird* v. *Tunbridge Wells Corporation* [1894].[2]]

Astbury, K.C., and *A. d'B. Terrell*, for the defendants.—The defendants have a statutory right under section 130 of the Metropolis Management Act, 1855, to obstruct the highway by the erection of lamp-posts, and the plaintiffs cannot set up a private right to interfere with them in the exercise of that statutory right. It is not suggested that the defendants have acted *mala fide*. The case is concluded in the defendants' favour by *Goldberg & Son* v. *Liverpool Corporation* [1900].[3]

H. Terrell, K.C., in reply.—*Goldberg & Son* v. *Liverpool Corporation*[3] does not apply. The defendants in that case had statutory powers to construct a particular tramway in a particular street. That enabled them to do all things ancillary thereto, although in doing them they might commit a nuisance. The extent of the obligation of a public body in such a case is limited to the exercise of reasonable skill — *Hammond* v. *St. Pancras Vestry* [1874],[4] *Hammersmith Railway* v. *Brand* [1869].[5] *Metropolitan Asylums District Managers* v. *Hill* [1881][6] shews that the mere fact that the Legislature has directed a hospital to be erected, but has not said in what particular place, does not authorise the commission of a nuisance.

It is an actionable nuisance to obstruct the owner or occupier of premises abutting on a highway in his right of access, and he may recover damages for loss of custom in his business due to such cause—*Fritz* v. *Hobson* [1880].[7]

[BUCKLEY, J.—The right to step on to the highway from your own land is a private right, but directly you step on to the highway your user of the highway is a public right.]

Here the access to the plaintiffs' warehouse with goods has been obstructed, and that is an interference with a private right—*Att.-Gen.* v. *Thames Conservators* [1862],[8] *Lyon* v. *Fishmongers Co.* [1876],[9] and *Rose* v. *Groves* [1843].[10]

BUCKLEY, J., stated the facts, and referred to the suggestion made by the plaintiffs as to suspending the lamp from a bracket from their premises, and continued: It does not lie within my province to ascertain whether or not the defendants might reasonably have accepted that suggestion. I can quite understand that a public body may be in considerable difficulty in entertaining a suggestion that they should erect their lights on the premises of adjoining frontagers. The defendants

(1) 50 L. J. Ch. 81; 16 Ch. D. 449.
(2) 64 L. J. Q.B. 145; [1894] 2 Q.B. 867.
(3) 82 L. T. 362.
(4) 43 L. J. C.P. 157; L. R. 9 C.P. 316.
(5) 38 L. J. Q.B. 265, 273; L. R. 4 H.L. 171, 196.
(6) 50 L. J. Q.B. 353; 6 App. Cas. 193.
(7) 49 L. J. Ch. 321; 14 Ch. D. 542.
(8) 1 H. & M. 1, 32.
(9) 46 L. J. Ch. 68; 1 App. Cas. 662, 675.
(10) 12 L. J. C.P. 251; 5 Man. & G. 613.

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say that the position of this standard lamp is the most convenient—in fact, the only convenient position for it; and unless I can review, which I think I cannot, their discretion in that respect, I do not think I can have any regard to whether or not the suggestion the plaintiffs made was reasonable or not. It is for the defendants to determine where the posts, or brackets, or whatever they are, are to be placed. The only question for me to determine is whether the plaintiffs have a legal right to restrain the defendants from doing that which the defendants in their discretion say is the proper thing to do.

The plaintiffs' case, very shortly stated, is this: [His Lordship stated it to the effect above set out, and continued:] The plaintiffs set up a right to have a particular portion of the highway so kept as that they shall be in a position to exercise an alleged right of using it to the maximum of their own convenience. It does not seem to me that they have any such right. It has been put forward that they have some private right here. It seems to me that that is wrong. The right which they here seek to exercise is a right to use this highway which they enjoy in common with all other members of the public. They have an individual interest which enables them to sue without joining the Attorney-General, in that they are persons who by reason of the proximity of their own premises use this portion of the highway more than others. I apprehend that a person who owns premises abutting on a highway does enjoy, as a private right, the right of stepping from his own premises on to the highway; and if any obstruction be placed in his doorway, or gateway, or, if it be a river, at the edge of his wharf, so as to prevent him from stepping from his own premises on to the highway, or obtaining access from his own premises to the highway, that interference will be an interference with a private right. But immediately that he has stepped on to the highway, and is using the highway, what he is exercising is not a private right, but a public right. For that proposition I will only refer to three cases. First, there is a passage in the judgment of Vice-Chancellor Page-Wood in *Att.-Gen.* v. *Thames Conservators*,[8] where the Vice-Chancellor says this, which contains the germ of the matter: "Independently of the authorities, it appears to me quite clear, that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right." Then a little further on, in dealing with the facts of the particular case with which the Vice-Chancellor had to deal—namely, access to a wharf—he said this: "But, in truth, the access is not blocked up. The wharf will not be as readily and easily approached, and perhaps not at all by the same route; but that is a mere interruption to the navigation of the river which they enjoy in common with the public, and not as part of their special right of access." There you have the two things contrasted—the right of stepping from the private property on to the highway, or from the highway on to the private property, and the right of use of the highway in proximity to the private property. The one is a private right, and the other is a public right. That passage in the judgment of Vice-Chancellor Page-Wood was read and approved by Lord Cairns in the House of Lords in *Lyon* v. *Fishmongers Co.*,[9] and it was again referred to and acted upon by Mr. Justice Fry in the case of *Fritz* v. *Hobson*.[7] I am reading from the head-note in *Att.-Gen.* v. *Thames Conservators*,[8] which correctly, I think, reproduces the judgment. It is stated that it was there held "that the right of access to a wharf was a private right within [a certain] saving; but that a pier, which rendered the approach to a wharf less convenient without rendering access impossible, was an interference, not with the private right of access, but with the public right of navigation enjoyed by the wharf-owner in common with the rest of the public." It appears to me

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that that authority is precisely in point upon the question which I have to consider here. The lamp-post which is here set up near to the plaintiffs' premises is an obstruction to the highway adjoining these premises, but it is no obstruction to the private right of the plaintiffs to step from their own premises on to the highway.

Now, that being the position of affairs, what the plaintiffs are here complaining of is this: They say the erection of this standard on the pavement near to their premises will be an obstruction to the highway, and as such a common-law nuisance. They are entitled to complain of that as members of the public, and they are entitled to sue in their own name in respect of it, because they are individuals specially affected by an interference with their rights. But what are their rights? Under the Metropolis Management Act, 1855, s. 130, a statutory duty is cast upon the defendants to cause their streets to be lighted, and the section provides that they for that purpose "shall maintain, or set up and maintain, a sufficient number of lamps in every such street." So that there is here cast upon the defendants a statutory duty to do an act and to erect in the highway lamps (which will be obstructions) so far as necessary for the purpose of doing that act. Now what is it they are doing? It is not suggested for a moment that they are not acting perfectly *bona fide*. What they say is this, and it commends itself to one's common sense if one had to consider it: Directly a fixed obstruction is put up the cardinal question is, how far is that obstruction from the next fixed obstruction? The greater or less proximity of two fixed points will to a greater or less extent increase the difficulty of circulation. They say this particular fixed point is at a greater distance than any other situation which can be taken from another fixed point. If the lamp is put in the middle of Craven Passage at the edge of the kerb or pavement, it is at a greater distance from the plaintiffs' premises and at a greater distance from the next adjoining premises to the north than if placed anywhere else. That is the best place to put it. Then, also, this has to be considered—that if you put it rather more to the north or south, that is not immediately opposite Craven Passage—it would cast a shadow down the passage. The duty of lighting the passage is not cast upon the defendants, but on the railway company; but the defendants might very well regard the fact that if they put their lamp at the side it would cast a shadow down the passage. They are selecting a position, therefore, which they, in their discretion, think is the best for the convenience of the public.

Now what is the plaintiffs' right in this respect? Their right is so to use this portion of the highway for loading or unloading their goods as to enjoy the highway reasonably in common with other members of the public entitled to its use. The highway is a thing which under the statute is to be, among other things, lighted, and lighted if necessary by fixed obstructions placed in the highway; and it appears to me that the plaintiffs' right in respect of the highway is to enjoy that reasonably with all other members of the public, and that they cannot set up an individual interest in the right to use the highway in common with other members of the public against the reasonable use by the defendants of the statutory authority given to them to obstruct the highway by lamp-posts where they think it necessary. I agree that the local authority must not so use their power as to commit a nuisance. They ought to use it so as to benefit all the members of the public, whom they have to consider reasonably according to the best of their judgment, and I think that they may, for the benefit of all, affect, to some extent, the convenience of one. Now that is the most the plaintiffs can say that the defendants are doing. Of course it is obvious that to place a post in this particular position will *pro tanto* affect the elasticity of the plaintiffs' operations in discharging their goods, but that is all that it can be said it does. [His Lordship then reviewed the evidence, and came to the conclusion that the erection of the post in the place the defendants proposed was in no reasonable sense an obstruction to the plaintiffs in doing that which they sought to do in respect of discharging at the entrance to this passage, and continued:] It seems to me

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therefore, both on the law and on the facts, the plaintiffs fail; and although I regret they did not come to some arrangement as to what was really a trifling matter, without this action ever having been brought into Court, still, as I am here simply to try the legal right and the plaintiffs fail, I must dismiss the action with costs, to be taxed as between solicitor and client under the Public Authorities Protection Act, 1893.

Solicitors—Dale, Newman & Hood, for plaintiffs; Fladgate & Co., for defendants.

[*Reported by W. Irimey Cook, Esq., Barrister-at-Law.*

KEKEWICH, J. 1901. May 21. June 13. MORTGAGE INSURANCE CORPORATION *v.* CANADIAN AGRICULTURAL COAL AND COLONISATION CO.

Company—Debenture-holders' Action—Solicitor—Costs—Taxation—Joint and Several Retainer—Company and Trustees for Debenture-holders Represented by Same Solicitor—Full Set of Costs.

In a debenture-holders' action where the same solicitor appeared for the defendant company and for two sets of trustees for debenture-holders, and where the funds were insufficient to pay the first mortgage debentures in full, a direction was given by the Court to the Taxing Master that, in taxing the costs of the defendants (other than the defendant company), he should allow the trustee defendants a full set of costs, except as regarded any separate costs of the defendant company.

Action brought by the plaintiffs, who were holders of first mortgage debentures of the defendant company, and who sued on behalf of themselves and all other holders of the same class, to enforce their security. The defendants were, in the first instance, the Canadian Agricultural Coal and Colonisation Co. alone. Subsequently Sir Henry Seymour King, Charles William Trotter, and Jasper Myers Richardson, were added as defendants, as the trustees for the first and second mortgage debenture-holders. There were not two separate bodies of trustees, the defendants Sir H. S. King and C. W. Trotter being trustees for the first mortgage debenture-holders, and Sir H. S. King and J. M. Richardson for the second mortgage debenture-holders. Some costs were incurred in connection with an application for a receiver before the defendant trustees were added.

Judgment was given in the action on July 31, 1897, and on May 15, 1900, the Master made his certificate, from which it appeared that the available funds of the company were insufficient to pay the first mortgage debentures in full.

On June 29, 1900, an order on the further consideration of the action was made, by which it was ordered "that it be referred to the Taxing Master to tax the costs of the plaintiffs and defendants, other than the defendant company, of this action." The order further provided that the residue of the funds to be dealt with, after payment of the costs, should be apportioned amongst the first mortgage debenture-holders named in the schedule to the Master's certificate, rateably, in proportion to the amounts certified to be due to them.

The Taxing Master taxed the bill upon the principle laid down in *Ford, Ex parte; Colquhoun, in re* [1854],[1] and disallowed one third part of the profit-costs of the bill of Mr. H. F. Pollock, who was the solicitor on the record for all the defendants, considering that this amount represented Mr. Pollock's share as appearing for the defendant company. Mr. H. F. Pollock applied to the Master in chambers to have his full costs, and the Master sent the matter to the Judge in chambers, who desired it to be argued in Court.

In his affidavit filed on March 29, 1901, Mr. Pollock stated that his firm, in the first instance, appeared for the defendant company, and when the writ was amended by adding as defendants the trustees of the first and second mortgage debenture-holders, in order to save the

(1) 23 L. J. Ch. 515; 5 De G. M. & G. 35.

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expense of a separate representation, he was instructed to represent the trustee defendants jointly and severally with the company. He also submitted in his affidavit that the trustee defendants were entitled to an indemnity out of the estate for all the costs for which they were liable. Mr. H. F. Pollock had since died.

Application was now made by motion, on behalf of the trustee defendants, that the order on further consideration might be amended by adding a direction that the trustees for debenture-holders should have a full set of costs allowed to them.

Whinney, for the application — In *Watson* v. *Row* [1874] [2] some remarks were made by Vice-Chancellor Hall on the case of *Colquhoun, In re*.[1] But, no doubt, in *Smith* v. *Dale* [1881],[3] *Watson* v. *Row* [2] was dissented from. The solicitor in the present case is entitled to his full costs, there being a joint and several retainer—*Furlong* v. *Scallan* [1875] [4] and *Cordery on Solicitors* (3rd ed.), p. 75.

George Lawrence, for the plaintiffs.—In *McEwan* v. *Crombie* [1883] [5] North, J., considered the decisions in *Watson* v. *Row* [2] and *Smith* v. *Dale*.[3] The plaintiffs do not actively oppose the application, and desire only to be protected as to their costs.

June 13.—KEKEWICH, J., delivered a written judgment, in which, after stating the facts, he proceeded as follows: On that part of the order on further consideration which deals with the payment of costs, a question has arisen which is one of some general importance, because actions of this character, and with the like result, are of frequent occurrence. The order on further consideration referred it to the Taxing Master to tax "the costs of the plaintiffs and defendants, other than the defendant company," and directed the taxed costs to be paid. It properly excluded the defendant company's costs; but the same solicitor appeared for the defendant company and the two sets of trustees, and he claims to be paid his full costs, notwithstanding that one of his clients gets none. The Taxing Master proceeded to tax the bill on the principle established by *Colquhoun, In re*,[1] and there can be no question but that in so doing he was perfectly right; and indeed this is admitted by the application now under consideration for an alteration of the order by a direction which will give the solicitor his full costs. That application is made pending the taxation with a view of setting the matter right at an early stage, and avoiding useless expenses. Indeed, it is obvious, from what I have already said, that if the taxation had proceeded to certificate, and had been followed by a summons to review, that summons must have failed. The course adopted, therefore, is convenient.

It has been endeavoured to base the application on the ground that the retainer by the trustees of the solicitor was joint and several, and that they are therefore liable for the costs of all the defendants, and that consequently all the costs ought to be paid out of the fund. This ground is put forward in an affidavit by the late Mr. H. F. Pollock, who acted as the solicitor for the defendants. His death has unfortunately rendered it impossible to ascertain what actually took place when he was instructed, and I am obliged to take his affidavit for what it is worth, without further explanation. It renders little, if any, assistance in determining what was the bargain between him and his clients the trustees. He, indeed, says he was instructed by the company and the trustees to act for them jointly and severally, and he states that the retainer was a joint and several one, and that the defendants are jointly and severally liable for the costs of the action. It is, I think, impossible to arrive at this conclusion from the general statement made in the affidavit. The effect of such a retainer as Mr. Pollock describes was discussed by Vice-Chancellor Bacon in *Allen, In re; Davies* v. *Chatwood* [1879].[6] And towards the conclusion of his judgment in that case the Vice-Chancellor sums up the position thus: "It is a joint retainer to this extent. 'We together undertake to pay

(2) 43 L. J. Ch. 664; L. R. 18 Eq. 680.
(3) 50 L. J. Ch. 352; 18 Ch. D. 516.
(4) 9 Ir. Rep. Eq. 202.
(5) 53 L. J. Ch. 21; 25 Ch. D. 173.
(6) 48 L. J. Ch. 358; 11 Ch. D. 244.

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you, but not that any one of us will pay you all; we jointly contract with you and with ourselves that we will pay you the whole amount of your charges.'" In this particular case there is the further difficulty that, in the first instance, the company were the only defendants, and Mr. Pollock was retained by the company before the trustees were added; and it would be strange if, when the trustees were added, they gave a retainer making them liable jointly in the sense contended for—that is, liable not only for their own costs, but also for those of the company. Mr. Pollock, in his affidavit, endeavours to get over this by saying that when the trustees were added as defendants he was instructed to represent them jointly and severally with the company; but, apart from the decision in *Allen, In re*,[6] I could not attribute the effect contended for to such retainer, and *Allen, In re*,[6] is conclusive against it.

There is, however, another ground which is mentioned in Mr. Pollock's affidavit, and which deserves consideration. It is said that the trustees are entitled, as such, to an indemnity out of the estate for the costs for which they are liable. The principle is sound, but requires some care in application. The trustees for the second mortgage debenture-holders have no estate, the funds being, as already mentioned, insufficient to pay the first mortgage debenture-holders, and, as regards them, therefore, the indemnity is worth nothing. But, as stated above, there are two separate bodies of trustees, and all the trustees have appeared together, so that the costs incurred by them are really the costs of the trustees for the first mortgage debenture-holders. In other words, if the latter are entitled to an indemnity for all the costs for which they are liable, there will remain no costs to be paid by the trustees of the second mortgage debenture-holders. It does not follow that the solicitor will thus be paid in full all the costs of all the defendants, and he ought not to be paid out of the funds any costs for which the company are, but the trustees are not, liable. If the action had been constituted as it now is in the first instance, and the trustees had originally been made defendants, these costs would have been trifling. This I say on the authority of the Taxing Master, whom I have consulted and who has the bill before him. It happens, however, that a motion for a receiver was made before the trustees were added as defendants. They were added before the order appointing a receiver was drawn up, and probably because the necessity of adding them was discovered when the motion was made; but some costs must have been incurred on behalf of the company before this was done, and for those costs the trustees cannot be liable. To such costs, therefore, their right of indemnity cannot extend, and these, together with any other separate costs of the company, must be left unprovided for.

Subject to the exception just noticed, I think it right that in a case like this, where the company and the trustees for debenture-holders appear by the same solicitor, all the costs of the defendants should be paid out of the funds before distribution between the debenture-holders, not because the company can claim costs, which they cannot, but because the costs must, subject to that exception, be treated as incurred on behalf of the trustees. If the company and the trustees appear by separate solicitors, the costs of the trustees would be substantially the same as here, where the solicitor appears for both. Where debentures are protected by a covering deed, the trustees of that deed are necessary parties, and they can, and often do, render the Court useful assistance. It is not desirable to discourage them by making difficulties about the payment of their costs, and there is no advantage in driving them to instruct a solicitor separate from that of the company, who presumably is possessed of information and has the means of getting it. The company is little more than a nominal defendant in such actions.

I have consulted with the Taxing Master, and have asked him to consider what words would be apt to give the trustees the costs to which I hold them to be entitled. He has been good enough to do this, and submit the language to some of his colleagues, so as to secure a

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settled practice, which is of importance in all proceedings, and especially in the matter of costs. I am afraid that the introduction of this language cannot be effected by a verbal amendment of the order on further consideration, and that there must be a new order. That is to be deprecated as causing further expense, but it is justified by the advantage of definite instructions expressed in clear terms. The order will be that in taxing the costs of the defendants other than the company, under the order on further consideration (which are to include the costs of the present order), the Taxing Master is to allow to the said defendants a full set of costs, notwithstanding that the said defendants and the defendant company have appeared by the same solicitor.[7]

Solicitors—F. Stuttaford; Baker, Blaker & Hawes.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

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(7) The order made upon reading the order dated June 29, 1900, and the affidavit of H. F. Pollock, filed March 29, 1901, was as follows:

"This Court doth order that in taxing the costs directed to be taxed by the said order, the Taxing Master do include in the costs of the defendants, the said Sir Henry Seymour King, Charles William Trotter, and Jasper Myers Richardson, a full set of costs, except as regards any separate costs of the defendant company. And it is ordered that the costs of the defendants, the said Sir Henry Seymour King, Charles William Trotter, and Jasper Myers Richardson, and of the plaintiffs of this motion be also taxed by the Taxing Master and be included in the Certificate of Taxation to be made under the said order dated the 29th June 1900.

"And it is ordered that the said costs, when taxed, be paid in like manner as the costs directed by the said order were directed to be paid."

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

STIRLING, J. 1900. June 13, 14. RIGBY, L.J. COLLINS, L.J. ROMER, L.J. 1901. June 27.

HAND v. BLOW.

Receiver — Debenture-holder's Action — Appointment by Court—Leaseholds Sub-demised to Trustees of Trust Deed—Possession by Receiver—Rent and Covenants—Claim by Landlord to be Paid out of Assets.

Where, in an action by mortgagees or debenture-holders to enforce their security (including leasehold property mortgaged by sub-demise), a receiver has been appointed who enters into possession of the mortgaged property, the Court will not order the receiver to pay out of the assets in his hands rent or moneys payable in respect of breaches of covenant which neither the mortgagees nor the receiver are liable at law or in equity to pay to the head landlord. The mere fact that the head landlord, owing to the appointment of a receiver, cannot re-enter or distrain without first obtaining leave from the Court, is not sufficient to raise such an equity in his favour.

By a trust deed to secure the mortgage debentures of a company, called Owen Jones, Lim., certain leasehold houses Nos. 116, 118, 120, 122, and 124 Edgware Road were purported to be leased by way of sub-demise to the trustees by the company. It was doubtful whether that sub-demise was effectual by reason of a mistake with reference to the original lease under which the property was held, but it was admitted that the trustees of the debenture deed were not assignees of the lease under which the company held, but that at most they were sub-lessees.

By the original lease an annual rent was payable in advance on the usual quarter days. The original lease also contained covenants to keep and deliver up the premises in proper repair, and a condition of re-entry on breach of covenants. The present action was commenced by the

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HAND v. BLOW, App.

debenture-holders to enforce their security, and on August 29, 1899, an order was made in the action appointing a receiver and manager, who entered into possession of the leasehold houses on behalf of the debenture-holders. In February, 1900, the landlord served notice on the receiver to put the property into repair, which had not been complied with.

On March 24, 1900, the receiver, it was alleged, removed all the chattels of the defendant company from the premises. The receiver had paid the rent up to March 25, 1900, but he did not pay the rent which fell due on March 25, 1900, nor did he deliver up possession to the landlord. On March 29, 1900, the landlord took out a summons asking that he might be at liberty to distrain for the rent which had become due. On April 25, 1900, that summons was amended by asking that, in default of sufficient distress being found or non-payment of the rent and costs, the applicant might be at liberty to enter upon the premises and determine the lease, and, in the latter alternative, that the receiver might be ordered to pay to the applicant a sum calculated at the rate of the annual rent for use and occupation by the receiver and manager from March 25, 1900, to the date of determination, together with such sum as might be due for dilapidations under the covenant in that behalf to the date of re-entry.

On May 7, 1900, the Master in chambers gave leave to the applicant to re-enter and determine the lease, and on May 9 following the landlord actually re-entered and put an end to the lease.

The other part of the summons was adjourned into Court.

Upjohn, Q.C., and *P. F. Wheeler*, for the applicant.—The principle upon which the Court acts is stated in *Oak Pits Colliery Co., In re; Eyton's Claim* [1882],[1] and is based upon the maxim *Qui sentit commodum sentire debet et onus*. This is a proper payment in respect of the user of the property—*Lundy Granite Co., In re; Heaven, ex parte* [1871].[2] The principle applies to the case of receivers—*Neate* v. *Pink* [1851][3] and *Balfe* v. *Blake* [1850].[4]

[STIRLING, J., referred to *Brocklebank* v. *East London Railway* [1879],[5] where it was held that persons not parties to the suit cannot apply in a summary way to have a claim against a receiver enforced against property out of which he is entitled to be indemnified.]

That rule has certainly not been observed in practice. The Court exacts a higher standard of conduct from its officers than from individuals — *James, Ex parte; Condon, in re* [1874],[6] and *Carnac, In re; Simmonds, ex parte* [1885].[7]

Martelli, for the debenture-holders.—The receiver is not the representative of the tenant, but of the tenant's mortgagee—*Ramage* v. *Womack* [1899].[8] That fact distinguishes the present case from those cited for the applicant.

[STIRLING, J., referred to *Cox* v. *Bishop* [1857].[9]]

The present application is an attempt to pay one man's debt out of another man's property. There is no case which sanctions such a proceeding, even where the Court is dealing with one of its officers.

Upjohn, Q.C., in reply, referred to *Jacobs* v. *Van Boolen; Roberts, Ex parte* [1889].[10]

STIRLING, J., after stating the facts to the effect before stated, continued: Both claims seem to me to stand on the same footing. It is quite clear, and it is admitted by and on behalf of the applicant, that if the trustees had been in possession themselves, as the receiver was in fact, there would have been no liability on their part at law or in equity to make either of these payments. There is at law neither privity of estate nor privity of contract between the landlord and these trustees, and the cases in equity are equally strong. They are referred to in

(1) 51 L. J. Ch. 768; 21 Ch. D. 322.
(2) 40 L. J. Ch. 588; L. R. 6 Ch. 462.
(3) 21 L. J. Ch. 574; 3 Mac. & G. 476. Before Shadwell, V.C. [1846], 15 Sim. 450.
(4) 1 Ir. Ch. Rep. 365.
(5) 48 L. J. Ch. 729; 12 Ch. D. 839.
(6) 43 L. J. Bk. 107; L. R. 9 Ch. 609.
(7) 55 L. J. Q.B. 74; 16 Q.B. D. 308.
(8) 69 L. J. Q.B. 40; [1900] 1 Q.B. 116.
(9) 26 L. J. Ch. 389; 8 De G. M. & G. 815.
(10) 34 Sol. J. 97.

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the recent case of *Ramage* v. *Womack*[8]; the leading case on this branch of the law being *Cox* v. *Bishop*.[9] That being so if the trustees had gone into possession and had discharged their duties as trustees, why is the receiver under any greater liability? There is, apart from his position as an officer of the Court, nothing which should impose any greater liability upon him. But it is said that the Court, finding its officer in possession, will compel him to do what is right, honest, and honourable in the execution of his duties as officer of the Court, and it is said that it would not be right, honest, and honourable if the Court were to abstain from enforcing payment of these sums, the receiver having been in possession as officer of the Court, and having abstained from delivering up possession with a view, it is said, to realise these securities for the creditor debenture-holders. Now I have a difficulty in the abstract in acceding to that proposition. The law of landlord and tenant is perfectly clear. A landlord lessor makes a demise to a lessee upon certain terms; the lessee makes an underlease to a sub-lessee upon other terms; there is nothing dishonest or dishonourable in the sub-lessee entering upon the property upon the terms which are contained in the sub-lease, and as between him and his immediate lessor he is entitled to remain there so long as he complies with the terms of his lease. If the terms of the sub-lease are less onerous or differ from those contained in the head-lease, then difficulties will no doubt arise. But there is no legal obligation on the underlessee to perform the obligations in the superior lease, apart from this, that if he fails to perform them he may find his sub-lease brought summarily to an end. If, for example, the sub-lessor fails to pay the rent which is due to the superior landlord, the sub-lessee may find his goods distrained upon by the superior lessor. If the sub-lessee fails to observe the covenants or stipulations in the head-lease in such a way that a power of re entry arises, then the sub-lessee may find himself ejected. But beyond that there is no obligation—no legal obligation certainly—and I can see nothing contrary to honour and right, in the sub-lessee remaining in possession on the terms arranged between him and the sub-lessor. It would seem to me, therefore, that there is no reason why an order should be made against the receiver on general principles.

But it is said that the Court has in certain cases laid down the rule that, under circumstances such as exist in the present case, there is an honourable obligation which the Court will see carried out. The first class of cases are those in which there has been a liquidation of a company and part of the property of the company was a leasehold, and the liquidator for the purpose of carrying out his duties as liquidator continues in occupation. The law on that is stated by Lord Lindley (then Lord Justice Lindley, and a member of the Court of Appeal) in *Oak Pits Colliery Co., In re.*[1] What he says is this: "When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose, and in such a case it appears to us that the rent for the whole period during which the property is so retained or used ought to be paid in full without reference to the amount which could be realised by a distress." That is the rule which has been laid down with reference to property of which the company is lessee. The landlord ought to be paid by the company on whose behalf the liquidator is acting. But here I am not winding up the company which has issued these debentures. I am only assisting the debenture-holders who stand in the position of equitable mortgagees to their rights, and it does not seem to me that that case is precisely in point, or that it lays down a general principle which applies to all cases in which a receiver or officer of the Court may find himself in possession of leasehold property under conditions which do not place him under a direct legal obligation to the superior landlord.

The cases which approach more nearly are one or two which have been decided

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with reference to the position of receivers. In an Irish case of *Balfe* v. *Blake*,[4] which was apparently an administration action, a receiver had been appointed, and he had for several years duly paid to the head landlord the head rent subject to which the defendant held the lands in question. The rent was paid up to May 1, 1848, but subsequently was allowed to fall into arrear. On November 1, 1849, there became due one and a-half year's rent, and on December 20 following the landlord obtained the leave of the Court to proceed as he might be advised against the lands. He accordingly brought an ejectment and recovered possession, and then the report states this: "During the period intervening between the 1st of May 1848 and the day of the execution of the *habere*, the receiver (who filled that office over other lands in the cause) had received from the sub-tenant of the lands of Blindwell sums of money on account of their rents considerably exceeding the amount due for head rent. The monies so received, instead of being applied by him in discharge of the head rent, had been wholly expended by him under an order of the Court in this cause, bearing date the 17th of June 1844, whereby it was provided that he should pay the various specified sums in satisfaction of certain demands therein mentioned." Then an application was made by the landlord that the receiver should pay the arrears of rent, and the Lord Chancellor made the order. He puts the case in this way: "this Court is bound to act with honesty both to landlord and tenant; and being placed in the position of tenant, to do as a just and honest tenant would do. It holds the rents received from the sub-tenants *in usum jus habentium*. It is responsible in the first instance to the landlord, it being the primary duty of the tenant, and therefore of the receiver over that tenant's interest, to keep down the head rent. So clear is the receiver's duty in this respect, that if, in consequence of his default, the landlord is compelled to institute proceedings for the recovery of his rent, the receiver is held liable for costs if rents have reached his hands. The Court is bound to protect all parties, and were it through its officer to apply the rents received from the sub-tenants to purposes other than those to which they ought to be applied, and leave the head rent unpaid, the landlord might distrain the lands in the possession of the sub-tenants, who would have already paid the receiver. To such a hardship the Court cannot expose them, nor, on the other hand, is it to deprive the landlord of his due. The receiver is the officer upon whom the performance of the obligations imposed by the possession of the land is devolved. His primary duty is to pay the head rent, and this he is bound to do without any special order of the Court to that effect." And in England, as has been pointed out to me, there is another case of *Jacobs* v. *Van Boolen; Roberts, Ex parte*,[10] only reported in the *Solicitors' Journal*, in which the same principle has been applied. These cases seem to me to have proceeded upon the principle that the Court being placed in the position of a tenant must do what all just and honest tenants would do. But how does that apply here? The receiver is not in the position of a tenant, but in the position of a sub-tenant, and, as I have pointed out, the under-tenant is entitled as between himself and the original landlord to hold upon the terms of the sub-lease, and is not bound, except as I have mentioned, to pay the rent or perform the covenants which are reserved or contained in the head lease. It seems to me that in this case the principle upon which that case is based does not apply.

Then there was also cited a very remarkable case of *Neate* v. *Pink*.[3] There the question arose with reference to certain property in Jamaica. The trustee and executor of John Hiatt, the testator in the cause, who was the owner of a moiety of the property, took a lease of the other moiety from the owners of it. The lease contained the usual covenants to pay the rent and to repair. A suit was subsequently instituted in England by the parties interested under the will of the testator for the execution of the trusts of his will. Certain parties in Jamaica were appointed receivers and managers of the estates of John Hiatt, and entered into

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possession of the entire estate, and remitted the proceeds to consignees in England, who were also appointed in the suit, and who paid the sums received into Court. No rent having for many years been received by the lessors in respect of their moiety, they presented a petition to the Court, and upon the hearing it was held that notwithstanding some of the parties interested under the will of John Hiatt were under disability, they were bound by the occupation of the receivers, and an order was made for payment to the lessors of the arrears of rent, and directing a reference in respect of the dilapidations. It seems to me that, looking at the whole of the facts, the Court came to the conclusion that this leasehold interest in one moiety must be treated as a leasehold interest which belonged to the estate, having regard to what had taken place; and when once that conclusion was arrived at there was no difficulty in applying the principle which was referred to in the Irish case to which I have referred. It is a material circumstance in *Neate* v. *Pink* [3] that in Jamaica the applicants, the landlords, recovered judgment against the receivers for the amount which was due, so that the Jamaican Courts shewed that they treated the relation of landlord and tenant as subsisting between the owners of the moiety and the receivers. If that were so, then there would be a right of indemnity for the receivers out of the estate, and the Court may only have applied a common equity by allowing the claims to be paid direct out of the fund appropriated. There is at all events this distinction. It seems to me to be impossible to say that no claim could be established by the present applicant against any one else except the receiver in respect of the sums now claimed.

Lastly, two cases in bankruptcy were referred to in which the Court ordered the trustee in bankruptcy to repay moneys paid to him under a mistake of law, and for the return of which no action would have lain at law. No doubt observations were made by very eminent judges—Lord Justice James and Lord Esher, then Master of the Rolls—as to the necessity of maintaining a high standard of honour and morality in officers of the Court. That doctrine must, however, be accepted with some limitations; and with reference to that I venture to read some observations of one of those learned Judges (Lord Justice James) in *Regent's Canal Ironworks Co., In re; Grissell, ex parte*, [1875].[11] In that case a company was being wound up and there were debenture-holders. By the direction of the Judge in chambers, an agreement was made between the liquidators and Mr. Grissell by which Mr. Grissell made an advance to enable the liquidators to carry on the business of the company, and the question arose whether these advances were to be repaid out of the property which was charged in favour of the debenture-holders. Vice-Chancellor Malins held that it must be so paid. Now, Lord Justice James, in the Court of Appeal, says this: "I am clearly of opinion that there has been some miscarriage on the part of the Vice-Chancellor, probably due to this, that he fancied that he had in some way, acting in the winding-up, induced Mr. Grissell, by sanctioning that agreement, to lay out money, and that he thought, therefore, as he himself expressed it in his judgment, that the honour of the Court was in some way involved, and that it was for the honour of the Court to see that Grissell was paid the moneys which he had been induced by the sanction of the Court to lay out in carrying on the works. But the honour of the Court cannot be satisfied at the expense of somebody else, who is not in point of law or in point of equity bound to satisfy it out of his means. It really comes to the simple question of what was the right of the debenture-holders. It appears that the machinery, plant, and effects (the proceeds of which are now in question) were well and effectually mortgaged to the debenture-holders, and the debenture-holders were, in my opinion, in exactly the same position as any other equitable mortgagees who had lent money to the company." In this case it seems to me that I am, in substance, asked to take the money of the debenture-holders, and to apply it in payment of debts for which the debenture-holders or their trustees are not at law or in equity liable. It seems to me that this

(11) 3 Ch. D. 411.

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part of the summons must be refused. As this is an experiment, I think the costs of the adjournment should follow the event.

The landlord appealed.

P. F. Wheeler (with him *Upjohn, K.C.*, and *Begg*), for the appellant.—The Court being in possession by its officer will see that justice is done to the landlord, whose rights of distress and re-entry are interfered with by the appointment of a receiver. The receiver is the agent of the mortgagor—Conveyancing and Law of Property Act, 1881, s. 24.

[ROMER, L.J.—That only applies as between mortgagor and mortgagee, and not in favour of third parties.]

The principle that a receiver or liquidator who occupies premises for the purposes of the administration or liquidation must pay the rent and discharge the covenants as a necessary outgoing has been generally recognised—*Eyton* v. *Denbigh Railway* [1868],[12] *Balfe* v. *Blake*,[4] *Great Eastern Railway* v. *East London Railway* [1881],[13] *Jacobs* v. *Van Boolen; Roberts, Ex parte*,[10] *Lundy Granite Co., In re*,[2] *Oak Pits Colliery Co., In re*,[1] *Marriage, Neave & Co., In re* [1896],[14] *Paterson* v. *Gas Light Co.* [1896],[15] and *Neate* v. *Pink*.[3] The maxim *Qui sentit commodum sentire debet et onus* applies.

Martelli, for the respondents, was not called on.

RIGBY, L.J.—In my opinion the decision appealed from must be maintained for the reasons given by Mr. Justice Stirling in the judgment which has been read to us, and the appeal should be dismissed with costs.

COLLINS, L.J.—I am of the same opinion. [His Lordship stated the facts, and continued:] The landlord having lost the opportunity of distraining for his rent, applied that the receiver might be ordered to pay the rent out of the moneys in his hands arising from the sale of the chattels; but Mr. Justice Stirling decided that the landlord had no right either at law or in equity to require the receiver to make good, out of the moneys in his hands, rent for the time he had been in use and occupation of the premises. From that decision this appeal is brought. It is not disputed that, in point of law, the appellant has no such right as is claimed on his behalf. There is no privity of estate between the lessor and sub-lessees, and the sub-lessees are under no liability to the lessor on the covenants in the lease. The contention, however, is that the Court has assisted the debenture-holders by putting in its own officer as receiver, and thereupon a new right arose in favour of the lessor against the receiver. I should like to examine the basis of that alleged right. It is admitted that the trustees themselves are under no liability. Is there any reason why the landlord should be better off because a receiver is appointed and goes into possession on behalf of the trustees, the sub-lessees? Why should that put the landlord in a better position? I can see no reason. Suppose that there had been no receiver and that the trustees, the sub-lessees, had done all that the receiver has done, the lessor would have no legal remedy on the covenants for the rent, and no actual remedy by distress unless put in before the removal of the goods.

There is only one point in the argument which impresses me at all, and that is about the possible damage sustained by the landlord through the action of the Court. When the Court appoints a receiver the rights of the landlord are suspended by the order of the Court, and if no receiver had been appointed it may be that the landlord might have put in a distress before the goods were removed, and to that extent the landlord may have been prejudiced by the interference of the Court, and there may be some ground for suggesting that the receiver should make good the loss the landlord has thereby sustained. No authority, however, has been cited to shew that a receiver has even been ordered to do anything of that kind under the circumstances here existing, and it is not my province to make a new equity, though I can follow the force of counsel's argument to that extent.

(12) 37 L. J. Ch. 669; L. R. 6 Eq. 14.
(13) 44 L. T. 903.
(14) 65 L. J. Ch. 839; [1896] 2 Ch. 663.
(15) 65 L. J. Ch. 709; [1896] 2 Ch. 476.

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It is sufficient to say that equity does not profess to cure every inconvenience that may arise from its action in appointing a receiver.

The cases relied on have all been distinguished by Mr. Justice Stirling in his judgment. Broadly speaking, they are all cases of direct liability between lessee and lessor. In none of them was there any question about the rights of the lessor against a sub-lessee. In my opinion, no right at law or in equity can be based on the fact that a receiver was substituted for the sub-lessee; and if any new right could arise through the landlord being thereby placed in a worse position, there is no authority which carries the appellant's case to that length. I agree that the appeal should be dismissed.

ROMER, L.J.—I agree in thinking that this appeal fails for the reasons given by Mr. Justice Stirling and my brother Lord Justice Collins. The case has been very well argued, and I only wish to add a word or two on the principle laid down by the authorities which were cited to us. I think that the principle is this: If in an action or other proceeding in which the estate, whether of a person or a company, is being administered or dealt with by the Court, a receiver or liquidator is appointed by the Court, and that receiver or liquidator has occupied or used premises part of the estate, then as to any rent or other outgoings payable to a landlord or other person during that occupation or user, and for which the company or person whose estate is being administered or dealt with is liable, the Court will see that such rent or other outgoings are paid out of assets got in by the receiver or liquidator. But that principle does not and cannot apply to a case between mortgagor and mortgagee when the mortgaged premises are leasehold property demised to the mortgagee by the mortgagor or charged in his favour in such a way that the mortgagee is not liable to pay the rent or other outgoings either to the mortgagor or to the mortgagor's landlord. In such a case the receiver is appointed in the right of the mortgagee. The Court is not administering the mortgagor's estate. It is only dealing with the mortgaged property, and the mortgaged property is in itself under no liability to the landlord in respect of rent. As between mortgagee and mortgagor the latter remains liable, even though the mortgagee should go into possession; and further, the mortgagee by going into possession does not become liable in respect of such occupation to the landlord for the rent. Is the matter changed by the appointment of a receiver? That does not take away from the mortgagor his primary liability. The mortgagor remains liable—not the mortgagee, nor the receiver, nor the mortgaged property. The landlord has no claim against the mortgagee, or the receiver, or the mortgaged property during the occupation by the receiver. Of course, in a case where the landlord by reason of the rent not being paid or of the covenants not being complied with, has a right to complain and to re-enter, he can apply, notwithstanding the appointment of the receiver, and obtain leave from the Court to re-enter and so take away the receiver's right of occupation. So in a proper case he may get leave to distrain; but the mere fact that owing to the appointment of a receiver application has to be made to the Court for such leave does not in my opinion give any special rights to the landlord, and has never, so far as I know, been held to do so. No authority whatever has been cited to shew that in such a case as I have indicated between ordinary mortgagee and mortgagor, where a receiver has been appointed in an ordinary action to enforce the security, the landlord has a right to apply to the Court and ask that the receiver should pay the rent out of the mortgaged assets; and for the reasons which I have given it would be contrary to principle to entertain such an application.

As to the argument that there is something in the nature of honesty and conscience requiring the Court to intervene, that is merely an appeal *ad misericordiam* which is put forward in default of any legal or equitable right, and has been dealt with sufficiently by Mr. Justice Stirling. The question here is a mere question of right, legal or equitable; and if the applicant has no right to make the

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application, the Court acts honestly in dismissing it. The mere fact that the mortgagor happens to be a limited company can make no difference, and if the applicant succeeded here a general principle would have to be stated by the Court which would apply to all cases between mortgagor and mortgagee. In my opinion that general principle ought not to be laid down, and this appeal ought therefore to be dismissed with costs.

Solicitors—Duffield, Bruty & Co., for appellant; H. E. Warner & Co., for respondents.

[*Reported by A. E. Randall and A. Cordery, Esqs., Barristers-at-Law.*

BYRNE, J. 1901. June 6.

HARVEY, *In re*; HARVEY *v.* HARVEY.

Estate Tail—Strict Settlement of Realty—Residuary Personalty—"Subject to be invested in the purchase of lands" after the Death of a Certain Person—Disentailing Deed Executed in His Lifetime—Validity—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4. *c.* 74), *ss.* 1 *and* 71.

The words "money subject to be invested in the purchase of lands to be settled" in section 71 *of the Fines and Recoveries Act*, 1833 (*which section enables a tenant in tail to acquire the absolute interest in such money*), *when read in conjunction with the interpretation clause* (*section* 1) *of the same Act, mean money subject either presently or at any future time to be laid out in the purchase of lands.*

Where, therefore, by will lands were settled in strict settlement and the testator's residuary personalty was given to trustees upon trust to pay the income thereof to a certain person for his life, and after his death to convert the same and invest the proceeds in the purchase of lands to be settled to the same uses as the settled realty, a disentailing deed executed in the lifetime of such person by the tenant in tail in remainder of the settled realty with the consent of the tenant for life thereof, is effectual to bar the estate tail of the tenant in tail in the residuary personalty.

Fordham *v.* Fordham (34 Beav. 59) *approved and followed.*

General Sir Robert John Harvey deceased, by his will dated January 22, 1852, devised all his freehold messuages, lands, tenements, and hereditaments situate in the counties of Norfolk and Suffolk and elsewhere in the kingdom of Great Britain, to trustees and their heirs, as to a portion of the hereditaments to the use of his wife Dame Charlotte Mary Harvey and her assigns during her life or widowhood, and as to all the rest of the hereditaments to the use of the trustees for the term of five years to commence from the day of his decease, upon trusts for raising the sum of 20,000*l.*, and after the expiration or other sooner determination of the said term of five years, as to all the same hereditaments, and after the decease or marriage of his wife, which should first happen, as to the hereditaments thereinbefore devised to her during her widowhood, to the use of the testator's first and eldest son Robert John Harvey Harvey during his life without impeachment of waste, with remainder to the use of Robert Lambart Sutton Harvey, the eldest son of R. J. H. Harvey, for life without impeachment of waste, with remainder to the use of the first and every other son of the body of R. L. S. Harvey severally and successively according to their respective seniorities in tail male, with remainder to the use of the second and every other son of R. J. H. Harvey severally and successively according to their respective seniorities in tail male, and for default of such issue to the issue of the testator's second son John Harvey during his life without impeachment of waste, and after the decease of J. Harvey to the use of the first and every son of his body severally and successively according to their respective seniorities in tail male. And for default of such issue to the use of the testator's third son, the defendant Edward Kerrison Harvey, during his life without impeachment of waste. And after the decease of E. K. Harvey, to the use of the first and every other son of his body severally and succes-

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sively according to their respective seniorities in tail male. And in default of all such issue, to the use of the testator's daughters and the daughters of his several sons as therein mentioned. And in default of all such issue as aforesaid, to the use of the testator's own right heirs. And the testator gave and bequeathed all the rest and residue of his personal estate and effects (subject to the payment of his just debts, funeral expenses, the charge of proving and executing his will, and to the payment of the legacies thereinbefore bequeathed) to his trustees, upon trust to convert the same into money and to invest the moneys to arise from such conversion in manner therein mentioned, and to pay the annual income of the whole of his residuary estate and the investments thereof unto or for the benefit of his sons John Harvey and the defendant E. K. Harvey in equal shares during their joint lives, and upon the decease of either of them upon trust to pay the whole of the annual income unto the survivor during his life, and upon the death of such survivor upon trust to pay certain annuities therein mentioned, and subject to the payment thereof upon trust to convert all his residuary personal estate into money and lay out and invest the moneys arising from such sale and conversion in the purchase of freehold or copyhold lands, tenements, and hereditaments in England or Wales, to be conveyed and assured unto the trustees to such of the uses and upon and for such of the trusts, intents, and purposes, and subject to such of the powers, provisoes, and declarations thereinbefore limited and expressed from and after the determination of the said term of five years of and concerning his real estate comprised in the same term as should be then subsisting and capable of taking effect.

By a codicil dated May 31, 1855, the testator revoked the trusts in his will declared of one moiety of the annual income of his residuary personal estate in favour of his said son J. Harvey, and declared that the whole of the annual income of his residuary personal estate should be paid to the defendant E. K. Harvey for his life, and after his death, subject to the payment of an annuity to his widow, the whole of the residuary personal estate should remain and be upon the trusts in the will mentioned concerning the same.

The testator died on June 18, 1860. Robert Lambart Sutton Harvey died on September 4, 1864, an infant and unmarried, leaving him surviving the plaintiff Sir C. Harvey, who was born on February 25, 1849, being the second and eldest surviving son of R. J. H. Harvey. The testator's eldest son R. J. H. Harvey was created a baronet on December 8, 1868. The widow of the testator died on March 23, 1869.

By an indenture dated July 14, 1870, and made between Sir R. J. H. Harvey of the first part, the plaintiff Sir C. Harvey (then C. Harvey), the second son of Sir R. J. H. Harvey, and the first tenant in tail under the settlement, of the second part, and trustees, of the third part, after reciting that Sir R. J. H. Harvey and Sir C. Harvey were desirous of barring the estate in tail male of Sir C. Harvey in the hereditaments devised by the said will, and in the moneys to arise from the conversion of the residuary estate of the testator Sir R. J. Harvey on the death of the defendant E. K. Harvey by the will directed to be invested in the purchase of lands to be settled as before mentioned and all remainders over, the plaintiff, Sir C. Harvey, with the consent of Sir R. J. H. Harvey as protector of the settlement, barred the estate tail in all the freehold lands devised by the said will, and it was thereby also witnessed that Sir R. J. H. Harvey and Sir C. Harvey assigned to the trustees all and singular the moneys to arise on the death of the defendant E. K. Harvey from the conversion and getting-in of the residuary personal estate of the testator, and all and every other sums and sum of money subject to be laid out then or thereafter in the purchase of land or hereditaments to be settled so that Sir R. J. H. Harvey would have therein an estate for life with remainder to Sir C. Harvey, with remainder in tail male or in tail general, and the stocks, funds, or securities in or upon which such sum or sums of money were, was, or might be invested, to hold the same freed and absolutely discharged from the estate in-

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tail male of Sir C. Harvey, and all remainders over, upon such trusts with and subject to such powers, provisoes, agreements, and declarations as Sir R. J. H. Harvey and Sir C. Harvey should as therein mentioned jointly appoint.

By another indenture of the same date and between the same parties, after reciting that doubts had been entertained whether under the provisions of the Act for the Abolition of Fines and Recoveries the above-mentioned indenture could operate so as to effectually bar the entail in the moneys subject to be invested in the purchase of lands to be settled, so that Sir R. J. H. Harvey would have an estate for life with remainder to the plaintiff Sir C. Harvey in tail male by reason of the defendant E. K. Harvey being then alive, Sir R. J. H. Harvey and Sir C. Harvey covenanted with the trustees within one calendar month after the death of the defendant E. K. Harvey to execute and do every such assurance and thing for the further or more perfectly barring the entail of the plaintiff Sir C. Harvey and all remainders over in the said residuary moneys subject to be invested in the purchase of land.

By an indenture of re-settlement also dated July 14, 1870, Sir R. J. H. Harvey and the plaintiff Sir C. Harvey, in exercise of the power given to them by the disentailing deed of even date therewith, appointed the freehold land devised by the will to the use of Sir R. J. H. Harvey for life, and after his death to the use of the plaintiff Sir C. Harvey for life, and after his death to the use that, if Jane Ann Harvey, the wife of the plaintiff Sir C. Harvey, should survive Sir R. J. H. Harvey and Sir C. Harvey, she should receive during her life the rentcharges therein mentioned, and subject thereto to the use of the trustees for the terms of years therein mentioned, to secure payment of the rentcharges and for portions for the younger children of Sir C. Harvey, and subject thereto to the use of the first and other sons of Sir C. Harvey successively and according to seniority in tail, with remainders over. And the indenture contained powers of sale and exchange, and provisions for investing the moneys payable upon any such sale or exchange in the purchase of lands to be settled to the uses upon the trusts and subject to the powers thereinbefore expressed and declared. And Sir R. J. H. Harvey and the plaintiff Sir C. Harvey appointed that the moneys to arise on the death of the defendant E. K. Harvey from the conversion and getting in of the residuary personal estate of the testator, and all and every other sums and sum of money subject to be laid out then or thereafter in the purchase of lands or hereditaments to be settled so that had not the disentailing deed of even date therewith been executed Sir R. J. H. Harvey would have had therein an estate for life with remainder to Sir C. Harvey in tail male or tail general, and the stocks, funds, or securities in or upon which such sum or sums of money were, was, or might be invested should immediately upon the execution of those presents be held upon the trusts and subject to the powers thereinbefore declared of and concerning the moneys to arise by the sale under the power of sale thereinbefore contained of any of the hereditaments thereinbefore appointed, and the stocks, funds, and securities in or upon which such moneys were thereinbefore authorised to be invested.

Sir R. J. H. Harvey died on July 19, 1870, and the wife of the plaintiff Sir C. Harvey died on December 13, 1891.

The defendant Charles Robert Lambart Edward Harvey was the first-born son of the plaintiff Sir C. Harvey, and was born on April 16, 1871.

John Harvey, the uncle of the plaintiff Sir C. Harvey, in the will and codicil of the testator mentioned, died on June 23, 1874, without ever having had any issue.

The question raised by this originating summons was whether, according to the true construction of the will of the testator, the disentailing deed of July 14, 1870, was effectual to bar the estate tail of the plaintiff Sir C. Harvey in the residuary personal estate of the testator by his will directed upon the death of the defendant E. K. Harvey, the tenant for life of the income of such residuary estate, to be invested in real estate to be settled to the same uses as the other real estate, devised by the will, and all estates in re-

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mainder expectant on the determination of such estate tail.

Levett, K.C., and *Martelli*, for the plaintiff Sir C. Harvey.—Having regard to sections 1 and 71 of the Fines and Recoveries Act, 1833,[1] and to the case of *Fordham* v. *Fordham* [1864],[2] which is treated as a correct decision in *Davidson's Precedents in Conveyancing* (3rd ed.), vol. 3, part ii. p. 1,302, the estate tail in the residuary personalty was duly barred by the disentailing deed of July 14, 1870.

[They also referred to *Shelford's Real Property Statutes* (9th ed.), pp. 241, 261, 288.]

J. M. Paterson, for the trustees.

Cozens-Hardy, for the defendant C. R. L. E. Harvey, the eldest son of the plaintiff.—The words in the definition of money —section 1 of the Act—are words of futurity in the widest sense, and ought not to be confined to moneys now raisable although not actually raised. The general policy of the Act was to confer a more extended power of disposition in respect of estates tail whether in land or money than previously existed. According to the earlier law a contingent estate tail could not be barred, but section 15 empowers a tenant in tail to disentail any possible estate tail.

(1) The Fines and Recoveries Act, 1833, so far as material, enacts as follows:

Section 1 (interpretation clause): "... the expression 'money subject to be invested in the purchase of lands' shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands. ..."

Section 71: "... money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall for all the purposes of this Act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses of this Act, so far as circumstances will admit, ... shall, in the case of money subject to be invested in the purchase of lands to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled. ..."

(2) 34 Beav. 59.

Dauney, for the defendant E. K. Harvey and his eldest son.—The deed of 1870 was ineffectual to bar the estate tail in the residuary personal estate. The words "money subject to be invested in the purchase of lands," in section 71 of the Fines and Recoveries Act mean money presently so subject, and do not extend to reversionary interests in personalty. The interpretation clause does not carry the matter any further. In *Fordham* v. *Fordham*[2] the circumstances were different. The *ratio decidendi* there was that, notwithstanding the trust for accumulation for twenty-one years, and for investment of the rents during that period in the purchase of lands to be settled, the tenant for life and the tenant in tail in remainder were the only persons interested in the rents to be laid out in lands and could give a discharge for the same, and consequently the disentailing deed was good.

Levett, K.C., replied.

BYRNE, J.—In this case the short question raised is whether a certain disentailing deed is effectual to bar an estate tail in lands to be purchased with moneys subject to a trust—after the death of a person who was at the date of the disentailing deed still alive—to be laid out in the purchase of lands.

Under the will there was a strict settlement of real estate. About that no question arises. The deeds executed were effectual to bar the estate tail. Then the testator deals with his personal estate, and he gives that subject to the payment of his debts and certain legacies and annuities to trustees. [His Lordship read the trust of the personal estate above set out, and continued:] The disentailing deed was executed, as I have said, during the lifetime of Edward Kerrison Harvey. It was executed by the tenant in tail with the consent of the person who, if Edward Kerrison Harvey had died and the money had been laid out in land, would have been tenant for life of the land so purchased. The whole question argued before me is as to whether that was effectual, having regard to the fact that this money was not immediately subject to be invested in the purchase of land, but only

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subject to be invested in the purchase of land after the death of E. K. Harvey. [His Lordship read sections 1 and 71 of the Fines and Recoveries Act, so far as material, and continued:] Counsel for E. K. Harvey argued the point very neatly. He said the whole question is whether the words in section 71 refer to moneys presently subject to be laid out in the purchase of land, or whether they mean subject either presently or at any future time to be laid out in the purchase of land. First, it is to be observed that the words in the Act are perfectly general. There is this further fact that I may mention, that under section 15 of the Act there is a provision for disentailing estates tail whether in possession, remainder, contingency, or otherwise, so that the Act is not contemplating merely the disentailing of estates in possession.

On the words of the section, independently of authority, I should have come to the conclusion that it would be too narrow a reading to say that these words mean presently subject to be laid out in the purchase of land. But I think the case is really covered by the case of *Fordham* v. *Fordham*,[2] to which I have been referred. The circumstances in the two cases are not, of course, exactly the same, but still I think that case is an authority which governs this, although the words are somewhat different. In that case the testator gave his freeholds, copyholds, and leaseholds to trustees, and he directed them to enfranchise the copyholds within twenty years; and as to his freeholds, copyholds, and leaseholds to be purchased as afterwards mentioned, he declared his will to be that his trustees should "enter into the possession and receipt of the rents, issues, and profits of the same estates, and should, until the expiration of twenty-one years after his decease," manage and pay the expenses and outgoings. And he directed his trustees to apply the surplus of his personal estate, and of the rents, &c., in payment of certain expenses of management and improvement, and to invest the surplus in the purchase of freeholds; and, in the meantime, to invest and accumulate the same, the accumulations to be subject to the trusts thereby declared of the fund from which the same should have proceeded. The testator continued as follows: "I declare my will to be, that from and after the expiration of twenty-one years from my decease, my trustees shall stand seised of and interested in all my said freehold estates and all the freehold estates into which my said copyhold estates shall be converted by enfranchisement, and the freehold estates hereinbefore directed to be purchased by my trustees, upon the trusts following, that is to say:—Upon trust for Frederick Nash Fordham of Royston, in the county of Hertford, banker, during his life without impeachment of waste, with remainder upon trust for the sons of the said Frederick Nash Fordham successively, according to seniority, in tail male," with remainder over. The testator died in 1855. Frederick Nash Fordham had one son, who attained twenty-one on November 11, 1863, and on the following day he, with the concurrence of his father, joined in disentailing, amongst other things, "all the money which, under the trusts of the will, was subject to be invested in the purchase of land, including money whether invested or to be invested, and whether the amount thereof was or was not ascertained." On behalf of the trustees Mr. Archibald Smith argued that, inasmuch as before the passing of the Act money could not have been disentailed before received, the Fines and Recoveries Act, 1833, did not alter the law in that respect; and he referred to section 71, which enables a tenant in tail to acquire the absolute interest in "money subject to be invested in the purchase of lands to be settled," and said that the meaning of the word "money" was governed by the interpretation clause (section 1), which applied to money in hand, and did not include money which may hereafter be received. So that the precise point taken in the present case was taken by Mr. Archibald Smith in arguing that case. Lord Romilly, M.R., said: "The plaintiffs are clearly entitled to have the rents of the present year paid to them, and it is quite unnecessary to invest them in land. The same thing will happen in 1865 and in

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every succeeding year, and during the whole remaining period of twenty years they will, from time to time, be absolutely entitled to have the annual rents paid to them. I am of opinion that the words of the statute are clear, and that they enable the tenant in tail to acquire an absolute right to any 'money subject to be invested in the purchase of lands to be settled,' including money received or to be received and the rents of this and of every succeeding year. As the plaintiffs would be entitled to have the rents paid to them every year, and there is no possibility of investing them in land, nobody else has any interest in them, and they are entitled to an immediate conveyance." If they were entitled to an immediate conveyance, that would only be upon the footing that the disentailing deed was effectual not merely to bar the entail in the moneys already received and liable to be invested in land, but in respect of moneys thereafter to be received and then to be invested in land. I think that this really is an authority which governs the present case. I have not been referred to any authority suggesting that that case is not good law; and it is treated in *Davidson's Precedents in Conveyancing* (3rd ed.), vol. 3, part ii., p. 1,302, as a binding authority.

The declaration will be that, according to the true construction of the will of the testator, and in the events which have happened, the disentailing assurance of July 14, 1870, was effectual to bar the entail in the moneys upon the death of Edward Kerrison Harvey directed to be laid out in the purchase of land.

Solicitors—Iliffe, Henley & Sweet, agents for Preston & Son, Norwich; Collyer-Bristow, Hill, Curtis & Dods, agents for Mills & Reeve, Norwich; Blake, Heseltine, Child & Crailsheim, agents for Bensly & Bolingbroke, Norwich.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

COZENS-HARDY, J. 1901. July 2, 3. } RICHARDS, *In re*; LAWSON *v.* HARVEY.

Administrator — Right of Retainer — Grant to Agent—Retainer for Principal's Debt.

A person to whom a grant of administration has been made as nominee of a creditor of an intestate, where the grant is not expressed to be for the use of his principal, cannot retain for the debt due to his principal.

Upon the further consideration of this administration action a short point arose as to the right of retainer under the following circumstances:

The intestate was indebted to a joint-stock banking company. The manager of the bank, as its nominee, obtained a grant of administration to his estate. The administrator was described as manager of the bank, but the grant was not expressed to be for the use of the bank. The estate was insolvent, and the plaintiff commenced the present proceedings, to which the administrator was a defendant, and in which an order for administration was obtained.

E. Bowen Rowlands, for the plaintiff.—The right of retainer is a necessary corollary of the rule that the creditor could not sue himself. Here the creditor is the bank, which could have sued the manager.

[He was stopped in argument.]

Dunham, for the administrator.—It is incorrect to say that the right of retainer depends upon the principle that the creditor cannot sue himself. An administrator could retain for a debt of which another was a trustee for him, and there no objection could have been raised to an action by the trustee, as the law took no notice of trusts. The administrator is in the position of one to whom a limited grant, as *pendente minore ætate*, has been made.

[He referred to *Franks* v. *Cooper* [1799] [1] and *Talbot* v. *Frere* [1878].[2]]

A. J. Chitty, for a claimant, took no part in the argument.

(1) 4 Ves. 763.
(2) 9 Ch. D. 568.

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RICHARDS, IN RE.

A reply was not called for.

COZENS-HARDY, J.—I think the administrator cannot retain. It is a peculiar case, because administration was granted to the manager of the bank. But although he is described in the grant as manager of the bank, and although that may have been the motive influencing the Court to make the grant, it is not a grant of administration for the use of the bank. He became administrator, and would continue subject to all the liabilities of an administrator, although he might cease to be manager of the bank. It would be competent to the bank to bring an action against him for the debt, and to that action it would be no answer to say that he was manager of the bank. He might, before decree, have preferred the bank; but the certificate is conclusive against him on that point, for it finds the money in his hands, and charges him with it. He has therefore one point, and one point only, left open to him, and that is his right of retainer; for it is settled law that, although there can be no preference after a decree for administration, the right of retainer is not so affected — *Nunn* v. *Barlow* [1824].[3] The only question, therefore, is, Is there or is there not a right of retainer in respect of this debt? The answer seems to me to be given at once, if it is said that the defendant is not a creditor. The foundation of the right of retainer is that a man cannot bring an action against himself. But the administrator here is not a creditor, and could not bring an action in his own name for this debt.

Solicitors—J. T. Lewis, agent for Aeron Thomas & Co, Swansea; Spencer Chapman & Co., agents for J. R. Richards, Swansea.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

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(3) 2 L. J. (o.s.) Ch. 123; 1 Sim. & S. 588.

COZENS-HARDY, J.
1901.
March 28, 29.
May 14, 15. June 21.
} POWER *v.* BANKS.

*Ecclesiastical Law — Endowment — Investment in Land—Sale by Incumbent—How far Binding on Successor—Trustee—Improper Investment—Power to Realise—*13 *Eliz.* c. 10.

By a private Act of Parliament an endowment consisting of personalty was vested in an incumbent, and liable to be laid out in the purchase of lands, ground-rents, or other hereditaments in fee-simple to be conveyed to and settled upon and to the use of the rector for the time being for and towards the maintenance of such rector. An incumbent (I.), who had no knowledge of the source from which the endowment came, but merely had a general idea (to use his own expression) that it was "church property," invested it in his own name in the purchase of freehold ground-rents, which were conveyed to him, his heirs and assigns, with a declaration in bar of dower. I. sold a portion of these ground-rents, and upon his resignation conveyed the unsold portion to his successor (H.) in fee-simple by deed which contained uses in bar of dower. Neither conveyance satisfied the provisions of the Charitable Uses Act, 1735 (9 *Geo.* 2. c. 36), *with respect to attestation and enrolment. H. sold part of the ground-rents conveyed to him to the defendant. I. joined in the conveyance to the defendant. H. subsequently applied the proceeds of sale to his own use. In an action by the present incumbent, who was H.'s successor,*—Held, *first, that the defendant's title was not invalidated by* 13 *Eliz.* c. 10; *and secondly, that, assuming I. or H. to be trustees of the ground-rents, the present incumbent could not impeach the sale.*

In the case of an unauthorised purchase of land by a trustee, a good title can be made by the trustee to a purchaser with notice, provided that all the beneficiaries are not competent and desirous to take the land in specie.

Patten and Edmonton Union, *In re* (52 L. J. Ch. 787) *followed.*

By the statute 3 Geo. 2. c. 3, the sum of 3,500*l.*, part of the moneys appropriated

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by an earlier Act for the maintenance of ministers of certain new churches, was allotted as the share which the rector of the parish of St. Mary, Stratford, Bow, in the county of Middlesex, should have, and this sum was to be laid out in purchasing lands, ground-rents, or other hereditaments in fee-simple, to be conveyed to and settled upon and to the use of the rector of the said church for the time being for and towards the maintenance of such rector.

By the private Act 31 Geo. 2. c. ii. it was enacted (*inter alia*) that the sum of 3,274*l.* 7*s.* 4*d.* South Sea annuities, in which the sum of 3,500*l.* had been invested and which was then standing in the books of the South Sea Co. in the name of Henry Fane, late treasurer to the Commissioners acting under the prior Acts, should be transferred unto the rector and his assigns to the intent that the dividends might be received by the rector and his successors towards his and their maintenance, but not to be transferred, sold, or disposed of unless for such purpose and with such licence and consent as therein mentioned, and which stock should, on the death or removal of the said rector, vest in and was thereby vested in the succeeding rector and not in the rector so removed, nor in the executors or administrators of the deceased rector, and should be carried to the account of such succeeding rector accordingly in the said company's books for the purposes of the said Act. And it was further declared that when a proper and convenient purchase should be found it should be lawful for the rector, for the time being, with the consent of the bishop of the diocese, to be signified in writing under his hand and seal, and attested by two witnesses, to sell, and that the money produced by such sale should be received by such person or persons as the said bishop should by writing under his hand and seal attested as aforesaid appoint, and such money should be laid out and applied in the payment of the purchase-money for lands, tenements, or hereditaments, such purchase being first approved by the bishop in writing under his hand and seal attested as aforesaid, and that the same lands, tenements, or hereditaments should be settled and assured to the use of such rector and his successors for and towards his and their maintenance for ever.

Under the statute 16 & 17 Vict. c. 23, owners of South Sea annuities who did not assent to the conversion of their annuities were to be paid off at par. Mr. Driffield, who was rector of St. Mary, Stratford, Bow, did not assent to the conversion, and in April, 1854, the sum of 3,524*l.* 6*s.* 7*d.* was paid to him. Mr. Driffield apparently treated the money as his own. He invested it in Consols in his own name. He afterwards sold out the Consols, and applied the proceeds towards payment of the contract price for the building of a new church, called St. Stephen's, Old Ford. He claimed credit for having built this new church in a circular which, after mentioning that the cost had been in part defrayed out of moneys placed in his hands for charitable purposes, stated that "the sum of 4,000*l.*, the residue of such cost, hath been temporarily furnished or supplied by the said J. T. Driffield out of his own moneys." By a deed dated April 6, 1857, to which the Bishop of London was a party, and by another deed dated July 7, 1857, the new church until consecration and afterwards the pew rents were charged with payment to Mr. Driffield of 4,000*l.*, with interest at 4½ per cent. Mr. Driffield afterwards borrowed 1,500*l.* on the security (*inter alia*) of this mortgage.

In 1880 Mr. Driffield resigned the living, and he was succeeded by Mr. Insley. In April, 1881, Miss Hyndman's trustees paid Mr. Driffield 3,500*l.* for the purpose of discharging the debt on St. Stephen's Church, Bow, in consideration of the transfer to Miss Hyndman's trustees of the patronage of three churches—St. Stephen's Church, Bow, St. Mark's Church, Bow, and St. Paul's Church, North Bow. Mr. Driffield accepted the 3,500*l.* in full satisfaction of his charge, and executed a release. Out of the 3,500*l.*, 1,000*l.*, the balance due to his mortgagees, was paid to them, and he received 2,500*l.* On April 20, 1881, he paid Mr. Insley 3,524*l.* 6*s.* 7*d.*, and took from Mr. Insley a receipt "on account of the endowment of the rectory of Bow."

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He also paid Mr. Insley back interest on this sum.

In October, 1881, Mr. Insley purchased some freehold land at Lewisham for 2,362*l.* 10*s.* This was part of the money he had received from Mr. Driffield. The land was conveyed by deed dated October 25, 1881, to Mr. Insley, "his heirs and assigns," with a declaration in bar of dower. This deed was not enrolled in Chancery, and there was only one attesting witness. The consent of the bishop was not given to this purchase, nor was any licence in mortmain obtained. In April and August, 1889, Mr. Insley sold portions of the Lewisham property to Mr. Byrne and Mr. Bush, receiving in each case the full purchase-money. It did not clearly appear what was done with this purchase-money, but apparently it was wholly, or in part, represented by a sum of Great Western Railway stock standing in the names of the Ecclesiastical Commissioners.

In March, 1892, Mr. Insley resigned the living, and he was succeeded in June by Mr. Hare. By deed dated February 17, 1893, Mr. Insley, "in consideration of 5*s.* as purchase-money," as beneficial owner conveyed all the unsold Lewisham property to Mr. Hare in fee-simple, with a declaration in bar of dower. This deed was not enrolled, and there was only one attesting witness. On October 6, 1893, the unsold property was put up for sale by auction by Mr. Hare, and the defendant was the purchaser of one lot. The conveyance to the defendant was dated November 14, 1893. It was made between Mr. Hare of the first part, Mr. Insley of the second part, and the defendant of the third part. After reciting the contract for sale, it recited that Mr. Insley had not dealt with the property for value since the execution of the deed of February 17, 1893, and at the request of the defendant had agreed to join in manner thereinafter appearing. Mr. Hare, as beneficial owner, conveyed, and Mr. Insley, as beneficial owner, confirmed, the property to the defendant in fee-simple. Mr. Hare received the defendant's purchase-money. On his resignation of the living in March, 1899, it was not forthcoming. The plaintiff was the present rector. The action was commenced on October 19, 1900. It was founded upon the Act 31 Geo. 2, and sought a declaration that the conveyance of November 14, 1893, was void, and that the hereditaments were part of the possessions appertaining or belonging to the rector, or in the alternative a declaration that the defendant took the conveyance with notice that they were held subject to a trust for the benefit of the rector for the time being, and that the defendant was a trustee for the rector for the time being, and for consequential relief.

There was no dispute regarding the foregoing facts, but the following finding of facts by the learned Judge, as stated in his written judgment, may be conveniently introduced here: "It is clear that Driffield knew that the 3,524*l.* 6*s.* 7*d.* cash received by him in April, 1854, was money subject to the statute 31 Geo. 2. He applied it in a manner which, though not fraudulent, was improper. He was enabled to make good the fund by means of the peculiar arrangement with the Hyndman trustees in 1881. He paid the exact sum to Insley, from whom he took a receipt 'on account of the endowment of the rectory of Bow.' I cannot regard this as a new endowment. Driffield's deposition is not in all respects consistent with the evidence given by Insley in the witness-box, but the discrepancies are not greater than may reasonably be expected after the lapse of twenty years. Insley was told it was 'church money,' though he was not told of the Act of George 2, nor was any explanation given to him of the origin of the fund. When Insley purchased the land he told his solicitor, Mr. Palmer, that he had received the money from Driffield to be invested for the parish church at Bow, but that, so far as he knew, there were no conditions attached to it. When Insley conveyed to Hare, he was not represented by a solicitor, but Hare was represented by his solicitors, Messrs. Corbin & Greener. Insley says that on completion he had a conversation with Mr. Corbin, and that it was spoken of as a trust. Mr. Corbin has not been called as a witness. When Hare sold the pro-

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perty Corbin & Greener acted as his solicitors and also as solicitors for the defendant Banks, the purchaser. Hare is said to have told Corbin that he was entitled to sell without anybody's consent, but that the proposed sale was with the bishop's consent. Of this allegation there is no proof. The concurrence of Insley in the conveyance was required solely to remove the difficulty occasioned by the conveyance from Insley to Hare having been without consideration. It had nothing to do with the existence of any trust. The conclusion at which I have arrived is that neither Insley nor Hare nor Corbin nor the defendant was aware of the statute of George 2; but Insley and Hare both knew that the property was, or was purchased out of, or represented in some way, 'church property.' They thought, as did Corbin, that, whatever the trust might be, there was full power to vary the investment and to sell the land for this purpose. The defendant himself knew nothing whatever about the matter." The case was twice argued.

Dibdin, K.C., and *F. H. L. Errington*, for the plaintiff.—The houses formed part of the possessions of the benefice, and could not be aliened by reason of 13 Eliz. c. 10.[1] This statute was amended by 14 Eliz. c. 11, which at first sight appears to have some bearing upon the present case, but, upon a critical examination, does not affect the 13 Eliz. c. 10 so far as money sales are concerned. From the earliest times 13 Eliz. c. 10 has been held to extend to conveyances in fee, and is not restricted to leases—1 *Co. Inst.* 44*a*. Whether the property be vested in the corporation or only held in trust for the incumbent, it is part of the possessions of the benefice—*Magdalene College Case* [1616][2] and *Parker's Charity, In re* [1863].[3] So in the case of 13 Eliz. c. 20, the statute relating to mortgages of ecclesiastical property, whatever comes to the incumbent as part of the possessions of the benefice is inalienable—*Leveson, In re; Arrowsmith, ex parte* [1878].[4] It is immaterial that the consent of the bishop was not obtained to the purchase of the ground-rents—*Lechmere* v. *Carlisle (Earl)* [1733][5] and *Sowden* v. *Sowden* [1785].[6] In the second place, the fund may be regarded as a charitable trust. It is traced into this investment, and the beneficiary may elect to take it in its present state of investment in land—*Patten and Edmonton Union, In re* [1883].[7] The consent of the Charity Commissioners is not required to an action of ejectment—*Holme* v. *Guy* [1877].[8]

[COZENS-HARDY, J., referred to *Att.-Gen.* v. *Gardner* [1848][9] as shewing that the want of enrolment was an insuperable objection to the present claim.]

That case must be read subject to the subsequent decision in *Att.-Gen.* v. *Munro* [1848].[10] It really deals with administration only. But, admitting the purchase by Insley to be void, he could, and in fact did, obtain a title by the Statute of Limitations — *Churcher* v. *Martin* [1889].[11] The defendant is estopped from denying the title of Insley or Hare

(1) The material clause of the 13 Eliz. c. 10 is section 3, which enacts: "And for that long and unreasonable leases made by . . . parsons, vicars, and other having spiritual promotions, be the chiefest causes of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverishing of all successors incumbents in the same: be it enacted . . . that from henceforth all leases, gifts, grants, feoffments, conveyances or estates, to be made, had, done or suffered by any . . . parson, vicar, or any other having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements or other hereditaments, being any parcel of the possessions of any such . . . parsonage, vicarage or other spiritual promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, bodies politick or corporate, (other than for the term of one and twenty years, or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term) shall be utterly void and of none effect, to all intents, constructions and purposes; any law, custom or usage to the contrary any ways notwithstanding."

(2) 11 Co. Rep. 66*b*.
(3) 32 Beav. 654.
(4) 47 L. J. Bk. 46; 8 Ch. D. 96.
(5) 3 P. Wms. 211; s.c. *sub nom. Lechmere* v. *Lechmere*, Ca. t. Talb. 80.
(6) 1 Cox, 165; 1 Bro. C.C. 582.
(7) 52 L. J. Ch. 787.
(8) 46 L. J. Ch. 648; 5 Ch. D. 901.
(9) 2 De G. & Sm. 102.
(10) 2 De G. & Sm. 122.
(11) 58 L. J. Ch. 586; 42 Ch. D. 312.

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POWER *v.* BANKS.

—*Board* v. *Board* [1873][12] and *Dalton* v. *Fitzgerald* [1897].[13] Neither Insley nor Hare could claim the property—*Ambleside Charity, In re* [1870][14]—and the defendant is in no better position.

Micklem, K.C., and *S. O. Buckmaster*, for the defendant.—The evidence does not trace the endowment into the land. The payment made in 1881 by the Hyndman trustees is a new endowment, and has no connection with the proceeds of the Consols which Driffield had invested upon St. Stephen's Church. Assuming a charitable trust, it was a trust with an absolute power of disposition.

[COZENS-HARDY, J.—The difficulty is, that, once it is admitted that there is a charitable trust, even if there be an express power of sale, the consent of the Charity Commissioners is essential to the exercise of the power—*Mason's Orphanage and London and North-Western Railway Contract, In re* [1896].[15]]

But, assuming the investment to be a breach of trust, the trustee can sell to cure his breach of trust, and a purchaser from him has a good title—2 *Dart, Vendor and Purchaser* (6th ed.), p. 688. The property ought to be sold where there is a breach of trust, if the investment is unauthorised—*Knott* v. *Cottee* [1852][16] and *Salmon, In re; Priest* v. *Uppleby* [1889].[17] *Board* v. *Board*[12] and *Dalton* v. *Fitzgerald*[13] are distinguishable, because here there is no privity of estate. *Paine* v. *Jones* [1874][18] applies. The statute 13 Eliz. c. 10 only avoids the deed against the successor, and not as against the grantor—*Magdalene Hospital* v. *Knotts* [1879].[19] The defendant is a purchaser for value without notice—Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3.

F. H. L. Errington replied on the first argument.

Dibdin, K.C., in reply on the second argument, referred to *Att.-Gen.* v. *Ward* [1848][20] and *Hallett's Estate, In re; Knatchbull* v. *Hallett* [1880].[21]

Cur. adv. vult.

COZENS-HARDY, J., read a written judgment, in which, after stating the facts as set out above, he discussed the law applicable to the case as follows: These facts raise legal questions of great difficulty, especially having regard to the peculiar position of a rector. He is a corporation sole. Apart from statute or special custom, personal property cannot be vested in a corporation sole. It will pass to the executors or administrators, and not to the successors, of the corporation sole—*Fulwood's Case* [1592][22] and *Howley* v. *Knight* [1849],[23] and cases there cited. Apart from statute, real property cannot be vested in a corporation sole, either at law or in equity, without a licence in mortmain. Now the statute of 31 Geo. 2 clearly vested the South Sea stock in the rector as a corporation sole, and thus created an exception from the general law. The Conversion Act of 1853 enabled all persons and bodies, politic or corporate, to assent to accept new stock, and provided that those who should not signify their assent should receive 100*l.* cash for every 100*l.* of stock, and should be at liberty to demand and receive payment from the bank. The bank assumed, and I think rightly, that Mr. Driffield, as a corporation sole, could receive and give a good discharge for the cash. Whenever by statute or by special custom, as in the case of the Chamberlain of London, chattels or *choses in action* are vested in a corporation sole, it seems to follow that such corporation sole must have the right to receive, and get in, and give a good discharge for, the property thus vested in him. Mr. Driffield handed the money to Mr. Insley, who must be taken to have received it in his character of corporation sole. His receipt was a good discharge to Mr. Driffield. Mr. Insley was accountable for this money to his successor, Mr. Hare. When in 1881 he invested part of the money in the pur-

(12) 43 L. J. Q.B. 4; L. R. 9 Q.B. 48.
(13) 66 L. J. Ch. 604; [1897] 2 Ch. 86.
(14) 18 W. R. 663.
(15) 65 L. J. Ch. 439; [1896] 1 Ch. 596.
(16) 16 Beav. 77.
(17) 42 Ch. D. 351.
(18) 43 L. J. Ch. 787; L. R. 18 Eq. 320.
(19) 48 L. J. Ch. 579; 4 App. Cas. 324.
(20) 6 Hare, 477.
(21) 49 L. J. Ch. 415; 13 Ch. D. 696.
(22) 4 Co. Rep. 64*b*.
(23) 19 L. J. Q.B. 3; 14 Q.B. 240.

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chase of land he did not purport or intend to effect a purchase under the statute of 31 Geo. 2, of which he had never heard. Nor did he purport or intend, as an individual, to create a trust of the land for the benefit of himself and his successors, as a corporation sole. Any such trust would have been unlawful as putting an equitable estate in mortmain without a licence from the Crown. In other words, Insley could not elect to treat this land as part of the benefice or as appertaining or belonging to it. The land was, therefore, not subject to the restraining Acts, and I cannot hold the subsequent conveyance by Hare to the defendant to be void under statute 13 Eliz. c. 10.

What, then, was the legal position when Insley purchased the land? He still remained accountable for the cash. There was nothing to prevent him from selling the land, which was his, to provide the cash. In the case of an unauthorised purchase by a trustee, I think the trustee can make a good title to a purchaser with notice, provided only that all the beneficiaries are not at once competent and desirous to take the land in specie—see *Patten and Edmonton Union, In re.*[7] Here there was no beneficiary either competent or desirous to take the land in specie. The right of the trustee to sell cannot depend upon the question whether the entire amount of the trust fund, or only a portion of it, is cleared by the sale. He must have a right to sell in lots, and generally to realise the property as a prudent owner would. He is simply doing his duty by turning the property into cash so as to replace as far as may be the trust fund. The contrary view would prevent a trustee from ever remedying a breach of trust of this nature without instituting a suit for that purpose, as was done in *Robinson* v. *Robinson* [1876].[24] Now *cestuis que trust* are said to have a lien upon the improper investment, but, where there is no right to elect to take the land in specie, I am not aware of any authority which shews that, before proceedings taken to assert the lien, the trustees cannot realise the property by means of an honest sale. It is analogous to the lien which, on the dissolution of a partnership, exists on partnership assets in favour of a retiring partner, or the executors of a deceased partner. Such a lien does not prevent the continuing or surviving partner from selling the assets—*Langmead's Trusts, In re* [1855].[25] But I doubt whether this analogy is not too favourable to the plaintiff. By means of the sales effected by Insley the purchase-money got into the hands of the corporation sole—that is, into the proper hands—and I cannot see what harm was done by this. To affect the purchasers from Insley with the consequences of any subsequent misappropriation by the corporation sole would be unjust unless the sale itself was a wrongful act.

On Insley's retirement in 1892 I assume that he in some way secured the purchase-money he had received for the benefit of Hare, as corporation sole. He certainly passed on to Hare, as an individual, the unsold property, which, so far as appears, was of ample value to make good the balance. Hare sold by public auction; no impropriety in the sale is suggested. The legal estate passed to the defendant. The purchase-money was received by Hare, the corporation sole. It reached the proper hands. Hare subsequently stole the money; but I cannot bring myself to make the defendant answerable for his misdeeds. I have assumed in favour of the plaintiff, without deciding it, that the defendant cannot, having regard to Corbin's position of solicitor for vendor and purchaser, be regarded as a purchaser for value without notice. But even on that assumption I think, for the reasons above stated, that the action fails, and I must dismiss it with costs.

Solicitors—Leslie Stock; Corbin, Greener & Cook.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

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(24) 10 Ir. Rep. Eq. 159.

(25) 24 L. J. Ch. 237, 589; 20 Beav. 20; 7 De G. M. & G. 353.

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WRIGHT, J.
1901.
June 19.

SEPTIMUS PARSONAGE AND CO., *In re.*

Company — Petition for Compulsory Winding-up — Resolution for Voluntary Winding-up Fraudulently Obtained — Contempt of Court—Committal.

It is a contempt of Court, while a petition for a compulsory winding-up is pending, to obtain by improper means the passing of a resolution for a voluntary winding-up, with a view to mislead the Court as to the real views of the shareholders and thereby induce the Court to abstain from making a compulsory order.

On March 21, 1901, a petition was presented to wind up the above-named company by an assignee of a claim of Albert Myers, a solicitor, to whom the company was indebted for costs.

On March 22, 1901, a board meeting of directors was held, at which were present Septimus Parsonage, J. V. Criper, T. M. Hayden, and H. T. Gould, and it was decided to call an extraordinary general meeting of the company for the purpose of passing a resolution for voluntary winding-up and the appointment of W. H. Pannell as voluntary liquidator.

Later in the same day Gould called upon Parsonage, and informed him that, on reconsidering the matter, he had come to the conclusion that it would not be proper for the directors to take the course proposed, and that he would oppose them if they persisted with it. A heated conversation then took place between Gould and Parsonage, in the course of which Gould made various reflections on Parsonage's conduct as director of the company.

Subsequently to Parsonage's interview with Gould, but upon the same day, Parsonage consulted Criper as to the best course to be pursued in view of Gould's hostile attitude. Parsonage originated the idea of a circular to the shareholders from an alleged independent shareholder urging the appointment of a committee of investigation, and Criper agreed with the suggestion. Parsonage then drafted a circular, and Criper approved it. They telephoned to Myers with a view to shewing him the proposed circular and getting his approval of it. Myers (who was not the company's solicitor, but had been occasionally employed by them) came and approved it, but was not aware whose signature was to be attached to it.

Subsequently Grace, who was an employé of the company, was sent for, and asked whether he would be prepared to sign the circular. He hesitated, but, upon being informed by Parsonage and Criper that it was perfectly legal and safe for him to do so, he consented. He was further told that if he felt nervous about it he was at liberty to consult a solicitor. He consulted a Mr. Dade.

Grace had been engaged by Criper in June, 1900, as an assistant in the company's export department. His salary at the time of the engagement was one pound per week, but was afterwards increased, and at the date when he consented to sign the circular he was being paid thirty-two shillings per week. He was also the holder of 200 fully paid preference shares of the company, the certificate of which bore date March 11, 1901, and which were a gift from Parsonage.

On March 26, 1901, the circular was issued to the shareholders of the company, and was as follows:

"Moss Glen, Park Road,
"Southend-on-Sea,
"March 26, 1901.

"Dear Sir,

"*Re* Septimus Parsonage & Co. Ltd.

"Referring to the circular we have received from the Directors convening a Meeting for Monday next, to pass resolutions for the liquidation of the Company, I am taking the liberty, as one of your brother shareholders, to ask your support in steps I propose taking at my own expense, to make a thorough investigation into the past management of the business, and the causes which have brought this unexpected and disastrous crisis. We were led to believe at the last General Meeting that all difficulties had been overcome, and that the Company was in a sound financial position, and, so far as I have been able to ascertain, no new misfortunes or losses have occurred since that date. How can the Directors reconcile the course they are

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now adopting with the positive assurance they gave us on the occasion referred to? I am a large shareholder, and, although I must bear the loss if the failure has been brought about by legitimate misfortune, I do not intend doing so unless and until I have exhausted every effort to satisfy myself beyond doubt that the balance-sheets and reports issued by the Directors are honest, and can be substantiated in every detail.

"I shall of course attend the Meeting personally, but if you are unable to do so, I would ask you to entrust me with your vote by at once returning me the enclosed form, signed, so that the same may reach me, if possible, by the morning of the 29th inst.

"I remain,
Faithfully yours,
"TOM ROBERT GRACE."

The circular was posted by Grace at Southend, Essex.

In response to the circular proxies were received by Grace from shareholders holding 60,000 shares in the company.

The directors also held a considerable number of proxies, and they and Grace together held a clear majority of the shares.

On April 1, 1901, the extraordinary general meeting was held, Parsonage being in the chair. There were also present at the meeting Gould and Criper, Dade and Myers, and Grace. The resolution for voluntary winding-up was moved by Parsonage and seconded by Criper, and, after a very stormy meeting, was carried, Grace using his proxies in favour of it, and the proxies held by the directors being used for the same purpose.

On April 9, 1901, a second circular, drawn up by Parsonage, was despatched from Southend to the shareholders who had sent proxies. It was as follows:

"Moss Glen, Park Road,
"Southend-on-Sea,
"April 9th, 1901.

"*Re* Septimus Parsonage & Co. Ld.

"Dear Sir (or Madam)

"Referring to my letter of the 26th ult. you will no doubt expect to hear from me, stating what was done at the meeting, and in what way I used the proxy entrusted to me.

"A couple of days before the meeting I called at the offices of the company, and obtained a deal of useful information. Mr. Criper expressed the opinion, on behalf of himself and Board, that the most advantageous plan would be to realize the assets of the company by a voluntary liquidation, as to wind up by compulsory liquidation is always most expensive, and usually took two or three years to liquidate, and most of the assets would disappear in expenses. I suggested to the company that some reliable independent person should be appointed liquidator. It was pointed out to me that Mr. Pannell was a well-known chartered accountant in the City of London, and could be thoroughly relied upon. I then asked that a committee should be appointed for the investigation of matters, and the company were willing that this should be done. Thereupon I consulted my solicitor with regard to the whole of the matter, on the information before me, and he attended the meeting with me, and I acted upon his advice. A proposal to appoint a committee of investigation was made by certain shareholders, which I voted for, but this proposal was out-voted.

"Taking all matters into consideration, I consider that I could not do better than exercise my vote in favour of voluntary liquidation, (not compulsory liquidation,) this being in my opinion the best and cheapest mode of realising and distributing the Company's properties amongst the shareholders. By myself I was not strong enough to carry the appointment of a liquidator other than Mr. Pannell, but I feel satisfied from enquiries made that the shareholders' interests are perfectly safe in his hands, and I feel sure that I acted in their best interests by voting for voluntary liquidation, as in my opinion this is the only method by which any return could be made to the shareholders.

"I trust I have acted in accordance with your wishes, and would ask you to kindly fill up and return to me the enclosed form expressing your approval of the way in which I used your proxy, as my action has been criticised in some quarters.

"Yours faithfully,
"T. R. GRACE."

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SEPTIMUS PARSONAGE & CO., IN RE.

An order having, in this condition of facts, been made for a compulsory winding-up upon the creditor's petition, a motion was, upon the direction of the Judge, now made by the official receiver that Parsonage, Criper, and Grace should be committed for contempt of Court in that they had conspired to obtain by improper means the passing of the resolution for voluntary winding-up, with intent to mislead the Court as to the real views of the shareholders, and to prevent a compulsory order from being made by the Court.

The Attorney-General (*Sir R. B. Finlay, K.C.*) and *R. J. Parker*, for the motion.—There can be no doubt that the conduct of Parsonage and Criper has been, as regards the shareholders, most improper and fraudulent. As regards the Court, inasmuch as the existence of a voluntary winding-up will influence the Court in dealing with a petition for a compulsory order, and the Court will not make a compulsory order, where a voluntary winding-up exists, unless it is shewn that the shareholders will be prejudiced by the continuance of the voluntary liquidation, such conduct as that of Parsonage and Criper in this case constitutes a contempt of Court which the Court will punish by committal to prison. The case of Grace stands on a different footing. He was a tool in the hands of Parsonage and Criper, and may perhaps be dealt leniently with by the Court. The matter is left with the Court to deal with as justice may require.

Shee, K.C., and *Edmondson*, for the respondents.—There was no intention to mislead the Court. The respondents had no thought of the Court in what they did, but their object was to checkmate Gould, who had turned round and was acting against them. A voluntary winding-up was the least expensive course, and under all the circumstances was the most desirable. It was the respondents' first experience of company matters, and they did not know that they were doing wrong. At any rate, the Court will act as leniently as it can.

WRIGHT, J.—I shall certainly go as far as I can in the direction counsel for the respondents asks me on behalf of his clients, but I must consider how far I can go. I say nothing about either of the two gentlemen, Messrs. Myers and Dade, for the simple reason that they are not before me. As regards the three persons who are before me, Parsonage, Criper, and Grace, there is no question at all that a fraud of the grossest kind has been committed; and the only question is how far that ought to be regarded as a fraud upon the Court, or an attempt to interfere with the action of the Court.

The company was a company for the sale of wines and spirits and so forth. On March 21 a petition was lodged by a creditor for winding-up, and on the following day three of the directors met Parsonage, Criper, and Gould and considered the matter. There was some discussion between them, and on the very same day it appears that the circular which is the foundation of this matter was prepared by Parsonage and approved by Criper. It does not tend to commend Parsonage to my mind at all that in his affidavit he seeks to put it upon Mr. Myers, that he was the author of this circular. It is clear from the rest of the evidence in the case, and from Parsonage's own statement, that Parsonage and Criper were the authors of that document, and that all that Myers did was in substance to approve their work, although he may have altered it in some respects.

Now the circular which they prepared on the very day after that on which the petition for the compulsory winding-up was lodged, was in substance this: Grace puts himself forward as an independent shareholder and a large shareholder hostile to the directors, and determined to have a thorough investigation of the management of the business of the company at his own expense, and he asks as a brother shareholder for proxies to be used as against the directors. Now, in reality, Grace was a man of straw, put up by Parsonage and Criper to act solely in their interests in the matter, and to put forward a false circular which purports to come from him as a large independent shareholder at Southend-on-Sea. That circumstance in itself induces one to ask what benefit or purpose there could be in

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having this circular posted at Southend, except a purpose of fraud. The secretary is informed beforehand by Parsonage in these words: "I have arranged all matters for you at the meeting." Then the meeting comes on. Grace obeys the orders he has received from Parsonage and Criper, and the 60,000 proxies which Parsonage and Criper and Grace had collected are, in spite of protest, used by Grace in favour of a voluntary liquidation. He did not use the proxies for the purpose for which they were given, but for defeating the purpose for which they were asked to be given. The effect was that the shareholders were not only entrapped into giving their proxies, which were used in a way different from that which was intended, but were deprived altogether of their representation. As regards the shareholders, it appears that the grossest of frauds was perpetrated, by means of conspiracy, and by means of false pretences that Grace was a large independent shareholder living at Southend, who in the ordinary course of things was asking for proxies.

Now so far there is no doubt, and the real and only question is how far I ought to consider that this fraud was directed against the Court. I cannot think that Parsonage and Criper acted so ignorantly as not to know why they wanted a voluntary liquidation when there was a creditor's petition pending for a compulsory liquidation. I think I must give them credit for knowing perfectly well that if they passed this resolution for a voluntary liquidation it would destroy the power of the Court to make the compulsory winding-up order, unless on proof, which it is sometimes not very easy to obtain, that the creditor would be prejudiced by the continuance of the voluntary winding-up. It seems to me an obvious inference that all that was done by these people was done for the purpose of defeating the creditor's petition, and that what they wanted to avoid was a compulsory winding-up. Parsonage, Criper, and Grace go with 60,000 proxies, as well as using their own, in favour of a voluntary liquidation, obviously with the knowledge that that would defeat the compulsory winding-up; and they wanted a voluntary liquidation because there was already a winding-up petition before the Court. I think that I should be failing in my duty if I did not consider that the inference ought to be drawn that the intention was to do what was the obvious consequence, and the importance of which in the eyes of these persons may be measured by the frauds to which they were willing to condescend in order to accomplish them. Where there is a real interference with the jurisdiction of the Court, which is probably a better phrase than contempt of Court, the Court has no option but to act, however unwilling it is to deal with matters affecting the liberty of the subject. If a case of the kind I have stated is made out, the Court has no option; and therefore under the circumstances of this case it is my duty to commit Parsonage to prison for six weeks. Criper, I think, is in some respects less guilty than Parsonage, because I do not think he was so much the originator of the matter as Parsonage, although he took a considerable part in it himself. He will be committed for four weeks. As for Grace, I gladly give effect to the recommendation of the Attorney-General. I am not able to pass his case over, but it is useless making an order upon a man of straw to pay costs; that is quite idle. It is better to treat him with complete mercy than to put an ineffectual penalty upon him of that kind. I think, therefore, no order ought to be made as to Grace.

As regards Parsonage and Criper, they will be committed for the terms I have mentioned, and they must pay the costs of the motion.

Solicitors — Solicitor to Board of Trade, for official receiver; Mason, Son & Turnbull, for respondents.

[*Reported by Arthur Lawrence, Esq., Barrister-at-Law.*

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[IN THE COURT OF APPEAL.]

RIGBY, L.J.
COLLINS, L.J.
ROMER, L.J.
1901.
July 8, 22.

NEW'S SETTLEMENT, *In re*; LANGHAM *v.* LANGHAM. LEAVERS, *In re*; LEAVERS *v.* HALL. MORLEY, *In re*; FRASER *v.* LEAVERS.

Trustee—Shares in Company—Reconstruction—Exchange for Shares in New Company—Sanction of Court—Jurisdiction—Compromise.

As a rule, the Court has no jurisdiction to give its sanction to the performance by trustees of acts with reference to the trust estate which are not authorised by the terms of the instrument creating the trust; but where peculiar circumstances have arisen not expressly provided for by the trust instrument, and not anticipated by its author, the Court, in the emergency that has arisen, has jurisdiction, for the benefit of the estate, to sanction acts by the trustees which in ordinary circumstances they would have no power to do.

Shares in a limited company were held by trustees, and circumstances arose which made it desirable in the interests of all the shareholders to reconstitute the company and substitute for its shares shares in a new company to be formed to take over its business. The trustees had no express power to enter into the reconstruction agreement and exchange their shares for those in the new company:—Held, *that the Court had jurisdiction to allow the trustees to enter into the reconstruction agreement.*

Crawshay, *In re*; Dennis *v.* Crawshay (60 L. T. 357), *and* Morrison, *In re*; Morrison *v.* Morrison (*ante*, p. 399; [1901] 1 Ch. 701), *distinguished.*

Appeal from decisions of Cozens-Hardy, J., in chambers on three originating summonses taken out by the surviving trustee of a settlement made by David New, the trustees of the will of John Wells Leavers, and the trustees of the will of Samuel Morley respectively, for the sanction of the Court to the ratification by the respective plaintiffs of an agreement dated March 29, 1901, relating to shares held by them respectively in the Wollaton Colliery Co., Lim., and for the authority of the Court to the plaintiffs to accept certain preference shares, ordinary shares, and debentures in a new company, in exchange for their shares in the Wollaton Colliery Co., Lim.

The Wollaton Colliery Co. was incorporated under the Companies Acts in 1875 with a capital of 105,000*l.*, divided into 1,050 shares of 100*l.* each, of which 100,000*l.* was paid up. The assets were valued at 300,000*l.*

It was proposed that the company should be wound up voluntarily and dissolved, and a new company, under the name of "The Wollaton Collieries Co., Lim.," should be incorporated, with a capital of 210,000*l.*, divided into 10,000 preference shares of 10*l.* each and 11,000 ordinary shares of 10*l.* each.

The shares in the existing company were proposed to be exchanged for fully paid-up preference shares and ordinary shares and debentures of the new company, on the footing that each shareholder should be entitled, in exchange for each of his existing 100*l.* shares, to ten fully paid-up 10*l.* preference shares and ten fully paid-up 10*l.* ordinary shares and a 100*l.* debenture in the new company.

It was proposed that the preference shares should carry a non-cumulative dividend of 6 per cent. and the debentures should carry interest at 5 per cent.

The value of the 100*l.* shares in the old company was at the present market price 175*l.* each, and the company had paid dividends in 1896 at the rate of 10 per cent., in 1897 of 10 per cent., in 1898 of 10 per cent., in 1899 of 12½ per cent., in 1900 of 25 per cent., and 25 per cent. by way of bonus.

It was considered desirable in the interests of the shareholders that the company should be reconstructed in consequence of the constantly increasing dividends which the company had paid, combined with the large outlays which it had been necessary to make out of profits in developing the collieries.

The scheme, embodied in the agreement of March 29, 1901, to which the summonses related, was, shortly, to recapitalise the company at a higher figure, so that the present shareholders might receive 100,000*l.* of debentures, 100,000*l.* of preference shares, and 100,000*l.* of ordinary shares in lieu of their present holdings, and to increase the power of the

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company to raise further capital. All shareholders who were *sui juris* agreed to the scheme.

Evidence was given that, although there was a market for the shares of the existing company, it would be disastrous to attempt to realise any large proportion of the securities of the new company by placing them on the market at once.

The trustees of New's settlement, Leavers' will, and Morley's will were desirous of obtaining the sanction of the Court to their respectively concurring in the proposed scheme of reconstruction.

New's settlement was dated October 21, 1875, and thereby David New covenanted to transfer into the names of trustees 110 shares of 100*l.* each in the Wollaton Colliery Co., Lim., and also certain shares in another colliery company, upon trust to permit them to remain in their actual state of investment, or at any time at the discretion of the trustees to sell the same and invest the moneys produced thereby (*inter alia*) in or upon "the Debentures or Debenture or Guaranteed or Preference Stocks or mortgages of any company in the United Kingdom paying dividends on its ordinary shares or stock at the time of investment," with power to vary investments, and to divide the trust funds into two equal shares and apply the same for the benefit of the two unmarried daughters of David New and their issue as therein expressed, with a power of revocation to David New.

By deed poll dated August 31, 1887, David New, in exercise of his power of revocation, substituted another daughter of his for one who had died, and gave the trustees the power of adjusting, settling, and approving all accounts in relation to the trust premises, and of executing and doing all releases and things relating to the trust premises as fully and effectually as if they or he were absolute owners or owner.

The 110 shares were still standing in the name of the surviving trustee of the settlement.

J. W. Leavers, by his will dated October 4, 1898, gave his residuary real and personal estate to trustees upon trust to sell and convert, and after payment of his funeral and testamentary expenses and debts to invest (*inter alia*) "in or upon the stocks funds shares debentures debenture stock mortgages or securities of any Corporation Company or Public body or authority municipal local commercial or otherwise in the United Kingdom or India or any other colony or dependency of the United Kingdom," with power to vary securities, and to stand possessed of the trust premises upon the trusts therein mentioned; and the testator declared that it should be lawful for his trustees in their own absolute discretion to permit all or any part of his personal estate to continue in the same state of investment in which it should be found at the time of his decease, notwithstanding the same or any of them might be of a wasting or hazardous nature, and not allowed by law for the investment of trust moneys, and that the actual produce thereof in any year should be deemed the actual income thereof, it being his express wish that his trustees should in all matters of investment of trust moneys under his will act in the same manner in all respects as if they were alone beneficially and absolutely interested therein, and that they should not be liable or responsible for any loss arising thereby; and he also declared that it should be lawful for his trustees to postpone the sale, conversion, and collection of the whole or any part or parts of his real and personal estate respectively, so long as they should in their uncontrolled discretion think proper.

The testator at his death on August 13, 1897, had 228 fully paid shares of 100*l.* each in the Wollaton Colliery Co., which were unrealised, and now bore an annual income of about 9,800*l.*

Samuel Morley, by his will dated June 3, 1881, devised and bequeathed all his real and personal estate to his trustees upon trusts for sale and conversion into money, with power to postpone such sale and conversion as his trustees should think proper and to stand possessed of the residue of the moneys produced thereby after paying the testator's funeral and testamentary expenses and legacies, upon trust to set apart and pay certain sums of money and to invest the residue (*inter alia*) "in the purchase of the preference or wholly or partially guaranteed stock or shares, or on

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the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway or other public company in Great Britain incorporated by special Act of Parliament and having within one year of the time of investment paid a dividend on its ordinary stock or shares," with power to vary investments. And the testator directed his trustees to stand possessed of the said investments and the annual income thereof upon trust as therein mentioned.

The testator died on March 12, 1890, possessed of 166 fully paid shares of 100*l.* each in the Wollaton Colliery Co., which were still unrealised, and bore an annual income of about 7,001*l.*

The summons came before Cozens-Hardy, J., in chambers, who said that he would have made the orders asked for by the three summonses if he had not considered himself bound by the decisions in *Crawshay, In re ; Dennis* v. *Crawshay* [1888],[1] and *Morrison, In re ; Morrison* v. *Morrison* [1901].[2] He expressed a hope that the cases would be brought before the Court of Appeal.

The plaintiffs in each case appealed.

Haldane, K.C., and *A. F. Peterson*, for the appellants.—If the trustees are not allowed to concur in the reconstruction scheme, the other shareholders could pass a resolution for winding-up and buy them out as dissentient members under section 161 of the Companies Act, 1862. This would be very prejudicial to the interests of the *cestuis que trust*, as the property is exceedingly valuable. The limits of the power of Court for carrying out what may be called "salvage transactions" has never been exactly defined. The Court always has power to carry out a reasonable compromise. The broadest statement of the jurisdiction of the Court in these matters is to be found in *Brooke* v. *Mostyn* (*Lord*) [1864],[3] where Turner, L.J., says, "That this Court has power to compromise the rights and claims of infants and persons under disabilities, where those rights and claims are merely equitable, has not been and cannot be disputed. It is a power which has been continually exercised by the Court, and results almost necessarily from the jurisdiction which the Court exercises over trustees. In the exercise of that jurisdiction the Court may in general order trustees to deal with the trust property in whatever mode it may consider to be for the benefit of *cestuis que trust* who are infants or under disabilities." It was applied by Fry, J., in *West of England Bank* v. *Murch ; Booker & Co., In re* [1883].[4] There is a wide statutory power to trustees to enter into a compromise—Trustee Act, 1893, s. 21.

The investment clause in New's settlement covers debentures and debenture stock, and that in Leaver's will covers shares, debentures, and debenture stock of commercial companies, but in Morley's will the power of investment does not extend so far.

Crawshay, In re,[1] was not like this case. There it was desired to turn the testator's business into a private company. Here it is only a case of substituting one form of property for another. In *Palmer's Company Precedents* (7th ed.), Part I. pp. 611, 612, 613, certain cases are referred to where similar orders have been made in chambers in the Chancery Division. There are also cases of salvage where money has been allowed to be spent without any express power. In *Att.-Gen.* v. *Ailesbury* (*Marquis*) [1887][5] a lunatic's estate was invested in land without any express power. These cases are illustrations of Turner, L.J.'s proposition in *Brooke* v. *Mostyn* (*Lord*).[3] Here it is desired to place the trustees in the most favourable position for realising the property vested in them to the best advantage. If the trustees do not fall in with the scheme they may be bought out *in invitum* by the other shareholders, and thus what they are asking to do may be treated as a compromise. Clause 17 of the articles of association of the old company restricts the power of transfer of shares, but there is no such restriction in the articles of the new company.

R. J. Parker, for all the respondents who were *sui juris*.—It will be to the advantage of everybody that this recon-

(1) 60 L. T. 357.
(2) *Ante*, p. 399 ; [1901] 1 Ch. 701.
(3) 34 L. J. Ch. 65, 74 ; 2 De G. J. & S. 373, 415.
(4) 52 L. J. Ch. 784 ; 23 Ch. D. 138.
(5) 57 L. J. Q.B. 83 ; 12 App. Cas. 672.

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struction should be carried out. In the *Prudential Life Assurance Society's Case*,[6] Chitty, J., in chambers authorised trustees to take shares offered on a division of profits in lieu of cash. The Court of Chancery has always held that it had power in chambers to depart from the strict letter of trusts. A great part of the benefit of the Court arises from its jurisdiction in such cases.

J. W. Manning, for the respondents who were infants.

Cur. adv. vult.

July 22.—ROMER, L.J., read the following judgment of the Court: As a rule the Court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not on the face of the instrument creating the trust authorised by its terms. The cases of *Crawshay, In re*,[1] decided by Mr. Justice North, and *Morrison, In re*,[2] decided by Mr. Justice Buckley, are instances where the Court was asked to sanction steps to be taken by trustees which it thought unjustifiable, and which it declared it had no jurisdiction to authorise. But in the management of a trust estate, and especially where that estate consists of a business, or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be very essential for the benefit of the estate, and in the interest of all the *cestuis que trust*, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen, and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being *sui juris* or in existence, then it may be right for the Court, and the Court in a proper case would have jurisdiction, to sanction on behalf of all concerned

(6) Not reported.

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the shareholders that by their consent the company should be reconstituted by its being wound up and a new company formed to take over its assets. The new company is to be like the old company, except that the capital is larger and that the new company will have power to issue debentures. The shares in the old company will be represented by fully paid-up shares and debentures in the new company. Every shareholder who is *sui juris* agrees to the scheme. But some shares are held by trustees who wish the sanction of the Court to their assenting on behalf of beneficiaries not *sui juris* or not in existence, the other beneficiaries agreeing. We understand that Mr. Justice Cozens-Hardy was himself satisfied that the course proposed to be adopted by the trustees was one which, if it could be, should be sanctioned by the Court. We think under the circumstances of the case that the Court has jurisdiction to sanction and ought to sanction the proposed act of the trustees. But the evidence should be supplemented so as to make clearer the points urged in the course of the argument before us as to the importance of further capital being provided by the proposed reconstruction of the company, and the issue of debentures by the new company, and the difficulties that will arise if the trustees are obliged to stand aloof and to take no part in any reconstruction. Then, in the cases where the trustees are not by the terms of the trust instrument authorised to invest in the shares or debentures of such a company as the proposed new company, they must undertake to apply to the Court for leave to further retain the shares and debentures they will obtain under the scheme of reconstruction, if they desire to retain them beyond one year from the time when the reconstruction is carried out.

Appeal allowed.

Solicitors—Taylor, Hoare & Pilcher, agents for Parr & Butlin, Nottingham, and for Hunt & Dickins, Nottingham.

[*Reported by A. J. Spencer, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
COLLINS, L.J.
ROMER, L.J.
1901.
June 25, 26.
July 15.

CAMPBELL-DAVYS v. LLOYD.

Highway—Footbridge—Right of Member of Public to Erect New Bridge—Trespass—Nuisance—Abatement — Statute of Bridges (22 *Hen.* 8. *c.* 5).

A person who is merely entitled as one of the public to use a highway has no right to enter on the plaintiff's land and construct on it a permanent footbridge because an old footbridge forming part of the highway has been allowed to decay and disappear. Such acts amount to a trespass, and do not fall within the doctrine of abating a nuisance.

This was a motion by the plaintiff for a new trial, or that final judgment might be entered for the plaintiff on a point of law.

The plaintiff and defendant Lloyd were adjoining landowners in Wales, their properties being separated at one point by the river Irfon, across which a footbridge had formerly existed, but had been allowed to decay and disappear. In 1898 the defendants, who alleged that a public right of way existed over the river by means of this footbridge, re-erected the footbridge partly on the plaintiff's land, and in order to do so entered on the plaintiff's land and constructed thereon a landing platform and piles or props to support it. The plaintiff removed that part of the bridge which passed on to or rested on his land, and the defendants re-erected it as before. The plaintiff then brought this action in the Chancery Division, claiming damages and an injunction to restrain the defendants from passing over the plaintiff's land, and from erecting or allowing to remain erected any piles, platform, or other erection upon the plaintiff's land or in his moiety of the bed of the stream, and from cutting into or otherwise injuring the plaintiff's land.

The defendants alleged that the land on which the bridge stood was not the plaintiff's, or was his subject to the public

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the alleged highway, and that the defendants having occasion to use the said highway necessarily did the acts complained of, without unnecessary damage, for the purpose of using the highway.

The action was tried before Bucknill, J., and a jury, who found that the plaintiff was possessed of the *locus in quo*, and that there was a highway for foot passengers over it by means of a footbridge, on which findings Bucknill, J., entered judgment for the defendants.

On the point of law it was contended on behalf of the plaintiff that, assuming the finding of the jury that a highway for foot passengers existed by means of the old bridge, still the defendants had no right, by reason of the disappearance of the old bridge, to come upon the plaintiff's land and erect a new bridge.

There was no obligation upon either the plaintiff or defendants to keep the old bridge in repair, and in doing what they did the defendants were not acting under the express or implied sanction of any authority responsible for the repair of the bridge.

Swinfen Eady, K.C., and *J. Sankey*, for the appellant.—It does not follow, because the footbridge was dedicated to the public, that therefore there was an obligation upon any one to repair—*Reg.* v. *Southampton County Inhabitants* [1887],[1] *Reg.* v. *Southampton County Inhabitants; Tinker's Bridge Case* [1852],[2] *Coke's Institutes*, Part II. p. 697, and Statute of Bridges (22 Hen. 8. c. 5). Without being under an obligation to repair, the defendants had no right to enter on the plaintiff's land and build a bridge according to their own design. The proper remedy is to indict the person (if any) who is under the legal liability to repair. The old bridge ought not to be altered in any particular —*Sutcliffe* v. *Sowerby* [1859][3] and *Reg.* v. *Wilson* [1852].[4] The acts of the defendants under the circumstances amount to a trespass, and the plaintiff is entitled to remove the bridge where it is built on his

(1) 56 L. J. M.C. 112; 19 Q.B. D. 590.
(2) 21 L. J. M.C. 201; 18 Q.B. 841.
(3) 1 L. T. 7.
(4) 21 L. J. Q.B. 281; 18 Q.B. 348.
(5)
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inhabitants, and it cannot be a trespass on their part to do that which they might be indicted for not doing.

Swinfen Eady, K.C., in reply.—No action lies for obstruction of a way, unless the plaintiff shews some substantial damage peculiar to himself—*Hubert* v. *Groves* [1794][10] and *Winterbottom* v. *Derby* (*Lord*) [1867].[11]

The proposition that the county is liable to repair every bridge, unless some one else is liable, is too wide—Highway Act, 1835 (5 & 6 Will. 4. c. 50), and *Hawkins's Pleas of the Crown*, vol. i. (8th ed. 1824), c. 32, s. 19, p. 711.

The right to abate does not exist in every case of a nuisance arising from mere nonfeasance—*Lonsdale* (*Earl*) v. *Nelson* [1823],[12] and *Lemmon* v. *Webb* [1894][13]—and the argument on behalf of the defendants goes far beyond any authority that can be cited.

Cur. adv. vult.

July 15.—COLLINS, L.J., read the following judgment: This was an action of trespass by erecting a bridge over the plaintiff's land consisting of one moiety of the bed of the river Irfon, in Wales. The defendants' pleas were "not possessed," and that there was a highway over the *locus in quo* by means of a footbridge, and the defendants, having occasion to use the said way, entered upon the *locus in quo*, and because the bridge had been destroyed erected and laid a footbridge across the river, and necessarily did the acts complained of, without unnecessary damage, for the purpose of using the said highway. The jury found the issue on "not possessed" for the plaintiff, and the other issue for the defendants. On an appeal by the plaintiff to this Court, the finding for the defendants was impeached on various grounds, and in addition it was contended that, even accepting the findings, the plaintiff was entitled to judgment. We decided to determine this point first, as, if the plaintiff is right upon it, it disposes of the action.

It was contended for the plaintiff that, assuming it to be the fact that a highway for foot passengers by means of a footbridge across the river existed, the fact that that bridge had been destroyed gave no right to the defendants to come upon the plaintiff's land and erect a new one. I think this contention is well founded. Though there was evidence that a bridge had once existed at the place in question, and the jury found that there was a highway over it, it was proved that for many years before 1898 that bridge had ceased to exist. In that year the defendants had erected a footbridge in the place where it now is, and the plaintiff had caused that part of it which passed over his land to be removed. The defendants had subsequently re-erected it in the present form across the plaintiff's land, and this action was brought. There was no proof of any right in, or obligation on, the defendants to repair the bridge, neither was there any proof of any such obligation on the plaintiff. The only right which the defendants set up is that which is averred in the plea. The defendants do not contend that they are in any better position than any other member of the public who, having occasion to use the way, finds there is no bridge where one once existed. The question is, therefore, whether in such circumstances a member of the public who wishes to cross is entitled, not merely to get across by some temporary makeshift serving the particular occasion, but to build a permanent structure on the plaintiff's land for that purpose. Counsel for the defendants contended that it was simply a case of abating a nuisance from which he suffered a special inconvenience, such as was held to be justifiable as long as *James* v. *Hayward* [1630],[14] where a passenger was held entitled not only to open but to throw down a gate placed across a highway. But there is a broad difference between removing an obstruction, which has been wrongfully placed in the highway, and making good by a permanent structure the result of mere nonfeasance on the part of those charged with the duty of repairing, and I doubt whether such an operation could properly fall under the term "abatement." Even if

(10) 1 Esp. 148.
(11) 36 L. J. Ex. 194; L. R. 2 Ex. 316.
(12) 2 B. & C. 302, 311.
(13) 64 L. J. Ch. 205; [1895] A.C. 1.
(14) Cro. Car. 184.

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the right to "abate" can be said to exist at all in the case of a nuisance arising from mere nonfeasance—as to which see the argument of Mr. Justice Parke and the judgment of Mr. Justice Best in *Lonsdale* (*Earl*) v. *Nelson*[12]—I do not think the cases which establish the right to abate by an individual for the purpose of passage would extend to protect such acts as were done by the defendants in this case. If this were the law, every individual who was obstructed in his desire to cross would be equally entitled to erect a permanent structure of his own design, although the obligation to repair and the incidental right to determine the method might be in other persons, who, moreover, might be reached by indictment. The right of abatement by individuals is not regarded with favour by the law. In the words of Lord Hale: "But because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary Courts of justice." See this cited from Hale *De Port. Mar.* Part II. c. 7, in *Lonsdale* (*Earl*) v. *Nelson*.[12] "If," says Lord Campbell in *Dimes* v. *Petley*,[8] "there be a nuisance in a public highway, a private individual cannot of his own authority abate it unless it does him a special injury, and he can only interfere with it as far as is necessary to exercise his right of passing along the highway; and, without considering whether he must shew that the abatement of the nuisance was absolutely necessary to enable him to pass, we clearly think that he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience." Again, in *Colchester Corporation* v. *Brooke*,[7] Lord Denman, in delivering the judgment of the Court, says: "a public nuisance becomes a private one to him who is specially and in some particular way inconvenienced thereby, as in the case of a gate across a highway which prevents a traveller from passing, and which he may therefore throw down: but the ordinary remedy for a public nuisance is itself public, that of indictment; and each individual who is only injured as one of the

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and coming only, and the right of "abatement" in an individual is only ancillary thereto. The dedicating owner, therefore, is not bound to accept a greater burden, and may complain if it is imposed upon him. I think the appeal should be allowed, and judgment entered for the plaintiff, with an injunction in the terms which will be stated by Lord Justice Romer.

ROMER, L.J., read the following judgment: The point involved in this appeal is a short one. I will assume for the purposes of the appeal that there was formerly a bridge over the river Irfon, at or near the place where the bridge now in dispute was erected by the defendants, and that there was a public right of way over that old bridge, as found by the jury. But it is admitted by the defendants that the plaintiff was under no obligation to repair or replace the old bridge, and that they themselves were under no such personal obligation. It is contended by the defendants that the obligation to repair the old bridge, and to replace it when necessary, is in some local authority, and that consequently that local authority had the right to repair and replace. But admitting this contention to be true for the purposes of the point we have now to decide, it is clear, as pointed out by Mr. Justice Wills in *Eyre* v. *New Forest Highway Board*,[5] that, where there is no obligation to repair, there can be (in the absence of any special power given) no right to repair. Although, therefore, the local authority may have the right to come upon the plaintiff's land for the purpose of re-erecting a bridge, the defendants have no such right to do so by virtue of any general right of repairing and replacing the bridge. And it is not established here that what the defendants did in entering upon the plaintiff's land and erecting a new bridge was by the authority and on behalf of the local authority, so that their act can be regarded as the act of the local authority. And, seeing that the plaintiff was under no obligation to repair or replace the bridge, he cannot be prejudiced by any default on the part of the local authority. The default of the local authority cannot extend the burden placed upon the plaintiff's land, and give to other persons a right to go on that land which could not have existed if the local authority had not been guilty of default.

But then the defendants say that, though they may have had no right to enter upon the plaintiff's land by virtue of any general right of repairing or replacing, they had, by virtue of the public right of way, and as members of the public, a right to come to the place in question and try and pass over the river, and that, finding a legal nuisance existing by reason of the fact that the old bridge had been allowed to decay and disappear, they had a right to abate the nuisance by re-erecting the bridge. This is a very far-reaching contention on the part of the defendants, and, if well founded, might lead to strange results. For instance, a local authority, bound and entitled to repair a bridge which falls suddenly into need of extensive repair, or is swept away by a flood, and properly taking advice as to the best means of repairing or re-erecting the bridge, might find itself forestalled by the impatience of some member of the public who wanted to pass over, and some repairs executed or new bridge put up of which the local authority wholly disapproves. It cannot be that in such a case the first member of the public who happens to come to the bridge to pass over has a right to do extensive works, if he chooses to bear the expense. And, if the works necessitate an entry on land of a private owner not part of the highway, it appears to me that it cannot be that any member of the public has a right to go on that land for the purpose of repairing or replacing the bridge. I think that there must be some limitation of the alleged right of abating such a legal nuisance as that I am now considering. In *Lonsdale (Earl)* v. *Nelson*[12] Mr. Justice Best said that there was no decided case which sanctions the abatement by an individual of nuisances of omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. This authority has been observed upon by Lord Davey in *Lemmon* v. *Webb*.[13] But, whether or not Mr. Justice Best was justified in stating or suggesting that there was such a general rule as he

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indicated, or whether or not to such a rule, if it exists, there may not be other exceptions than the cutting of trees, I do not think we need decide in this case. For I think that where the question concerns a substantial structure, such as the bridge erected in this case, and when the abatement of the nuisance cannot be effected in ordinary course by the individual going upon and passing along the highway in the way in which he has the right as a member of the public, and where he has (as in the case before us) in order to erect the structure to go and remain and do work upon land, in a manner not justified by the mere exercise of the public right of way, and the land belongs to a person who is not guilty of causing the nuisance, then he cannot justify the entry on the land and the erection of the structure as against the owner of the land by alleging that he was abating a nuisance. I think, therefore, that in this case the defendants were not justified in entering upon the plaintiff's land and erecting their bridge upon it, and that consequently their act was wrongful as against the plaintiff, and entitled him to remove the bridge so far as it was erected on his land.

I agree in thinking that the appeal should succeed, and that, notwithstanding the findings of the jury, the judgment for the defendants must be set aside. There must be an injunction restraining the defendants, their agents and servants, from preventing the plaintiff from removing from his land the bridge erected by them. The plaintiff should have the costs of the appeal. He will also have the general costs of the action, except the costs of the issue as to the right of way, which will be paid by him, with a set-off.

Rigby, L.J., concurred.

Solicitors—Riddell & Co., for appellant; J. B. Somerville, agent for A. Gwynne-Vaughan, Builth, for respondents.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

Kekewich, J. 1901. July 4.

Richards v. De Winton.
Richards v. Evans.

Compulsory Purchase—Common Lands—Compensation for Commonable Rights—Apportionment—Action by Commoner to Ascertain Interest — Jurisdiction —Lands Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 104—*Inclosure Act*, 1854 (17 *&* 18 *Vict. c.* 97), *ss.* 15, 16, *and* 17.

Common lands were compulsorily taken by a local authority. Meetings of statutory committees of the commoners were held, pursuant to the Lands Clauses Consolidation Act, 1845, *and agreements were come to with the local authority as to the compensation to be paid for the extinction of the commonable rights. Under these agreements certain moneys were paid to the committees of commoners of two parishes. By section* 15 *of the Inclosure Act*, 1854, *a majority of a committee might apply to the Commissioners to call a meeting of the persons interested in the compensation money to determine whether it should be apportioned; and by section* 17 *of the same Act the Inclosure Commissioners or any assistant Commissioner appointed for the purpose were directed to ascertain, determine, and award the names of the parties entitled to interests in the commonable lands, and the amount or value of their interests therein. The committees were willing to act under these statutory powers, but had not yet done so. An action was brought by a plaintiff, who claimed to be the sole person entitled to commonable rights, for the payment to him of the whole of the compensation money*:—Held, *upon the construction of section* 104 *of the Lands Clauses Consolidation Act*, 1845, *and sections* 15 *and* 17 *of the Inclosure Act*, 1854, *that proper machinery was provided to determine who were the parties entitled, and the amount of their interests, and therefore the Court had no jurisdiction to interfere at the present stage.*

The plaintiff, Howell Richards, alleged that he was the sole person entitled to commonable rights over certain pieces of land forming part of two commons called Torglas and Neuadd Fach, in the parishes

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of Cantreff and Llanfrynach, in the county of Brecknock.

In the year 1895 the urban district council of Merthyr Tydfil promoted a bill in Parliament to enable them to construct certain waterworks, and for this purpose to take over certain parts of these two commons. On May 18, 1895, the respective commoners of the parishes of Cantreff and Llanfrynach entered into two agreements with the urban district council, under which they agreed, by their agent David Thomas Jeffreys, to accept 40*l.* per acre, and so in proportion for any less quantity than an acre, for the extinction of their commonable rights over any of the common lands required for the purposes of the waterworks. On August 2, 1895, meetings of the commoners of the respective parishes were convened in accordance with the provisions of the Lands Clauses Consolidation Act, 1845, and at these respective meetings the defendants in the second action were appointed a committee of the commoners of Cantreff, and the defendants in the first action were appointed a committee of the commoners of Llanfrynach, and the two agreements were ratified by the defendants respectively as such committees.

The urban district council, under the powers conferred by the Act, took forty-eight acres of one common and sixteen acres of the other for the purposes of the waterworks, and the committee of the commoners of Llanfrynach now had a sum of 2,700*l.* in their hands representing moneys for the extinction of the commonable rights in their parish, while the defendants, the committee of the commoners of Cantreff, had a sum of about 370*l.* in their hands for the extinction of the commonable rights over the remainder of the common taken.

The plaintiff claimed a declaration that he was entitled to both these sums, and for payment of the same to him. The defendants denied that the plaintiff was the sole person entitled to the commonable rights in question, and submitted that he was only entitled as one commoner in common with the others, and was not entitled to maintain the action. They also pleaded that the defendants received the sums respectively as statutory committees of the commoners, to be dealt with in accordance with the provisions of the Lands Clauses Consolidation Act, 1845, the Commonable Rights Compensation Act, 1882 (45 Vict. c. 15), and the Merthyr Tydfil District Council Waterworks Act, 1895 (58 & 59 Vict. c. clvi.).

By this last-mentioned Act it was provided by section 12 that compensation moneys might be applied in certain specified improvements and ways, in addition to those sanctioned by the Commonable Rights Compensation Act, 1882, s. 2.

The sections of the Inclosure of Land Act, 1854, referred to in the argument, are set out in the footnote.[1]

(1) The Inclosure of Land Act, 1854:

Section 15: "Where any money shall have been or may hereafter be paid to a committee under 'the Lands Clauses Consolidation Act, 1854,' or under any railway or other special Act by which money may have been directed or authorised to be paid to a committee as compensation for the extinction of commonable or other rights, or for lands, being common lands or in the nature thereof, the right to the soil of which may have belonged to the commoners, and the majority of such committee shall be of opinion that the provisions of such Act for the apportionment thereof cannot be satisfactorily carried into effect, such majority may make application in writing to the commissioners to call a meeting of the persons interested in such compensation money, to determine whether or not such compensation money shall be apportioned under the provisions of this Act."

Section 16 provided for the compensation money to be paid into the Bank of England.

Section 17: "As soon as the said monies shall have been paid into the Bank as aforesaid, the said Inclosure Commissioners, or any assistant commissioner appointed or to be appointed by them for that purpose, shall proceed to ascertain, determine, and award the names of the parties who were entitled to such estates, rights, and interests in the said common and commonable lands, and the amount or value of their respective shares, rights, and interests therein, and the proportionate amount of the price so to be paid as aforesaid for such estates, rights, and interests to which each party so entitled as aforesaid is entitled, in respect of his share, right, or interest as aforesaid; and the award of the commissioners, under their common seal, or assistant commissioner in writing under his hand and seal, shall be binding on all parties claiming such estates, rights, and interests as aforesaid; and for the purpose of ascertaining the rights and interests of such parties as aforesaid it shall be lawful for the said Inclosure Commissioners or assistant com-

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RICHARDS *v.* DE WINTON.

Warrington, *K.C.*, and *R. Rowlands*, for the plaintiff.—The plaintiff has a right to have his interest determined by the Court, unless the jurisdiction has been excluded by the Acts upon the subject. Under the Lands Clauses Consolidation Act, 1845, the compensation money, when received, was to be apportioned by the committee among the several persons interested. Those interested were to be summoned to meetings; but no provision was made by this Act for ascertaining who the persons interested were, and before the provisions of this and subsequent Acts could be put in motion there must be a means of determining who were the parties interested. In the Inclosure Act, 1854,[1] there is at any rate nothing to exclude the jurisdiction of the Court in sections 15 to 17. Once the interests have been determined, then the machinery of the Act applies for the apportionment of compensation. The plaintiff, therefore, has a right to come to the Court now—*Fox* v. *Amherst* [1875].[2]

[The plaintiff's counsel was proceeding to prove his title, when a preliminary objection was taken by the defendants.]

Evans, *K.C.*, and *R. J. Parker*, for the defendants.—There is no jurisdiction to entertain this action at all. The plaintiff rests his title to this compensation money upon these committees having been duly appointed and held. They could only be appointed by the commoners interested or entitled. The Inclosure Act, 1854,[1] developed the provisions of the previous Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 22; and by section 17 of the Act of 1854 it is provided that the Commissioners shall proceed to ascertain, determine, and award the names of the parties entitled to interests in the commonable lands, and the value of the same.

[KEKEWICH, J., referred to *Nash* v. *Coombs* [1868],[3] where a committee could not make up their minds, and applied for directions to the Court.]

This action is therefore not maintainable, and premature. The question of whether the plaintiff is the only commoner must be decided by the committee, or else by the Commissioners, or the assistant Commissioner, and they may call meetings of persons claiming any rights to determine the question.

Warrington, *K.C.*, in reply.—It could not have been the intention of these Acts to exclude the jurisdiction of the Court altogether. There is no machinery provided by these Acts for deciding who are the proper persons to say whether the money is to be laid out in improvements under the terms of the special Act, or of the general Act of 1882.

KEKEWICH, J.—Notwithstanding the difficulty and novelty of the question calling for decision, I do not think anything will be gained by my deferring my judgment. Counsel for the defendants has pointed out in his reply that there is no machinery for determining who are the proper persons to say whether or not this money shall be laid out in some of the improvements or other purposes sanctioned by the general and the special Acts of Parliament. It is a singular omission, and, so far as I can see, it is an omission; but what would be right to do if the question was now before me, I need not pause to determine.

The plaintiff claims the whole of the money which is in the hands of these two committees. I will speak of them, for simplicity's sake, as the committee, for the plaintiff's claim against each is the same as if it were one action. At present he claims, not that the money should be laid out in improvement purposes, but that it should be paid to him, because he is the sole commoner. It is a strange phrase; but that is his position. The committee, on the other hand, say

missioner to call such meetings as they or he shall think fit of all persons having or claiming any such rights or interests in the said common and commonable lands as aforesaid, at such time and place as the said commissioners or assistant commissioner shall think fit, . . . and at such meeting the said commissioners or assistant commissioner do and shall proceed to examine into and ascertain all and every the claims which shall be made or put forward in respect of any such rights or interests as aforesaid, and the relative and proportionate value of the estates, rights, and interests of any person or persons claiming to be entitled thereto. . . ."

(2) 44 L. J. Ch. 666; L. R. 20 Eq. 403.

(3) 37 L. J. Ch. 600; L. R. 6 Eq. 51.

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that they are prepared to do their duty, and it is for them to determine, and they are prepared to determine, themselves whether the plaintiff is or is not the sole commoner; and if it becomes a question which they cannot properly determine, then the Act provides machinery by which that can be determined by a competent tribunal. The question is whether I ought to intervene between the plaintiff and the committee, and say that the committee is not to do its duty and to fulfil the obligations cast upon it by the Acts of Parliament. Now, what are these obligations? The fasciculus of clauses—to use Lord Cairns's term in the House of Lords—in the Lands Clauses Act, 1845, relating to common lands, runs from section 99 to section 107. Except as regards one particular provision, to which I will refer presently, there is no occasion to go through them in detail. The Act contemplated that in the course of taking lands for the purposes of railways and other public works the promoters of the undertakings would have to buy up common rights, and those who have had any experience in such matters know very well that the Legislature was well advised in providing for such a state of facts. The Legislature provided, in short, that, there being no trustees, as is often the case when lands are taken compulsorily, or no tenant for life, still less any owner in fee who can make a bargain, something must be done to ascertain what money should be paid for the acquisition of common rights, and the Legislature provided that a meeting should be summoned of those who claimed to be interested, and they were to determine what should be done. They were to appoint a committee, and the committee was authorised to make a bargain as binding upon all the commoners, and to receive the money. It was fairly straightforward machinery. No doubt, it was contemplated that it would work very well, because in most cases there is not any serious doubt who the commoners are. Then, the committee having made their bargain with the railway company, or other promoters of the undertaking, of course the money which they received had to be distributed in some way or other among those whom the committee represented. Section 104 of the Lands Clauses Consolidation Act, 1845, provides thus: "and such compensation, when received, shall be apportioned by the committee among the several persons interested therein, according to their respective interests." That is the whole thing. They were left to do that, and it seems to me they were bound to ascertain who were the persons interested therein, and to ascertain what the particular interests were, not only of commoners, but commoners with varying rights, and then to distribute the compensation money among those parties according to their respective interests. Difficulties might arise, but the Legislature does not seem to have anticipated that any difficulty would arise. What would happen under that Act if difficulties arose, it would be rather hard to say. There is a case of *Nash* v. *Coombs*,[3] to which I called attention in the course of the argument, which shews that the Court will be open to the committee to come for directions as stakeholders in the character of trustees, and they might come by bill in those days and now by originating summons, or at any rate by writ, to ascertain what they should do with the money which was entrusted to their care, and no doubt some means would be found to make them do their duty, if they did not shew proper alacrity in performing it. But I do not see how the Court could have determined, even under that section, who were the several persons interested therein, if it was objected that there was no jurisdiction. I suggested the case of a committee threatening and intending to exclude some person who had an interest, as to whether he could maintain an action for an injunction to prevent their distributing the money without making proper provision for him. As at present advised, I think if any such action were brought, and it were resisted, it would fail, on the ground that it was not competent for the Court to interfere. Of course I am not thinking of fraud, or of an improper refusal of the committee to hear and determine claims. The duty seems to me to be cast on the committee to apportion the money among the persons interested therein according

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answer to that is, that if unfortunately the deadlock occurs to which I referred, the Court must decide for itself whether there is any solution within the power of the Court. It has not occurred, and I must deal with the matter as it stands, giving credit to the committee for a desire to do their duty and to the Board of Agriculture that it will use its discretion for the benefit of all concerned. Assuming then, as the Act does, for the present purpose, that the meeting will be called and will determine that the money shall be apportioned, then what is to happen? The money will be paid into the Bank of England, as provided by section 16, and will be under the control of the Board of Agriculture. Then section 17 declares what the procedure is to be. When the money has been paid into the bank, the Inclosure Commissioners direct an enquiry, and appoint an assistant Commissioner for the purpose, and they, through him, are to "proceed to ascertain, determine, and award the names of the parties who were entitled to such estates, rights, and interests in the said common and commonable lands, and the amount or value of their respective shares, rights, and interests therein, and the proportionate amount of the price so to be paid as aforesaid for such estates, rights, and interests to which each party so entitled as aforesaid is entitled, in respect of his share, right, or interest as aforesaid." And that is to be binding. Once you get to that stage, then it is quite impossible for the High Court, or any other Court, to intervene, except, perhaps, on the invitation of the Board of Agriculture. It is left entirely to the Commissioners to determine. It does not seem to me an objection to rely on those provisions that the Board of Agriculture has not yet been called on. Here we have a still stronger provision than that in the Lands Clauses Consolidation Act. In that Act there is only a provision directing the committee to apportion the money. Here we have not only a direction to the Commissioners to do it, but a carefully considered procedure, with their duties and powers expressed in plain as well as elaborate language. It seems to me that I cannot possibly interfere. The plaintiff must come under the Act, as against the committee, to claim money which was received by the committee under the provisions of the Act, and, claiming under the Act, he must claim in the manner pointed out by the Act, and through the tribunal appointed by the Act.

That being my opinion on those Acts, I need only briefly allude to the Commonable Rights Compensation Act, 1882, and the special Act of 1895 under which the Merthyr Tydfil District Council took this land. It had not been thought of before that there might be a way of applying the money paid for commonable rights which would be equally beneficial to the commoners as dividing small sums between them, so section 2 of the Act of 1882 provides that compensation money paid under the Lands Clauses Act, or any other Act of Parliament, may be laid out in certain improvement purposes; and the special Act, which incorporates the Lands Clauses Acts and other Acts, says, by section 12, that the improvements mentioned in the Act of 1882 shall include also some others which are mentioned specifically in the special Act. That does not affect the apportionment in the least. One is bound to look at these Acts, of course, to see what is the whole scheme of the Legislature; but I really have not to construe the Act of 1882 at all—only to determine the meaning of the previous Act. The objection comes in there that if the compensation money is to be laid out in this way, who is to say whether it is to be laid out or not? My answer to that is that at present I have nothing to do with that. When the question arises I will do my best to deal with it. At present I have only to determine whether the committee, being willing to fulfil the duties cast upon them by the Act of Parliament, and there not being the slightest suggestion that they are not intending to discharge that duty honestly and to the best of their ability, are to be allowed to do so or not. I think my duty is to say that I cannot interfere with the committee under present circumstances. What may happen in the future is best

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left for the future to determine. The action must be dismissed with costs.

Solicitors—Schultz & Son, agents for Gwilym James, Charles & Davies, Merthyr Tydfil, for plaintiff; Sharpe, Parker, Pritchards, Barham & Lawford, agents for D. T. Jeffreys, Brecon, for defendants.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

BYRNE, J. 1901. July 4. } YATES, *In re*; YATES *v.* WYATT.

Will — Construction — Annuity for Maintenance of Infant—Cesser.

A testator directed his trustees to pay an annuity to his wife during widowhood, and to pay to her a further annuity till his daughter should attain twenty-one to be applied by his wife for the maintenance and education of his daughter. The widow died while the daughter was an infant:— Held, *that the further annuity had not ceased.*

By his will dated January 19, 1894, William Clark Yates devised and bequeathed all his real and personal estate to executors upon trust, and directed that they should out of the rents, dividends, and annual income arising therefrom pay to his wife during widowhood such a sum as should, together with the income to which she would be entitled under the settlement made in contemplation of their marriage, amount to the sum of 1,000*l.* per annum, by equal quarterly payments.

The will proceeded: "And (my trustees) shall also pay to my said wife by the like equal quarterly payments a further annuity of 300*l.* per annum until my daughter Charlotte shall attain the age of 21 years, and to be applied by her my said wife in and about the maintenance and education of my said daughter." Then followed a bequest in similar terms of a further annuity of 300*l.* for the benefit of his other daughter Kathleen. And the

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seems to have been to make provision for his daughters till they should attain twenty-one, and he has only made his wife a trustee for his daughters, and she is not to have any benefit from the annuities of which she is trustee. Her receipt for these annuities is to be a sufficient discharge to the trustees of the will. This direction would not have any operation after the daughters attained twenty-one. The direction to the trustees to accumulate is subject to the payment of the annuities. Having regard, therefore, to the fact that the testator was providing for the benefit of his daughters, I do not think the annuities cease by reason of the death of the widow.

Solicitors—Bird & Eldridges; Nicholson, Graham & Graham.

[*Reported by Arthur Lawrence, Esq., Barrister-at-Law.*

WRIGHT, J.
1901.
April 2, 17.
May 8.

AMALGAMATED SYNDICATES, *In re.*

Company—Sale to Another Company—Voluntary Liquidation of Vendor Company—Compulsory Liquidation of Purchasing Company—Remuneration of Voluntary Liquidator—Basis of Remuneration.

On the sale of a company's assets to another company the purchasing company agreed to pay the costs, charges, and expenses of the voluntary winding-up of the vendor company:—Held, *that the remuneration of the voluntary liquidator was not governed by the regulation as to the mode of remunerating official liquidators adopted by the Master of the Rolls and sanctioned by the Lord Chancellor* (1868); *such a case must be considered in regard to its own particular circumstances. It is not a proper mode of remuneration that all letters should be paid for on a uniform scale irrespective of the difficulty involved.*

The official receiver in the compulsory winding-up of the above-named company, which had purchased the assets of three other companies under an agreement by which the purchasing company undertook to pay the costs, charges, and expenses of the voluntary winding-up of the vendor companies, took out a summons for the determination of the question on what basis the remuneration of the voluntary liquidator should be assessed. (It was suggested on the authority of *Vimbos, In re* [1900],[1] that the Court had not jurisdiction, but by consent the point was waived.)

The voluntary liquidator claimed to be paid on a scale according to time occupied or estimated to be occupied by him and his clerks on the following footing—namely, his own time *per diem* at the rate of three guineas, and that of his clerks at one and a-half and one guinea respectively; letters to be reckoned as having taken half an hour each to write. His claim thus amounted to some 330*l.* (He had already received 425*l.* in respect of a previous claim for prior work.)

The Registrar having suggested 150*l.* as a proper sum, the matter was adjourned to the Judge in Court.

Shearman, for the applicant.—The respondent had only to get in the assets of the vendor companies.

A general scale of charge for letters, irrespective of whether they required much or little trouble in writing, is wrong. Many were merely circulars.

The respondent will be amply remunerated with what the Registrar suggests (in addition to what he has already received).

Stewart-Smith, for the respondent.—The respondent's position and duties as voluntary liquidator of the vendor companies continued notwithstanding the order for compulsorily winding up the purchasing company.

The rate of charge for letters is in accordance with the practice of accountants.

The respondent's whole claim is reasonable—see regulation as to the remuneration of official liquidators adopted by the

(1) 69 L. J. Ch. 209; [1900] 1 Ch. 470.

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AMALGAMATED SYNDICATES, IN RE.

Master of the Rolls and Vice-Chancellors (1868).[2]

Cur. adv. vult.

WRIGHT, J.—I do not see my way to increase the amount of remuneration suggested by the Registrar. The respondent has already been paid 425*l.* in respect of remuneration. The only question is whether 150*l.* in addition is or is not enough. I think it is abundantly enough. If I had been asked to reduce it, it is possible that I might have done so, but no such reduction is asked for. The respondent has attempted to shew that it is the general practice to allow half an hour's time for each letter written. That seems to me to be quite wrong, and it is not established that there is any such general practice as to the charges allowed to be made by accountants. The Court should not adopt a practice which makes no discrimination between letters which from their importance require real attention, and letters which do not call for such attention. Solicitors do not charge for letters upon that principle. I think the respondent was mainly influenced by the regulation as to the mode of remunerating official liquidators adopted by the Master of the Rolls and the Vice-Chancellors, and sanctioned and approved by the Lord Chancellor, in 1868[2]; but that was applicable only to official liquidators. There is nothing that binds me to apply it. In the matter of a voluntary liquidator each case must be considered with regard to its own particular circumstances. In the present case I think the sum proposed by the Registrar is sufficient.

Solicitors—W. H. Smith & Son, for official receiver; J. Vernon, Son & Stephen, for voluntary liquidator.

[*Reported by Arthur Lawrence, Esq., Barrister-at-Law.*

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(2) L. R. 3 Ch. lxiv.

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STATE OF WYOMING SYNDICATE, IN RE.

Before the expiration of the twenty-one days from the date of the requisition allowed to the directors by sub-section 3 of the same section[1] for convening a meeting — namely, on April 29—the secretary of the company, acting on his own authority, issued notices to the shareholders for a meeting of the company to be held on May 10 to pass the extraordinary resolution.

On May 10 the meeting was held, at which an extraordinary resolution to wind up the company voluntarily was passed by the required majority, and a liquidator was appointed. At the meeting two directors, the requisitionists, and many of the shareholders were present.

The petition came on for hearing on June 5, and was opposed by the company on the ground that the company was being wound up voluntarily. The petitioner denied the existence of a voluntary winding-up, alleging that the resolution to wind up voluntarily was invalid; and the case stood over for further argument.

The company was governed, so far as the summoning of meetings was concerned, by Table A in the First Schedule to the Companies Act, 1862, article 32 of which is as follows: "The directors may, whenever they think fit, and they shall upon a requisition made in writing by not less than one-fifth in number of the members of the company, convene an extraordinary general meeting."

By article 35, seven days' notice is to be given of the meeting, and by article 95 such notice may be given personally by sending it through the post.

By article 20 of the special articles it was provided that until otherwise determined two directors should form a quorum for the transaction of business.

Gore-Browne, for the petition.—The resolution for voluntary winding-up was invalid. The only persons who could convene a meeting during the twenty-one days from the date of the requisition being deposited with the company were the directors—Companies Act, 1900, s. 13, sub s. 3.[1] Before the expiration of the twenty-one days the meeting was called by the secretary, acting on his own responsibility.

The action of the secretary in thus convening the meeting without the authority of the board of directors was not a mere irregularity—*Haycraft Gold Reduction &c. Co., In re* [1900].[2] If both the directors and the requisitionists could call meetings, two separate meetings might be called for the same time, and shareholders might not know which they ought to attend. A resolution obtained in the irregular manner in which the resolution in the present case was obtained is not a compliance with the requirements of the articles of the company and sections 51 and 129 of the Companies Act, 1862, and the effect is to vitiate the resolution for winding-up passed at the meeting. There is, therefore, no voluntary winding-up in existence, and upon the merits the petitioner is entitled to a compulsory winding-up order.

Martelli, for the company and the

company, the directors of a company shall, on the requisition of the holders of not less than one-tenth of the issued capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company.

"(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the office of the company, and may consist of several documents in like form each signed by one or more requisitionists.

"(3) If the directors of the company do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists, or a majority of them in value, may themselves convene the meeting, but any meeting so convened shall not be held after three months from the date of such deposit.

"(4) If at any such meeting a resolution requiring confirmation at another meeting is passed, the directors shall forthwith convene a further extraordinary general meeting for the purpose of considering the resolution and, if thought fit, of confirming it as a special resolution; and, if the directors do not convene the meeting within seven days from the date of the passing of the first resolution, the requisitionists, or a majority of them in value, may themselves convene the meeting.

"(5) Any meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors."

(2) 69 L. J Ch. 497; [1900] 2 Ch. 230.

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voluntary liquidator.—There has been a technical irregularity, no doubt, on the part of the secretary in summoning the meeting, but the matter was one of internal regulation of the affairs of the company, and a Court of equity will not interfere in such a case—*Browne* v. *La Trinidad* [1887],[3] *Foss* v. *Harbottle* [1843],[4] and *Southern Counties Bank* v. *Rider* [1895].[5]

Further, the secretary of a company is an agent of the directors, and they can ratify his acts at any time afterwards—*Bolton Partners* v. *Lambert* [1889],[6] and that is what the directors here have in effect done. The whole of the shareholders who paid cash for their shares were present at the meeting. Two of the directors—who under the special articles of the company formed a quorum—were also present and took part in the discussion. Further, the petitioner was himself present at the meeting as a shareholder and raised no objection to the proceedings. Any irregularity on the part of the secretary must therefore be taken to have been cured by the confirmation of the members of the company. *Haycraft Gold Reduction &c. Co., In re*,[2] was a totally different case from the present. There the articles provided that the directors "may" whenever they think fit convene an extraordinary general meeting, and there was nothing to shew that any single director was asked to approve of the resolution as proposed. The decision in that case is inconsistent with *Bonelli's Electric Telegraph Co., In re; Collie's Claim* [1871].[7]

[WRIGHT, J.—I cannot see that the latter case has much bearing on the present.]

It shews that the directors need not act as a board. This was a mere informality which could have been set right at any time, and the Court will not therefore interfere with the validity of the voluntary winding-up. The sections of the Companies Act, 1862, which have been referred to do not apply to a meeting called under the Companies Act, 1900.

Gore-Browne was not called upon to reply.

WRIGHT, J.—In my judgment it is clear in law that the meeting could not have been properly summoned on the day on which it was summoned except by the directors. It could not be summoned by the requisitionists, because the twenty-one days limited by section 13 of the Act of 1900 had not expired. I need not decide whether the requisitionists could, after the expiration of the twenty-one days, call a meeting by notices signed by the secretary. But before that period had expired only the directors could call the meeting, and the secretary could not, without their authority, summon a meeting. This is admitted by counsel for the company, but he says there has been a mere irregularity in the internal regulation of the affairs of the company, which could have been immediately set right, and would have been set right, if the existence of the irregularity had been known; and that it is contrary to the established principles of equity to regard such a matter as this as an irregularity which is fatal to the validity of the proceedings. This is a serious question, and no one would desire to infringe on *Browne* v. *La Trinidad*,[3] and the rules laid down in that and other cases. But I hesitate to apply the principles of those cases to a case like this. Nothing can be more important than the question whether a company should proceed to voluntary liquidation, especially when a petition for a compulsory winding-up order is pending against the company, and it seems to me that proceedings of this kind ought to be conducted with substantial propriety. I think that Mr. Justice Cozens-Hardy acted on this view of the law in *Haycraft Gold Reduction &c. Co., In re*,[2] where the question was whether the resolution for winding up was valid. He says, "In the present case I cannot regard the omission to convene a board meeting to consider matters of such vital moment as a winding-up of the company and the appointment of a liquidator as a mere irregularity"; and he then goes on to point out that the winding-up

(3) 57 L. J. Ch. 292; 37 Ch. D. 1.
(4) 2 Hare, 461.
(5) 73 L. T. 374.
(6) 58 L. J. Ch. 425; 41 Ch. D. 295.
(7) 40 L. J. Ch. 567; L. R. 12 Eq. 246.

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STATE OF WYOMING SYNDICATE, IN RE.

in that case was part of a scheme devised for an improper purpose. I am not for a moment suggesting that that is the case here. I think I should not be deciding in accordance with the decision of Mr. Justice Cozens-Hardy if I were to hold that in a matter of this kind a secretary could act entirely on his own authority. If he does summon a meeting without authority I do not think I ought to hold that a resolution passed at the meeting is valid. If it had been a mere question of informality with reference to the constitution of the board which summoned the meeting—for instance, some question as to whether there was a proper quorum present—I might have applied the principle of *Browne* v. *La Trinidad*[3]; but I think I should be going too far if I held that it applied to the present case. No doubt two directors, the requisitionists, and many shareholders were present at the meeting; and there would have been great reason for argument if there had been full knowledge of the irregularity and the directors had done anything to recognise the act of the secretary as their act. Then a different question would have arisen, but there is no question here of ratification.

I must hold that the meeting was improperly convened, and that no valid resolution for the voluntary winding-up was passed. There will therefore be the usual compulsory order for winding up. No imputation is made with regard to the secretary, and the gentleman named as voluntary liquidator must have his costs out of the assets.

Solicitors—Judge & Priestley, for petitioner; Robbins, Billing & Co., for company.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

BUCKLEY, J.
1901.
May 14, 15, 16, 17, 18, 20, 21, 22.

HANBURY *v.* JENKINS.

Fishery — "Several" — Grant — Ownership of Bed of River — Inconsistent Rights — Evidence — Right of Way — Incorporeal Hereditament — Appurtenancy.

A grant of a fishery and weirs (gurgites) in a river is a grant of the bed over which the fishery extends.

A several fishery may be granted without the use of the word "several."

On a claim for a several fishery, evidence that rights of fishing exist in certain portions of the waters to which the claim extends inconsistent with the existence of a several fishery in those portions is admissible on the question whether a several fishery exists in other portions; but proof of the existence of such inconsistent rights does not necessarily negative the existence of a several fishery elsewhere.

Acts by riparian occupiers, such as placing stakes and wattles on the soil of a river to prevent erosion by flood, taking gravel deposited by flood, and making pens in the stream to prevent cattle from straying, though prima facie acts of ownership, but referable to an absence of objection on the part of another person claiming the bed of the river and reasonably necessary or convenient for the protection and enjoyment of the property of the riparian occupiers, are not inconsistent with the ownership of the bed of the river being in such other person.

Where there is no incongruity in the union of two incorporeal things, one—e.g. a right of way—may be appendant or appurtenant to the other—e.g. a several fishery.

By a deed dated September 1, 1516, King Henry 8 granted and to farm let "our fishery in our waters or rivers" of Usk and Seyn in the lordships of Usk and Caerleon "and all our weirs" (gurgites) "in and upon the waters or rivers aforesaid and in every of them and all and singular profits of and in the waters or rivers aforesaid and of and in the weirs aforesaid in any wise arising accruing and to us in any wise belonging," and a manor, demesne land, and other premises in the neighbourhood of the Usk, "to have and

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to hold the aforesaid fishery and weirs," and the manor, demesne land, and other premises, to the Earl of Worcester his executors and assigns for a term of twenty years from Michaelmas then next ensuing, at a yearly rent of 20*l.* for the fishery and weirs, and certain other rents for the manor, demesne land, and other premises respectively.

By a succession of leases covering a period of 320 years, the fishery and weirs comprised in the lease of 1516 were from time to time vested in successive lessees, and ultimately in 1839 the Crown granted to the then lessee, Mr. Capel Hanbury Leigh, the fee in the property. Mr. Leigh and his successors in title granted a series of leases from 1839 onwards, their lessee since 1856 and at the present time being the Usk Fishery Association, holding through a trustee.

The fishery which was the subject of the grants above mentioned extended for a distance of about twelve miles and a furlong from a stone known as Maen y Wrath, about four miles above the town of Usk, to Redland Pool, which was about eight miles below Usk.

The plaintiff was the successor in title of Mr. Capel Hanbury Leigh, and claimed under his will.

The defendant was the owner in fee of certain lands known as Pont Sand Pit, lying on the left bank slightly below the town of Usk, and having a frontage of nearly half a mile to the river.

The plaintiff commenced this action claiming a declaration that he was entitled to the bed of the river within the limits of twelve miles or thereabouts as aforesaid, and to a several fishery therein, and to a right of way along the banks of the river for the use and enjoyment of the fishery; and an injunction to restrain the defendant from fishing within the limits aforesaid, and from interfering with the use and occupation of the bed of the river and the fishery by the plaintiff.

Attacks had in times past been made on the right of fishing claimed by the plaintiff, and litigation had taken place in respect to it. In 1764 the claim of a lessee of the fishery to enter upon land abutting on the river for the purpose of his fishing was upheld, and the fishery was treated

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were inconsistent with the plaintiff's claim—namely, gorretting, taking gravel, and erecting fences. "Gorretting" consisted in driving stakes into the bed or margin of the river for the purpose of making a number of tiers, with wattles, rising step above step to prevent erosion (or replace it where it had taken place) of the bank of the riparian owner when the Usk was (as was frequently the case) in flood. In regard to the taking of gravel, it appeared that in times of flood great quantities of gravel were brought down by the water and were left, when the flood abated, deposited in the form of heaps or banks in the middle or at bends of the stream, and people used to go, some where they pleased, and others only opposite their own land, and remove such quantities as they chose for purposes of their own. Fencing consisted in placing stakes in the bed of the river some distance from the edge and connecting them with ropes so as to allow cattle to enter the water and to form a pen to prevent them straying.

Neville, K.C., *Ingpen, K.C.*, and *P. S. Stokes*, for the plaintiff.

Warmington, K.C., *H. Terrell, K.C.*, and *Archibald Allen*, for the defendant.

BUCKLEY, J.—The question I have to determine in this action is whether the plaintiff is entitled to restrain the defendant from fishing in a moiety of the river Usk where it adjoins certain freehold lands of the defendant known as Pont Sand Pit, and whether the plaintiff is entitled to restrain the defendant from obstructing the plaintiff and his lessees, licensees, and assigns from a certain right of way which the plaintiff claims along the edge of the river Usk over the Pont Sand Pit grounds. The plaintiff by his statement of claim invites a much more ambitious judgment. He asks for a declaration that he is entitled to the bed of, and a several fishery over, the river for a distance of twelve miles and a furlong extending from a stone known as Maen y Wrath some four miles above Usk to a place called Redland Pool some eight miles below Usk, but I decline to enter into that larger question. That is a question which would affect the rights of parties who are not before the Court. An examination of what is put forward as regards that claim is for certain purposes material in determining the question which I have to decide, but beyond that I propose not to enter into the question of those rights at all.

The plaintiff, Mr. John Capel Hanbury, claims to be entitled to what is known as the Crown Fishery, a fishery extending over twelve miles and a furlong from Maen y Wrath down to Redland Pool. The defendant's premises are situate on the left bank of the river, which flows from north to south, at a point some little distance below Usk. What I have to consider are the rights at that particular point. In order to ascertain that, the convenient course, and the one which I propose to take, is first to investigate the title which the plaintiff shews upon documents which he puts forward to the whole of this fishery of which Pont Sand Pit is part, with a view to seeing whether he is or is not entitled to a several fishery at the particular point in question, or is entitled to the bed of the river and the right of fishing in it, which is really one and the same thing; and next to investigate the difficulties which the defendant says arise from the other fisheries, which I shall have to mention. For that purpose I shall have to refer to the title of persons who are not parties to this action; but, in the first instance, I will take the title which the plaintiff seeks to shew. [His Lordship considered the title at some length, and continued:] In tracing that title, it seems to me to be plainly made out on the part of the plaintiff that he has become entitled to whatever it was that was originally granted in 1516 by the document which I first mentioned; and I now proceed to consider what was the subject of that grant. The plaintiff claims a several fishery. There is no doubt that a several fishery means an exclusive right to fish in a given place, for which I may refer to *Malcomson* v. *O'Dea* [1863][1] and *Holford* v. *Bailey* [1849].[2] A several fishery may exist either apart

(1) 10 H. L. Cas. 593.
(2) 18 L. J. Q.B. 109; 13 Q.B. 426.

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from, or as incident to, the ownership of the soil over which the river flows; but since *Att.-Gen.* v. *Emerson* [1891][3] it must be taken as settled that where a several fishery is proved to exist, the owner of the fishery is to be presumed to be the owner of the soil unless there is evidence to the contrary, whether it is in a navigable river—*Hindson* v. *Ashby* [1896][4]—or in a river neither public nor navigable—see *Foster* v. *Wright* [1878][5] and *Ecroyd* v. *Coulthard* [1897].[6] The question, therefore, which I propose to investigate on this grant of 1516 and the subsequent deeds is whether the grant did amount to a grant of a several fishery—passing as such by the words of the grant describing the fishery—with the result that the soil in the river would *prima facie* be in the owner of the several fishery; or whether, inasmuch as the grant was not merely of the fishery but also of the "weirs in and upon the waters or rivers aforesaid," those words "the weirs" do not of themselves grant the soil, so as to give to the grantee the soil and bed of the river, with the result that he would be entitled to the exclusive right of fishing because he was owner of the land over which the water flowed.

The word which is used in this grant of 1516, and in the subsequent deeds, is "gurgites," and as to the meaning of that word various authorities have been referred to. In the first place there has been cited Hale, *De Jure Maris*, which I read from *Hargrave's Law Tracts*, Pars Prima, cap. 5, p. 18, where Lord Hale says this: "Fishing may be of two kinds ordinarily, viz. the fishing with the net, which may be either as a liberty without the soil, or as a liberty arising by reason of and in concomitance with the soil, or interest or propriety of it; or otherwise it is a local fishing, that ariseth by and from the propriety of the soil. Such are *gurgites*, weares, fishing places, *borachiæ stachiæ*, etc., which are the very soil itself, and so frequently agreed in our books." And

(3) 61 L. J. Q.B. 79; [1891] A.C. 649.
(4) 65 L. J. Ch. 515, 518, 523; [1896] 2 Ch. 1, 11, 20.
(5) 49 L. J. Q.B. 97; 4 C.P. D. 438.
(6) 66 L J. Ch. 751, 757; [1897] 2 Ch. 554, 570.

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From those authorities, dealing first with the use of the word "weirs," I come to the conclusion that the grant of the weirs is a grant not of a mere right of fishing, but is a grant of a corporeal hereditament consisting of the soil on which the weir is constructed; and the same thing I think follows from a passage I will read next from *Malcomson* v. *O'Dea*,[1] where a fishery was held to be a several fishery. The words of the grant were these: "The profits of a certain fishery which is called 'Lax Wear,' with its appurtenances." Again, I find that Lord Selborne, in *Neill* v. *Devonshire* (*Duke*) [1882],[8] says this: "It is not disputed that the weirs ('Kidelli,' or 'gurgites') mentioned in the documents of title to which I have referred, did, from a remote antiquity, exist; nor that they were used for fishing purposes more or less exclusive of the public; nor that, in more modern times, their number was increased. This, in my opinion, is important evidence of an actual and continual possession and enjoyment, in or near those places, at all events, of some several fishery or fisheries. Weirs ('Kidelli' or 'gurgites') were the means usual, in ancient times, for appropriating and enjoying several fisheries in tidal waters." From the use of the word "gurgites" in the documents I come to the conclusion that there was a grant of a corporeal hereditament in the soil on which the weirs were constructed. But it seems to me the relevance of the word "weirs" does not stop there, because, as Lord Selborne says in the passage which I have just read, in ancient times the weirs were the means of getting fish. It was by means of putting an obstruction against the stream and preventing the egress of the fish which went up that the fish were taken. Therefore when you find a grant of weirs, it is not merely a grant of the particular place where fish were taken at the date of the grant and the grant of the bed of the river there, but is of wider import; and if there is nothing to the contrary it is a grant of the right to construct weirs for the purpose of taking fish, and a grant of the soil over which the river runs for the purpose of such construction in exercise of the right of fishery.

There is a second ground, and that is this—What are the apt words apart from the use of the word "weirs" to create a several fishery? Do you want the word "several"? Do you necessarily look for that word? I think the answer is No. Counsel for the plaintiff has shewn me from the cases of *Malcomson* v. *O'Dea*[1] and *Neill* v. *Devonshire* (*Duke*)[8] that in neither of those cases do you find the word "several" used. You find a grant of the right of fishing or the grant of the weir, or something of that kind, and from that there follows the inference that what is granted is a several right.

I pass from these considerations in order to see what we know as regards the attacks that have been made on this right in times past, and what has been established in litigation with respect to it. [His Lordship here considered the litigation, and continued:] Apart from the construction that I put on the documents, it seems to me that those litigations go a great way to assist me in saying that the conclusion at which I have arrived by way of construction is right.

I pass on to consider the difficulties which the defendant says arise in supporting the claim on the part of the plaintiff to a fishery in this twelve miles and one furlong of the river. Here I have to say something about the claims of persons who are not parties to this action, but, of course, I am not to be taken to be deciding in any way anything about their rights. I am only going to see how far, if at all, the existence of these alleged other rights must drive me to hold (contrary to what would otherwise be my judgment) that the right of fishing of the plaintiff is not a several right of fishery. [His Lordship here considered the claims which had been made to rights of fishing in portions of the river other than that portion on which the Pont Sand Pit lands abutted, and continued:] Is the existence of these other fisheries, being as they are over a portion of the river which does not include the defendant's land, admissible on the question which I have to decide? It seems to me it is admissible. If authority is necessary for that, I refer

(8) 8 App. Cas. 135, 143.

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to *Jones* v. *Williams* [1837].[9] I have, no doubt, to regard all the rights that are shewn in respect of the property over which the plaintiff claims his several right of fishery, for the purpose of ascertaining whether he is entitled to a several right anywhere, and it is only for this reason that I am investigating these other rights. Also I would say this, with regard to the Monkswood and Trostry Fisheries, that it does not appear, so far as I can see, that the rights which are claimed are claimed as being either partial or limited, so as to be capable of existing concurrently with the several fishery of the plaintiff in those particular parts of the river. That partial or limited rights may exist concurrently with a several fishery will be found from the case of *Seymour* v. *Courtenay* (*Lord*) [1771],[10] where it was pointed out that the right of taking oysters, for instance, or taking a particular class of fish may co-exist with a several right of fishery; and again in *Ecroyd* v. *Coulthard*[6] is indicated the possible existence of a right to take lampreys in a several fishery. I say, in the defendant's favour, that the Monkswood and Trostry rights are not shewn to be partial or limited rights. All that I grant him. But I have only to do with Pont Sand Pit. What are the rights there? There is no trace, as far as I can find, of any concurrent right at Pont Sand Pit; and then I ask myself, even if the rights of the Monkswood Fishery and the Trostry Fishery—and, if it be material, of the Edlogan or the Ninth Day Fishery—are inconsistent with the several right of fishery in those parts of the water, is there anything in that which would oblige me to say there is not a several right of fishery in the Pont Sand Pit part of the water? It seems to me that there is not. Let me read upon that a few words from what Lord Selborne says in *Neill* v. *Devonshire* (*Duke*)[8]: "These written titles (if the possession and enjoyment has been consistent with them) afford irresistible ground for a presumption that the fishery, either in all the tidal waters of the River Blackwater, or at all events in that part of them which is now imme-

(9) 6 L. J. Ex. 107; 2 M. & W. 326.
(10) 5 Burr. 2815.

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that people have under the plaintiff's title fished this Pont Sand Pit water for years. A gentleman used to stay there with a man named Gould, who was the tenant there at the time, and he used to walk along the track at Pont Sand Pit and fish the water there. Pont Sand Pit has been fished as of right—there is no question about it; persons have claimed to do it as of right since 1856 at least, and probably as far back as 1844—that is to say, there is evidence that some fifty-seven years ago it has been fished as of right—claimed as a right. Then there have been issued periodically tickets. [His Lordship then considered the materiality of the issue of "brinkers' tickets" and of gifts of salmon, and continued:] It seems to me those acts are material in considering whether this right has been exercised.

There is a matter to which I must refer on the other side, and that is this: It is said that persons other than the lessees have from time to time exercised acts of ownership upon the soil in the bed of the river; and the three matters which are referred to are—first, what is known as gorretting; secondly, the taking of gravel; and thirdly, the erection of fences a short distance within the water to prevent the cattle who go down to drink from straying through the river on to the other bank. [His Lordship here considered the several acts, and continued:] All those acts, it seems to me, are quite consistent with the absence of any claim on the part of those who did them to the soil of the river. They were acts reasonably necessary for the enjoyment of the land abutting on the river. Let me read what Lord Selborne says in *Neill* v. *Devonshire* (*Duke*)[8]: "The appellants' evidence of cot-fishing also extends to at least some part of the Bishops' Fishery, which is admitted to be the property of the Duke. There, at all events, it must have been by sufferance, and not of right and (if so), why not also by sufferance elsewhere? Usage, continued during living memory, when there is nothing to the contrary, and when the question is one of prescription, may (no doubt) justify the presumption of a similar usage, as of right, from time immemorial. But when it is relied upon not to establish a prescriptive right, but to displace a prescriptive right, supported by written titles and evidence of long possession for a period earlier than, and coming down to, the time of living memory, it appears to me that such a presumption would be neither reasonable in fact, nor necessary in law. It would be extremely dangerous if titles, otherwise impregnable and supported by long enjoyment, could be overturned by evidence of that kind. 'It is the wise policy of the law,' said Mr. Justice Heath, in the celebrated gleaning case—*Steel* v. *Houghton* [1788][11]—'not to construe acts of charity, though continued and repeated for never so many years, in such a manner as to make them the foundation of legal obligation.'" Lord O'Hagan says: "An interruption may have been permitted through the absence of the proprietor; or through his ignorance, partial or complete, of the acts relied on; or through his neglect or indifference to them as not vitally affecting, in his own case, his interest or position; or as requiring from him, for the purpose of resistance, effort or expense unjustified by the necessity of the case; or as allowed from kindly or benevolent motives to humble people for a great length of time. And it would not seem just, as it would not be legal, on the ground of such an interruption, so tolerated, to pronounce the forfeiture of his vested estate." It appears to me that I can entirely give effect to these various acts of gorretting, gravel getting, and cattle fencing, by referring them to an absence of objection by the owner of the bed of the river to acts which did him no harm, and which were reasonably convenient or necessary, if you will, for the protection or enjoyment of the property of the riparian owner.

I arrive, therefore, at the conclusion that as regards that portion of the river which lies opposite Pont Sand Pit, the defendant has not shewn anything to displace that which I think the plaintiff *prima facie* makes out—namely, the right to a several fishery on lands opposite Pont Sand Pit, either by the form of the grant of the fishery in the original deeds imply-

(11) 1 H. Bl. 51, 60.

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claim mentioned, and from interfering with or in any way obstructing or hindering the enjoyment use or occupation by the plaintiff his lessees licensees and assigns and every other the person or persons claiming or to claim under or by virtue of the said will of the said Capel Hanbury Leigh" of that portion of the bed of the said river.

I order the defendant to pay the costs of the action.

Solicitors—Foyer & Hordern, for plaintiff; Thomas White & Sons, agents for Gustard & Waddington, Usk, for defendant.

[*Reported by Arthur Lawrence, Esq., Barrister-at-Law.*

FARWELL, J. 1901. July 15.

PANHARD ET LEVASSOR (SOCIÉTÉ ANONYME ANCIENS ÉTABLISSEMENTS) *v.* PANHARD LEVASSOR MOTOR CO., LIM.

Trade Name — Similarity — Fraud — Form of Injunction — Order to Change Name of Company—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 13.

It appearing that the words "Panhard et Levassor," or "Panhard," in connection with the manufacture and sale of motors and motor-cars designated the goods of the plaintiffs, and that the individual defendants had subscribed the memorandum of association, and had caused the defendant company, in which they were the only shareholders and directors, to be registered with a view to annex the benefit of the trade and name of the plaintiff company, THE COURT *granted the following injunctions—first, An injunction to restrain the defendants and their agents or servants from using the names of Panhard and Levassor, or either of them, or any title or description including those names, or either of them, or otherwise colourably resembling the names of the plaintiffs in connection with the manufacture, use or sale of, or other dealing in, motor-cars or parts thereof; secondly, An injunction to restrain the seven defendant signatories from allowing the defendant company to remain registered under its present title, or any such title or description as aforesaid.*

The plaintiff company was a French company constituted under French law. It carried on in France the business of engineers and manufacturers of motors and motor-cars, and parts thereof, and of saw blades. It was the successor in business of a firm of Panhard et Levassor. Its motor-cars were only sold in England through the instrumentality of agents in that country.

The individual defendants caused the defendant company to be registered under the provisions of the Companies Acts, 1862 to 1890. The defendant company was registered with a capital of 100*l.* divided into 100 shares of 1*l.* each. Its main objects were (shortly stated) to acquire and use patents and to manufacture and deal in motors and vehicles, ships, boats, launches, flying-machines, and carriages of all kinds. The only members of the company were the seven signatories to the memorandum of association. Each had subscribed for one share only. The defendant company had not commenced business.

The plaintiff company brought this action against the defendant company and the seven signatories to the memorandum of association, who were also directors, claiming (*inter alia*)—first, An injunction to restrain the defendants and their agents or servants from using the names of Panhard and Levassor, or either of them, or any title or description including those names, or either of them, or otherwise colourably resembling the names of the plaintiffs, in connection with the manufacture, use or sale of, or other dealing in, motor-cars or parts thereof; secondly, An injunction to restrain the seven signatories from allowing the defendant company to remain registered under its present title, or any such title or description as aforesaid.

The plaintiff alleged, and as his Lordship held proved, that the words "Pan-

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FARWELL, J.
1901.
June 6, 12.
GREENHALGH *v.* BRINDLEY.

Vendor and Purchaser—Implied Warranty—Easement—Light—Newly Erected Buildings.

Upon the sale of land with newly erected buildings having windows overlooking an open space, there is no implied warranty that the vendor has not been a party to anything whereby the easement of light over the open space cannot be acquired upon the effluxion of the statutory period from the time when the houses were first erected.

By an agreement in writing dated October 4, 1900, the plaintiff agreed to sell and the defendant to purchase twelve dwelling-houses in Stockport. The agreement was in the form of an open contract. The houses abutted on Florence Street and were situate fronting and with windows overlooking a recreation ground under the control of the Corporation of Stockport. This recreation ground was vested in the corporation by deed dated August 5, 1873, and under the provisions of that deed the corporation were precluded from building thereon except to a very limited extent, and only with the consent of Lord Egerton of Tatton. It appeared that the erection of buildings on that part of the recreation ground which abutted on Florence Street would materially affect the access of light to the houses in question. The defendant had inspected the property before entering into the contract, but no representations were made to her with reference to the access of light to the windows.

By indenture dated February 10, 1900, made between the Corporation of Stockport of the first part, the plaintiff's mortgagee of the second part, and the plaintiff (thereinafter called "the owner," which term was to include the owner for the time being of the premises thereinafter referred to, his or her executors, administrators, or assigns) of the third part, after reciting (amongst other things) the title of the plaintiff and his mortgagee to the twelve houses, and of the corporation to the recreation ground, and that the owner had erected on the said plot of land twelve messuages or dwelling-houses on the northerly side of Florence Street and had put three windows in the southerly walls and doors of each of the twelve messuages, which said windows faced or overlooked the said recreation ground, It was witnessed that the owner thereby covenanted with the corporation that the said owner would pay to the corporation the yearly sum of one shilling on every 25th day of March in each year, the first payment to be made on the 25th day of March, 1900, and the owner and his mortgagee declared each of such payments to be a fresh acknowledgment that the owner had not been, nor was he, entitled as of right to the uninterrupted flow of light and air to any windows or lights in the said southerly walls of the said messuages over or from the said recreation ground: And it was thereby declared that in case of the non-payment of the said sum of one shilling in any year or in any number of years, the fact of any such non-payment or non-payments for any year or any number of years should not be taken as an abandonment of the rights of the corporation to obstruct on their own land the admission of light or air to the said lights or windows, but those presents, so far as was thereinbefore contained, should remain in full force notwithstanding any such non-payment.

The defendant before she entered into the agreement to purchase was well aware that the houses had only been recently erected and that the recreation ground belonged to the corporation, but had no knowledge of the contents of the indenture of February 10, 1900. Upon her refusal to complete unless the plaintiff allowed her 100*l.* compensation the plaintiff brought the present action claiming specific performance. By his pleadings he submitted that the defendant was under no obligation to pay the shilling a year and waived any right to indemnity from the defendant in respect of the performance of the obligations contained in the deed of February 10, 1900. The defendant counterclaimed for rescission or in the alternative for compensation.

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and she relies on this as a ground for declining to perform the contract. [His Lordship then read the material provisions of the deed of February 10, 1900, as above set out, and continued:] No purchaser would be bound by the covenant to pay contained in this deed; but as against a purchaser with notice the deed would have the effect of a consent in writing within section 3 of the Prescription Act granted by the corporation and accepted by the purchaser, and continuing until determined by notice of repudiation. In this respect the arrangement bears some resemblance to that which formed the subject of the decision in *Bewley* v. *Atkinson*.[1]

Notwithstanding the argument on behalf of the defendant, I have no doubt that the arrangement created by the deed can be put an end to by a subsequent purchaser. The very nature of the transaction shews this, for the object is to prevent time from running under the Prescription Act against the corporation, and notice of repudiation gives them twenty years in which to assert their rights by blocking the windows. Further, on the construction of the deed, the person to make the payments is the owner for the time being; but the covenant cannot bind him to make any such payment, and the proviso that follows and that does bind him merely negatives the presumption of abandonment of right by omission to receive, and does not extend to the presumption or inference arising from a positive refusal to pay and acquiescence in such refusal. The effect of the deed, therefore, as against the purchaser is merely to postpone the commencement of the statutory period until he has given notice of repudiation; and this he can do as soon as he has completed his purchase.

It is argued that the purchaser is prejudiced by this in two ways: first, by losing four years of the statutory period; and secondly, by being compelled to give notice of repudiation, with the consequent probability of exciting the corporation to block the lights at once. But, as I have already said, a contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over such land. If such access has in fact been enjoyed for the statutory period, then the property has the easement of light; but an access for ten years creates nothing at all—see *Bonner* v. *Great Western Railway*[3]—and what counsel called the potentiality of the acquisition of the easement within less than twenty years is not an interest in land, or easement, known to the law. It is a mere question of the doctrine of chances; and, assuming the owner of the adjoining land is alive to his own interest, the chances are far greater that he will block up lights in the second than in the first half of the period. There is no such period of twenty years to the lapse of a portion of which the purchaser is entitled as the defendant's argument assumes. There is either an easement of light or there is not. If there is not, there is no intermediate stage which has any legal existence; and the vendor does not fail to possess the fee-simple free from incumbrances of a house because he has not got the easement of light over the adjoining property nor because the time necessary for acquiring that easement has not commenced to run. I find, therefore, no ground on which I can refuse to grant specific performance, or on which I can give the defendant compensation. Compensation is given in respect of the difference between the expressed subject-matter of the contract and the property offered by the vendor as answering that description, and in this case there is none.

But although I must make the usual decree for specific performance, I make no order as to costs, for this reason. A vendor knows, and the purchaser does not know, the incumbrances on the property before the contract. In this case the vendor has chosen to enter into a contract with the corporation which renders his position different from the normal position of the vendor of a house, and he appeals to this Court for its equitable remedy of specific performance. I think he ought to have informed the defendant before the contract of his covenant with the corporation and left her to judge for herself whether it was or was not advantageous to the pro-

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association; and for an injunction to restrain the defendant directors from convening any meeting for the purpose of creating such shares.

The plaintiff now moved for an injunction.

Martelli, for the plaintiff.—The memorandum of association gives the original preference shareholders a fixed cumulative preferential dividend. The company have no power to "water down" their security by issuing fresh preference shares to rank *pari passu* with them. On the true construction of the memorandum, the power therein contained to issue new preference shares does not enable the company to alter the rights already given. And such a power, even if the memorandum purports to give it, is invalid.

Nothing which is stated in the memorandum of association can be altered (except to the extent permitted by section 12 of the Companies Act, 1862, or under the Companies (Memorandum of Association) Act, 1890), though it may not be one of the matters required to be stated in the memorandum—*Ashbury* v. *Watson* [1885].[1] Where the preferential rights are only given by the articles of association they may be altered, because the Companies Act gives power to alter the articles of association (see section 50)—*Andrews* v. *Gas Meter Co.* [1897].[2] Clearly the powers given by the articles cannot affect anything contained in the memorandum.

A. R. Kirby, for the defendants.—The directors are not seeking to alter the memorandum, but to act under it. The power to issue these shares is given by the memorandum, and the statement as to the original shares must be taken to be subject to this power. *Andrews* v. *Gas Meter Co.*[2] is in my favour. In *Collins* v. *Birmingham Breweries* [1899][3] the memorandum contained no power to issue new shares with preferential rights.

Martelli replied.

(1) 54 L. J. Ch. 985; 30 Ch. D. 376.
(2) 66 L. J. Ch. 246, 250; [1897] 1 Ch. 361, 371.
(3) 15 Times L. R. 180.

May 17. — COZENS-HARDY, J.—This motion, which by arrangement is to be treated as the trial of the action, raises a question whether the defendant company can issue preference shares. This turns upon the construction of a badly drawn and obscure clause in the memorandum of association. [His Lordship read clause 5, above set out, and continued:]

The whole of the original capital, both preference and ordinary, has been issued. The company desire to increase their capital by the issue of shares having a preference *pari passu* with the original seven per cent. preference shares. I think it is competent for the company to do this. The memorandum of association cannot be altered by the company, but the memorandum itself, after defining the position of the original shareholders, states that any increased capital may be issued on such special conditions as to priority as the company may determine. The result is that the seven per cent. preference shareholders are subjected by the memorandum itself to the risk of having increased capital placed in front or alongside them. The clause is ill drawn, because it is difficult to see how it can apply to the present or original capital; but I do not think it is so obscure that I ought to decline to give effect to it. I must therefore dismiss the action.

Action dismissed.

Solicitors—Morten, Cutler & Co., for plaintiff; Nicholson, Graham & Graham, for defendants.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

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COZENS-HARDY, J. 1901. July 11, 19. } HARTLEY *v.* PENDARVES.

Settled Land—Sale of Timber by Court —Conversion.

Where timber growing on settled land has been rightfully felled and sold under an order of the Court it becomes personal estate, and all the consequences of conversion must follow; and there is no equity for re-conversion as between the heir-at-law and the legal personal representative of the tenant in fee in remainder.

Field *v.* Brown (27 Beav. 90) *not followed.*

Adjourned summons.

This summons raised a question as to whether a certain sum of Consols in Court, representing the proceeds of the sale of timber on a settled estate sold by order of the Court, was to be regarded as real or personal estate.

In 1860 Mary Hartley, a lunatic, was equitable tenant for life of the Rosteage and Tragassa estates in the county of Cornwall. She was subject to impeachment for waste. William Henry Harris Hartley, who was also a lunatic, was tenant in fee in remainder.

By an order made on July 20, 1860, by the Lords Justices in Lunacy and in Chancery in the administration suit of *Hartley* v. *Pendarves*, it was (*inter alia*) referred to the Master in Lunacy to enquire and certify "whether there are any and what timber and other trees standing or growing upon the lands called Rosteage and Tragassa proper to be cut, and whether it is fit and proper and for the benefit of the said Mary Hartley and William Henry Harris Hartley that the same (if any) should be felled and sold, and that . . . . William Hunter Little do, as . . . . committee . . . . [of the said Mary Hartley and William Henry Harris Hartley] cause to be felled such timber and other trees as the said Master shall approve of as proper to be cut, and do sell the same with the Master's approbation, and pay the net proceeds of such sale, to be certified by the Master, into the bank with the privity of the Accountant General to the credit of the said case of *Hartley* v. *Pendarves*, 'The Timber Account.' And that the same when so paid in be laid out in the purchase of Bank 3*l.* per cent. annuities in the name, and with the privity of, the said Accountant General in trust for the same cause, the like account. And that the dividends from time to time to accrue on the bank annuities which shall be so purchased be carried over to the credit of the said matter of Mary Hartley, a Lunatic."

The Master duly made his certificate dated April 15, 1864, and thereby certified (*inter alia*) "that the said William Hunter Little as Committee of the estates of the said Mary Hartley and William Henry Harris Hartley, and with his approval, caused to be felled such timber and other trees, and with his approval sold the same by public auction and in lots, and the sum of 95*l.* 5*s.* 2*d.* is the net proceeds of such sale, and is the sum which the said William Hunter Little is to pay into the Bank with the privity of the Accountant General of the Court of Chancery to the credit of the said cause of *Hartley* v. *Pendarves*, 'The Timber Account.'"

In accordance with this certificate the said sum of 95*l.* 5*s.* 2*d.* was duly paid into Court, and invested in the manner directed as aforesaid.

Mary Hartley died in October, 1868, and William Henry Harris Hartley died intestate in June, 1894, and the question now arose as to whether his heir-at-law or his legal personal representative was entitled to the Consols now standing to the credit of *Hartley* v. *Pendarves*, "The Timber Account."

Boome, for the heir-at-law of W. H. H. Hartley.—The essential facts in the present case are exactly similar to those in *Field* v. *Brown* [1859],[1] in which there was held, under the circumstances, to be no conversion. The fact that the tenant for life in the present case was a lunatic is an additional argument in our favour, for it brings the case within the observations of Lord Selborne in *Att.-Gen.* v. *Ailesbury* (*Marquis*) [1887].[2]

Awdley v. *Awdley* [1690][3] is the converse

(1) 27 Beav. 90.

(2) 57 L. J. Q.B. 83, 89; 12 App. Cas. 672, 680.

(3) 2 Vern. 192.

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of the present case, and is also in favour of my contention.

S. Dickinson, for the legal personal representative of W. H. H. Hartley.—It has been settled conclusively for the last hundred years, by cases which were not cited in *Field* v. *Brown*,[1] that under circumstances like these there is conversion, and that there is no equity between the real and personal representatives, at the lunatic's death, to have the nature of the property restored—*Bromfield, Ex parte* [1792],[4] *Oxenden* v. *Compton* (*Lord*) [1793],[5] *Phillips, Ex parte* [1812],[6] and *Phillips* v. *Daycock* [1867][7]; *Williams on Executors* (9th ed.), vol. i. p. 589; *Lewin on Trusts* (10th ed.), p. 1177. The principles that govern conversion are explained at length by Jessel, M.R., in *Steed* v. *Preece* [1874].[8] As for *Field* v. *Brown*,[1] that case is loosely reported; no single authority is referred to, though the point had been settled sixty years before; and there is a clearly incorrect analogy on page 92, for when a railway takes land the nature of the property is specially preserved by statute. That case, accordingly, ought now to be disregarded. In *Att.-Gen.* v. *Ailesbury* (*Marquis*)[2] there was a special direction to preserve the quality of the property.

[COZENS-HARDY, J.—Is not *Dyer* v. *Dyer* [1865][9] another case in your favour?]

Boome, in reply.—The present case is similar to *Cooke* v. *Dealey* [1855],[10] and there ought not to be any conversion. That case was criticised, it is true, by Jessel, M.R., in *Steed* v. *Preece*,[8] but it has never been overruled.

Cur. adv. vult.

July 19.—COZENS-HARDY, J., after stating the facts set out above, read the following judgment: The order directing the sale of the timber was made under the general jurisdiction of the Court, and was not in any way dependent upon the circumstance that both the tenant for life and the tenant in fee were lunatics. The jurisdiction of the Court to order the sale of timber on a settled estate, when it is for the benefit of all parties interested in the settled estate, is well established, and in such a case the tenant for life, though impeachable for waste, is entitled to the income produced by the proceeds of sale of the timber—*Tooker* v. *Annesley* [1832].[11] It was on this footing that the committee of Mary Hartley received the dividends of the Consols during her life. This being so, I think on principle that where timber has been rightfully sold under an order of the Court all the consequences of conversion must follow, and that there is no equity as between the heir and the legal personal representative of the owner in fee. This is the view taken by Sir George Jessel in *Steed* v. *Preece*,[8] and by Mr. Justice Kay in *Hyett* v. *Mekin* [1884].[12] It is contended, however, that the point was decided in the opposite sense by Sir John Romilly in *Field* v. *Brown*.[1] I cannot regard that case as a satisfactory authority. It seems to me difficult to reconcile it with the decision of the same learned Judge in *Dyer* v. *Dyer*.[9] It was apparently based on *Cooke* v. *Dealey*[10]—a case which was disapproved by Sir George Jessel in *Steed* v. *Preece*.[8] Under these circumstances I feel at liberty to follow my own view, and to hold that the Consols in Court form part of the personal estate of the late owner in fee. The order must, subject to the payment of costs, direct the transfer of the Consols to the legal personal representative of W. H. H. Hartley.

Solicitors—Collyer-Bristow, Hill, Curtis & Dods, for heir-at-law; F. C. Lingard, for legal personal representative.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

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(4) 1 Ves. 453.
(5) 2 Ves. 69.
(6) 19 Ves. 118.
(7) W. N. [1867] 54.
(8) 43 L. J. Ch. 687; 18 Eq. 192.
(9) 34 L. J. Ch. 513; 34 Beav. 504.
(10) 22 Beav. 196.
(11) 5 Sim. 235.
(12) 53 L. J. Ch. 241; 25 Ch. D. 735.

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BUCKLEY, J. 1901. July 23. } SUTTON, *In re*; LEWIS *v.* SUTTON.

Charity—Mortmain—Will—Construction—Bequest of Money to be Laid Out in Purchase of Land and Erection thereon of Model Dwellings to be Let to Poor at Low Rents—Validity—"Charitable uses"—Working Classes Dwellings Act, 1890 (53 & 54 *Vict. c.* 16)—*Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 7 *and* 8.

A testator, who died in 1900, *devised and bequeathed his residuary real and personal estate to trustees upon trust to sell and convert and to stand possessed of the proceeds upon trust from time to time to purchase land in populous places and to erect upon the land so purchased model dwellings, and to let the same to the poor at low rents*:—Held, *that the testator had manifested a general charitable intention to provide model dwellings for the poor, and therefore that the effect of striking out the direction to purchase land in accordance with section* 7 *of the Mortmain and Charitable Uses Act*, 1891, *was not to put an end to the whole charitable trust.* Held, *therefore, that the residuary gift was valid.*

The words "the charitable uses" in section 7 *of the Act of* 1891 *have the same meaning as the words "the purposes of the charity" in section* 8 *of the Act.*

Semble, *the Working Classes Dwellings Act*, 1890, *is not an Act dealing with charity matters.*

William Richard Sutton, by his will dated August 15, 1894, devised and bequeathed his residuary real and personal estate to trustees upon trust to sell and convert the same into money and to stand possessed of the proceeds upon the following trusts:

"1. Upon trust to purchase or acquire from time to time freehold or copyhold land in London or any other populous place or town in England as sites for the erection of the model dwellings and houses hereinafter mentioned (with power to enfranchise at any time any copyhold land so purchased or acquired) and to pay all moneys required for any of the purposes aforesaid out of the trust premises.

"2. And upon further trust to build upon the sites so to be purchased or acquired as aforesaid model dwellings and houses for use and occupation by the poor and from time to time to repair and rebuild the same with power to enter into any contracts and to employ any persons necessary in sole judgment of my trustees for such purposes and to pay all moneys required for any of the purposes aforesaid and all taxes rates assessments and outgoings whatsoever (including the premiums on any policies of insurance against loss or damage by fire) which may at any time be taxed rated charged or assessed or be payable upon or in respect of such dwellings out of the trust premises.

"3. And upon further trust to let the said dwellings and houses when so erected to the poor in the several districts in which they are erected at such rents (being below the full rents which could be obtained for the same) as my trustees shall in their uncontrolled discretion in each case and from time to time determine but so that the rents received by my trustees therefor shall be held by them for the general purposes of the trust intended to be hereby created and shall form part of the trust premises.

"4. And I empower my said trustees in their uncontrolled discretion from time to time to sell any part or parts of the land so to be purchased by them together with all buildings thereon and to raise any sum or sums of money upon mortgage thereof and generally to deal with the same as if they were the absolute owners thereof but so that all moneys to arise by any of the means aforesaid shall be held by my trustees for the general purposes of the trust intended to be hereby created and form part of the trust premises.

"5. And I also empower my trustees to employ all architects, builders, workmen, clerks, accountants, agents, and servants whatsoever necessary or expedient in their discretion to carry out or assist in the work required by the trusts of this my will and to pay them out of the trust premises such remuneration salaries wages and recompense as they shall think fit.

"6. The model dwellings and houses when erected to be called 'the Sutton Model Dwellings.'

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SUTTON, IN RE.

"7. I direct that my trustees shall if they in their absolute discretion think necessary have power to raise money for all or any of the purposes aforesaid from any bank insurance office or other financial or public office or institution by way of loan upon security of all or any part of my property and estate. It being my will desire and intention by the means aforesaid to create a continuing trust for the purpose of supplying the poor in London and other populous places or towns in England with proper and sufficient dwelling houses or lodgings at such rents (however low) as my trustees shall in each case in their absolute discretion consider the tenants can afford to pay and see fit to charge them (but I wish that some rent however small shall in each case be reserved and paid and that no person or persons shall be allowed to live in the said dwelling houses or lodgings rent free) but so nevertheless that my trustees are to be left in complete control of the said trust and to have the amplest and fullest powers and discretions as to the methods by which the same shall be carried into effect and in applying the trust premises in the execution thereof."

The testator died on May 20, 1900, without leaving issue.

This was an action brought by three of the next-of-kin and the heir-at-law of the testator for a declaration that the residuary gift was void under the Mortmain and Charitable Uses Acts, 1888 and 1891, or alternatively that it was void in so far as it was in excess of the limits allowed by the Working Classes Dwellings Act, 1890.

The defendants to the action were the trustees and executors, the testator's widow, and certain of his next-of-kin, and the Attorney-General.

H. Terrell, K.C., and *H. T. Whitaker*, for the plaintiffs.—This is the case of a gift of personal estate to be laid out in the purchase of land for charitable purposes, and is void under section 4, subsection 1 of the Mortmain and Charitable Uses Act, 1888, unless saved by the Mortmain and Charitable Uses Act, 1891. Applying section 7 of the Act of 1891,[1] it is necessary to strike out clauses 1 and 2 of the will, in which case there will be no charity left. Apart from section 8 of the Act the trusts of the will perish, but the Court has a discretionary jurisdiction under that section to say to what extent, if any, the trusts are to be validated. It will be for the trustees or the Attorney-General to come to the Court in proper proceedings and ask that the whole or a portion of the fund shall be invested for the purposes of the will. The doctrine of *cy-près* is not applicable, as the will shews no charitable intention except to purchase land and to carry out the purposes indicated by the will on the land so purchased.

The trusts of the residuary estate can only be good to the extent permitted by the Working Classes Dwellings Act, 1890, and the restriction to five acres in that Act applies in the case of a bequest of money to be laid out in the purchase of land as in the case of a devise of land. There is no substantial distinction between the words "working classes" referred to in that Act and the word "poor" in clause 7 of the will. What the testator had in his mind was the creation of a trust very much on the lines of the Peabody Trust. He did not intend to provide houses for the indigent poor, as almshouses. The matter having been dealt with by special legislation was not affected by general legislation, and therefore the Act of 1890 is not affected by the subsequent passing of the Act of 1891.

Ingpen, K.C., and *Ashton Cross*, for one of the defendant next-of-kin.

George Lawrence, for the widow and the other defendant next-of-kin.

Astbury, K.C., and *L. S. Bristowe*, for the trustees of the will.

The Attorney-General (*Sir R. B. Finlay, K.C.*) and *R. J. Parker*, for the Crown.—The argument for the plaintiffs proceeds on a misreading of the words "charitable uses" in section 7 of the Act of 1891.[1]

(1) Mortmain and Charitable Uses Act, 1891, s. 7: "Any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land."

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SUTTON, IN RE.

Those words are equivalent to the words "charitable purposes"—see the preamble to the Charitable Uses Act, 1735 (9 Geo. 2. c. 36), and the Act of 1888, s. 4, sub-ss. 1 and 2. Here the testator has given a clear exposition in clause 7 of his will of what are the charitable uses he intends. The charitable uses are the charitable purposes. Section 8 of the Act of 1891 applies. It is impossible to say that the Working Classes Dwellings Act, 1890, limits the operation of the Act of 1891. Moreover, although the quantity of land which may be assured by will under the Act of 1890 is limited, there is no similar limit to the amount of personal estate which may be given to be laid out in the purchase of land for the purposes authorised by the Act.

H. Terrell, K.C., in reply, referred to *Smith, In re; Clements* v. *Ward* [1887],[2] *Seward* v. *Vera Cruz* [1884],[3] and *White's Trusts, In re* [1886].[4]

BUCKLEY, J.—The key to the solution of the question before me lies, in my opinion, in the proper understanding of the sense in which the words "charitable uses" are used, so far as I know, throughout the statutes dealing with charity matters. "Charitable uses" does not, I think, mean the exact clause of the will defining the investment, and dealing with the funds, but it means the same thing as "charitable purposes." In order to illustrate that, I may refer to one or two of the statutes. I find that in the Charitable Uses Act, 1735, the expression is used in this connection, that no hereditaments should be given and so on "in trust or for the benefit of any charitable uses whatsoever, unless such gift" is made by deed and so on. And in the same way in 9 Geo. 4. c. 85, the expression is used just in the same way—"every deed . . . . for the purpose of conveying or assuring such lands . . . . in trust or for the benefit of such charitable uses." You have the same expression in section 4 of the Mortmain and Charitable Uses Act, 1888—"Every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made" in a certain manner. And then, when you come to the sections in the Mortmain and Charitable Uses Act, 1891, on which the question here arises, you find that same expression, "to or for the benefit of any charitable uses."

Now what I have to look at in this will, as it seems to me, is in the first place to ascertain what are the charitable uses to which this testator has given his fortune. Counsel for the plaintiffs have argued that the charitable uses are to be found in clauses 1 and 2 of the will, which direct—first, the purchase of lands for the erection of model dwellings and houses; and secondly, which declare a trust for building upon the sites so to be purchased or acquired. I do not think that is the true view of the situation. It seems to me that the dominant clause of the will which defines the charitable use is clause 7, where the testator says: "It being my will, desire, and intention by the means aforesaid to create a continuing trust for the purpose of supplying the poor in London and other populous places or towns in England with proper and sufficient dwelling houses and lodgings at such rents (however low) as my trustees shall in each case in their absolute discretion consider the tenants can afford to pay and see fit to charge them," with the direction that some rent, however small, shall be reserved. In order to give effect to that charitable purpose he directs that the fund which he creates by the conversion of the whole of his real and personal estate shall be laid out in the purchase of land, and in the erection of buildings on land so purchased. That is the charitable use—namely, the devotion of the buildings when erected to the housing of persons of small means at rents below the rack rental of the property. Now under the Act of 1888 lands and personal estate to be laid out in the purchase of land could not be assured by will. That was altered by section 5 of the Act of 1891, which provides that land may be assured by will to or for the benefit of any charitable use, with a provision for its sale within a

(2) 56 L. J. Ch. 726; 35 Ch. D. 589.
(3) 54 L. J. P. 9; 10 App. Cas. 59.
(4) 55 L. J. Ch. 701; 33 Ch. D. 449.

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year from the death of the testator, or such longer time as the Court or the Charity Commissioners may allow. That section is not the one relevant to this case. What I have to deal with here is a fund of personal estate, because the direction in the will is to convert all the testator's estate into money. It is a direction to invest personal estate in the purchase of land, and in the erection of buildings on land. Now that matter is dealt with by sections 7 and 8 of the Act of 1891, and in my judgment those two sections are intended to cover the whole field. They may be read together thus: "Personal estate directed to be laid out in the purchase of land for charitable uses shall be held for the charitable uses as though there had been no direction to lay out in land: provided that if the Court is satisfied that the land is required for actual accommodation for the purposes of the charity, and not as an investment, the Court may sanction its acquisition"—that is, the acquisition of land.

Now the argument presented to me by counsel for the plaintiffs is this: They do not deny that under section 8 the Court could if the land were wanted for actual occupation give validity, as they express it, to the trust, but they say that, unless validity is so given to the trust, section 7 cannot apply, because the personal estate would be held for the benefit of charitable uses, which are to lay out in the purchase of land, which by the hypothesis when you get to section 8 you cannot deal with. It appears to me that that argument involves a fallacy. It invites me for the purposes of section 7 to strike out clauses 1 and 2 from the will, and to say that the trust is invalid, and then to put them in again for the purposes of section 8, when the Court is applied to, to say that, inasmuch as the land is wanted for the purposes of the charity, validity may be given to it. The testator's disposition must be either good or bad, and it cannot be made good by an application to be made to the Court on a disposition which by the first hypothesis is bad. I think the argument would involve that sections 7 and 8 do not cover the same field, but that one is applicable in one event and not in another. It appears to me that that is not so. Looking a little closely to the language, I find that in section 7 the expression used is that to which I called attention, and which I found in the previous Acts, "to be held to or for the benefit of the charitable uses." That language is varied in section 8, and the language there is, "required for actual occupation for the purposes of the charity." That variance of language does not, I think, indicate any difference of intention. "The charitable uses" in section 7 and "the purposes of the charity" in section 8 mean the same thing. What is the charitable disposition which the testator has directed? Here the charitable disposition is one to provide dwellings for the poor at reduced rents. That that is a good charitable trust is not disputed at all. It appears to me that under those circumstances the disposition is good.

I ought perhaps to add a word on the Working Classes Dwellings Act, 1890, which has been referred to. If I am right in the view I have taken of the Act of 1891 it seems to me nothing arises on the Act of 1890 at all. But in any case I should have thought that that was not an Act which had any bearing on this particular case, because the Act of 1890 is not an Act dealing with charity matters at all. It is an Act providing for the erection of dwellings for the working classes. Now the poor need not necessarily be poor of the class known as the working class, and many of the working class, as we know, are not poor. It seems to me that that Act was dealing with a different subject-matter altogether. My decision is based wholly on the Act of 1891.

I therefore declare that the gift of the residuary estate is valid. The costs of all parties as between solicitor and client will be paid out of the fund.

Solicitors—Routh, Stacey & Castle, for plaintiffs; Solicitor to the Treasury, for Crown; Lamb, Son & Prance and Darley & Cumberland, for various defendants.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

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COZENS-HARDY, J. 1901. July 11, 24. { GUYTON AND ROSENBERG'S CONTRACT, *In re.*

Will—Construction—Devise of "Real estate" — Leasehold Interest — "Contrary intention"—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 26.

A testator who was possessed of the fee-simple in certain freehold property subject to a term of years, and was also possessed of a sub-leasehold interest in the said term of years less by two days than the original term, "gave and devised all his real estate whether in possession, reversion, or remainder," to a certain devisee. He also "gave and bequeathed all his leasehold estate" (except a certain house thereinbefore specifically bequeathed) to his executors. At the date of his will, the fee-simple in remainder and the sub-leasehold interest in the property in question had been enjoyed and dealt with by the testator and his predecessor in title for more than twenty years as a single freehold estate in possession:—Held, *that although the sub-leasehold interest did not pass under the devise of "real estate" by virtue of section* 26 *of the Wills Act*, 1837, *yet that, having regard to the whole of the surrounding circumstances, it passed under the devise on the true construction of the will.*

Adjourned summons.

By an indenture of lease dated November 16, 1820, certain freehold property situated in Ellen Street, in the parish of St. George-in-the-East, in the county of London, was demised by John Furze to John Saunders for a term of ninety-nine years from December 25, 1820.

By an indenture of mortgage dated December 9, 1823, the leasehold interest created by the aforesaid indenture of lease was mortgaged by the said John Saunders to John Gibbins for the whole term therein less the last two days thereof by way of sub-demise.

By an indenture of sale dated May 13, 1842, the sub-leasehold interest in the said premises created by the said indenture of mortgage of December 9, 1823, was conveyed by John Gibbins to Matthew John Rippingham free from all equity of redemption in the same.

By an indenture of sale dated August 25, 1848, the fee-simple in the said property, subject to the aforesaid leasehold interest created by the indenture of lease of November 16, 1820, was conveyed by the said John Furze to the said Matthew John Rippingham.

By his will dated February 23, 1865, Matthew John Rippingham "gave and devised" the said property to William Robert Roberts, his heirs and assigns, for ever, subject to the intervention of two life estates, both of which had since determined.

It had never been disputed that the sub-leasehold interest in the property in question created by the indenture of mortgage of December 9, 1823, had duly passed to William Robert Roberts under the above devise.

The said Matthew John Rippingham died on May 1, 1865, and his will was proved in due course.

By his will dated March 15, 1871, the said William Robert Roberts disposed of his freehold and leasehold property in the following terms:

"I give and devise all my real estate whether in possession reversion or remainder unto my friend, William Guyton . . . . his heirs and assigns . . . . I give and bequeath my leasehold house, No. 339, Walworth Road . . . . unto . . . . Jane Green . . . . I give and bequeath all my leasehold estate (except the house hereinbefore specifically bequeathed to the said Jane Green) to my executors hereinafter named. . . ." By a codicil to his said will dated November 25, 1871, the testator made (*inter alia*) the following further specific disposition: "I also give to the said Jane Green, her heirs and assigns, all my interest in two freehold cottages at the back of the Mile End Road. . . ."

William Robert Roberts died on March 30, 1872, and his said will and codicil were duly proved by the executors therein named.

By his will dated February 2, 1881, the said William Guyton devised all his freehold estate to his trustees, upon trust (*inter alia*) to sell the same by public auction or private contract; and the testator further directed that his said

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trustees should realise his residuary personal estate.

By an agreement dated August 29, 1900, the trustees of the will of William Guyton entered into a contract with Michael Rosenberg for the sale to him (*inter alia*) of the freehold property in Ellen Street already mentioned. A condition of such contract was as follows: "The title shall commence with a conveyance dated August 25, 1848, whereby a predecessor of the deceased acquired the freehold subject to a lease dated November 16, 1820, for a term of 99 years from December 25, 1820. . . . Such predecessor had previously acquired the said lease from a mortgagee by demise, and no objection shall be taken on the ground that the last few days of the said term may be outstanding." An abstract of the title to the property in question was duly furnished to the purchaser; and the latter objected that no title whatever was shewn in the vendors to the sub-leasehold interest created by the mortgage of December 9, 1823, inasmuch as such interest had not passed to William Guyton under the devise to him of "real estate" in the will of William Robert Roberts.

The present vendor and purchaser summons was accordingly taken out by the purchaser for the determination of the point in question.

J. M. Stone, for the purchaser.—The sub-leasehold interest created by the mortgage of December 9, 1823, did not pass under the gift of "real estate" in the will of W. R. Roberts, and section 26 [1] of the Wills Act, 1837, has no application whatever—*Butler* v. *Butler* [1884].[2] To the same effect are the *dicta* of Lord Langdale in *Wilson* v. *Eden* [1848].[3] That case came, in its later stages, before both the Court of Queen's Bench and the Court of Exchequer, but these *dicta* of Lord Langdale were left untouched, as is pointed out by Chitty, J., in *Butler* v. *Butler*.[2] *Davison, In re; Greenwell* v. *Davison* [1888],[4] shews that there is some slight divergence of opinion on the main point; and North, J., apparently thought that Chitty, J., meant to imply in *Butler* v. *Butler*,[2] by what he said about *Moase* v. *White* [1876],[5] that the phrase "real estate" might possibly pass leaseholds. This, however, is a misconception, and all that Chitty, J., thought with reference to *Moase* v. *White*[5] was that the gift in that case was not, in substance, a general gift of "real estate" at all as such, but a gift in substance of real estate described with reference to locality.

Moreover, even if section 26 [1] had any application at all, there is here a clear contrary intention. If this devise of "real estate" is to include this particular leasehold by virtue of the section, it ought logically to include all the leaseholds, which would be absurd.

A. F. Peterson, for the vendors.—In *Davison, In re; Greenwell* v. *Davison*,[4] the words "real estate" were held to pass leaseholds under section 26.[1] Apart, however, from section 26,[1] we have here a direct gift of this sub-leasehold interest on the true construction of the will—*Vallance* v. *Vallance* [1863],[6] *Mathews* v. *Mathews* [1867],[7] *Moase* v. *White*,[5] and *Uttermarr, In re; Leeson* v. *Foulis* [1893].[8]

J. M. Stone, in reply.—In *Moase* v. *White*[5] the Court held that there was no expression of contrary intention. That is not the case here. In *Uttermarr, In re; Leeson* v. *Foulis*,[8] the leaseholds were mixed up inextricably with the freeholds.

Cur. adv. vult.

(1) Wills Act, 1837, s. 26: ". . . a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

(2) 54 L. J. Ch. 197, 200, 201; 28 Ch. D. 66, 74, 75.
(3) 11 Beav. 237, 252.
(4) 58 L. T. 304.
(5) 3 Ch. D. 763.
(6) 2 N. R. 229.
(7) L. R. 4 Eq. 278.
(8) 28 L. J. N.C. 785; W. N. (1893), 158.

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GUYTON AND ROSENBERG'S CONTRACT, IN RE.

COZENS-HARDY, J., after stating the facts set out above, continued as follows: Now I think it is clear that section 26 [1] of the Wills Act, 1837, does not help the vendors. I cannot hold that, under the devise of "all my real estate," leaseholds are included, when I find in the same will an express bequest of "all my leasehold estate." This is a "contrary intention" appearing by the will. It remains, however, to consider whether, under the language of this will, and having regard to all the surrounding circumstances, the devise to Guyton, which must be read as a devise of all my freehold property, did not include all the testator's interest in this property, which was his freehold. Upon the whole, I think this is the true view. It seems to me to be consistent with the judgment of Vice-Chancellor Wood in *Mathews* v. *Mathews*.[7] The testator cannot have intended to split up this property into two parts, when it had for many years been enjoyed and dealt with as a freehold estate in possession. The devise passed all his interest in this property, which was his freehold, and not merely his freehold interest in this property subject to his leasehold interest therein.

The result is, that I must declare that the purchaser's objection is not well founded; and the purchaser must pay the costs of the summons.

Solicitors—Stones, Morris & Stone, for purchaser; Storey, Cowland & Hill, for vendors.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

[IN THE HOUSE OF LORDS.]

1900. Nov. 29, 30. Dec. 7, 10, 11. 1901. Aug. 1.

DOVEY AND OTHERS *v.* CORY.*

Company — Winding-up — Director — Misfeasance—Payment of Dividend out of Capital—Reliance of Director on Officers of Company—Extent of Director's Responsibilities—Companies (Winding-up) Act, 1890 (53 *& 54 Vict. c.* 63), *s.* 10.

The director of a company is bound to give his attention to the matters brought before him at meetings of the board, and to exercise his judgment as a man of business upon them. In the absence of ground for suspicion he is entitled to rely upon the judgment, information, and advice of the officials of the company, and is not bound to examine entries in the company's books, but is entitled to rely on the examination of those whose special duty it is to attend to such details.

It is not the function of any tribunal to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs, but to deal with each particular case on its own facts and circumstances.

A director who attends meetings, makes enquiries, is assured by the officials that provision has been made for bad debts and believes such assurances, and examines such matters as are brought before him in the ordinary course of business, cannot be made liable in the liquidation of the company in respect of losses incurred by improper credits to directors and customers or the payment of dividends out of capital.

Semble, *a company is not at liberty to write off to capital losses incurred in previous years, or in any subsequent year, and, if the receipts for that year exceed the outgoings, to pay dividends out of such excess without making up the capital account, such a procedure being inconsistent with the provisions of the Companies Act*, 1877.

Observations of the COURT OF APPEAL *disapproved.*

* *Coram*, The Lord Chancellor (Earl of Halsbury), Lord Macnaghten, Lord Shand, Lord Davey, and Lord Brampton.

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DOVEY *v.* CORY, H.L.

Decision of the COURT OF APPEAL (*sub nom.* National Bank of Wales, *In re*; Cory's Case (68 L. J. Ch. 634; [1899] 2 Ch. 629), *affirmed.*

Appeal from a decision of the Court of Appeal (Lindley, M.R., Sir F. H. Jeune, and Romer, L.J.), which reversed a judgment of Wright, J. (68 L. J. Ch. 634; [1899] 2 Ch. 629).

The appellant was the liquidator of the National Bank of Wales, and the Metropolitan Bank of England and Wales had purchased and taken over its assets and liabilities. The respondent, John Cory, was for some years a director of the National Bank of Wales. In the liquidation of the latter a summons was taken out to render the respondent liable—not to creditors, all of whose claims had been satisfied, but to the contributories—in respect of alleged misfeasance—first, in paying dividends out of capital; secondly, in making improper advances to directors; and thirdly, in making improper advances to customers who were, or were reputed to be, insolvent; and the summons asked that the respondent should be ordered to repay the full amount of all losses caused by such acts of alleged misfeasance with interest and costs.

Mr. Cory became a director on November 23, 1883, and resigned on December 18, 1890. The summons asked that the respondent should be deprived of the benefit of the Trustee Act, 1888, and of the Statutes of Limitation, on the ground that the losses arose from the respondent's wrongful acts and concealment of the true state of affairs. The transactions complained of were voluminous and ranged over a series of years and related to the affairs not only of the head office, but of the branches, which in 1890 were thirty-three.

In February, 1893, an agreement was entered into between the National Bank of Wales and the Metropolitan, Birmingham, and South Wales Bank, now the Metropolitan Bank of England and Wales, Lim., whereby the latter bought the assets and goodwill and undertook the liabilities and contracts of the former, the value of the assets and goodwill being taken at not less than 110,000*l.* Voluntary resolutions were passed for winding up the National Bank of Wales, and Thomas Cory, its former chairman, and the appellant were appointed liquidators. Thomas Cory subsequently resigned and the appellant became sole liquidator. The alleged amount of improper payments of dividends was 52,986*l.*; of loss on advances and credits to directors to December 31, 1890, 37,731*l.*; and of loss on improper advances to customers, 43,087*l.* The whole of the assets were realised or valued, and the appellant Dovey alleged that after discharging the liabilities of the National Bank of Wales and crediting it with the value of its assets and 110,000*l.* as its goodwill, there remained a deficiency of assets amounting to 84,392*l.* Calls were made of 2*l.* 10*s.* per share each in July, 1896, and September, 1899. Wright, J., ordered the respondent to pay 54,787*l.*, being 37,000*l.* the aggregate amount of dividends paid to the shareholders in 1887, 1888, 1889, and 1890 (except a part of the last dividend), and as to the balance, interest at 5 per cent. on each of the dividends. The learned Judge held that all these dividends were in fact paid out of capital; but he declined to make the respondent liable for improper advances to directors or customers. The Court of Appeal exonerated the respondent from liability.

The liquidator appealed.

Sir R. T. Reid, *Q.C.*, and *Ingpen*, *Q.C.* (*S. T. Evans* with them), for the appellant Dovey.—No moral obliquity is imputed to the respondent, but he was guilty of great and culpable negligence for which he should be held responsible. In no year from 1884 to 1890—except in 1886—was any profit made available for distribution among shareholders. The appearance of profit was created by the treatment of bad debts as good assets. The circulating capital of a business should be kept intact, and no dividend should be declared for a year without deduction of loss incurred in a previous year. Payment of dividends in this way out of capital constitutes a misfeasance, for which "a past or present director" is made liable by the Companies (Winding-up) Act, 1890, s. 10, sub-s. 1; and the respon-

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dent Cory was thus guilty of misfeasance, as with ordinary care and diligence he must have known that the balance-sheets were a sham, and that there was an alarming and progressive diminution of capital. He was guilty of *crassa negligentia—Overend, Gurney & Co.* v. *Gibb* [1872].[1] As a director he was in a fiduciary position, and ignorance of the state of affairs is no defence to a claim for repayment of dividends not earned by profits. *Bloxam* v. *Metropolitan Railway* [1868],[2] *County Marine Insurance Co., In re; Rance's Case* [1870],[3] *Exchange Banking Co., In re; Flitcroft's Case* [1882],[4] *Oxford Benefit Building and Investment Society, In re* [1886],[5] *Leeds Estate Building and Investment Co.* v. *Shepherd* [1887],[6] *Verner* v. *General and Commercial Investment Trust* [1894],[7] and *Wilmer* v. *M'Namara & Co.* [1895][8] fully establish these propositions and the liability of a past or present director for losses sustained in consequence of neglect of duty and of ordinary business precautions. *Denham & Co., In re* [1883],[9] is distinguishable.

The respondent is also liable in respect of improper advances, debts, and overdrawn accounts of customers, which he ought to have prevented. Especially is he responsible for advances made to directors without security, as they were prohibited by article 98 (E) of the articles of association. Directors are paid for their presumed business capacity, and are to be treated as trustees of money which is under their control—*Lands Allotment Co., In re* [1894].[10] Nor can the respondent claim the advantage of any Statute of Limitations, as he has been guilty of that *culpa lata* which the legal maxim states to be equivalent to fraud. He is not entitled to the benefit of the Act of 1888.

[They also cited *Ebbw Vale Steel, Iron, and Coal Co., In re* [1877],[11] *Lee* v.

(1) 42 L. J. Ch. 67; L. R. 5 H.L. 480.
(2) L. R. 3 Ch. 337.
(3) 40 L. J. Ch. 277; L. R. 6 Ch. 104.
(4) 52 L. J. Ch. 217; 21 Ch. D. 519.
(5) 56 L. J. Ch. 98; 35 Ch. D. 502.
(6) 57 L. J. Ch. 46; 36 Ch. D. 787.
(7) 63 L. J. Ch. 456; [1894] 2 Ch. 239.
(8) 64 L. J. Ch. 516; [1895] 2 Ch. 245.
(9) 25 Ch. D. 752.
(10) 63 L. J. Ch. 291; [1894] 1 Ch. 616.
(11) 46 L. J. Ch. 241; 4 Ch. D. 827.

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as soon as it was incurred; there is inevitable delay in making up the accounts, and the loss may not be ascertained till long after the year has passed. The respondent acted as a reasonable business man, and could not be expected to adhere to any such counsel of perfection, which could only paralyse business. In any view of the facts the respondent is protected, in respect of all matters before June 14, 1889, by the Trustee Act, 1888.

Ingpen, Q.C., replied.

The House took time for consideration.

Aug. 1, 1901. — THE LORD CHANCELLOR (EARL OF HALSBURY). — In this case the liquidator of the National Bank of Wales appeals against a judgment of the Court of Appeal, whereby Mr. John Cory, the respondent, was discharged from the liability which Mr. Justice Wright's judgment had imposed upon him to pay 37,000*l.* for the benefit of the shareholders of the company, in respect of dividends already distributed, and a further sum for interest.

Mr. John Cory was a director of the company, and it is for his supposed misconduct in the management of the affairs of the company that this liability was imposed upon him. It is alleged and proved that certain losses have been sustained by the company, and the ground upon which Mr. John Cory is sought to be made liable is the very short and intelligible ground that he was a party to false and fraudulent statements as to the position of the company, and had had a share in causing these losses. The Court of Appeal have acquitted him of any knowledge of what was falsely stated, and counsel for the appellant Dovey, in opening this appeal, stated that he did not intend, in arguing for Mr. John Cory's liability, to impute to him any moral obliquity. Now, there is no doubt that there were balance-sheets laid before meetings of shareholders which, to use the language of the articles of association, were not proper and which did not truly report as to the state and condition of the company, and did not comply with the requirements of the articles in question in respect of the particular sum which the directors recommended as dividend, that it should be paid out of the profits, but a greater sum was paid out as dividend than would have been paid if certain things had been taken into consideration, and therefore larger than should have been paid.

A great part of the judgment, both of Mr. Justice Wright and of the Court of Appeal, is occupied by discussing matters which are not now before your Lordships as matters in debate. It is now admitted that Mr. John Cory ceased to be a director in December, 1890.

I am very clearly of opinion that the judgment of the Court of Appeal is right and ought to be affirmed; but my opinion is entirely based upon the question of fact that he was guilty of no breach of duty whatever, and for reasons which I will refer to hereafter I am very anxious not to deal with some reasons given for their judgment by the Court of Appeal, which, in the view of the facts that I take, do not arise here; and in what I say I desire to be understood as only dealing with the facts of this particular case.

Now, in the first instance, I will assume that the company has sustained loss by the issue of fraudulent balance-sheets, by the improper advance of money to the customers of the bank, and that it has also sustained loss by the lending of money to directors without security. With respect to the default involving liability, if Mr. John Cory was conscious of the falsehood it is not necessary to go any further. Like any one else who is a party to a false statement acted upon to the prejudice of the person to whom it is made, he would be liable to the extent to which his falsehood has inflicted loss on his victims, but after the admission that has been made it is unnecessary to pursue this head of enquiry; he certainly could not be acquitted of moral obliquity if party to a fraudulent statement. But it is said he has so grossly neglected his duty as a director that, though he may not have known the true state of the facts, he ought to have known them, and his breach of duty in that respect renders him liable. In order to see how far this obligation is made out it is necessary to

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consider what the business of the company was, and what was the position of Mr. John Cory in relation to it.

I think it is idle to talk in general terms of the duty of a director to look after the concerns of the company of which he is one of the managers without seeing what in the ordinary course of business he ought to do or to have done. Now there are some things which, of course, must be, or at all events ought to be, apparent to any one responsible for the conduct of a commercial business, and that observation applies to the business of which we are speaking—namely, a banking business—but I do not understand that any one has suggested that there was neglect or default by reason of the absence of some system under which, if honestly carried out, the interests of the bank would have been in that respect secured.

It is admitted that the company's principal bank and its head office were at Cardiff, where the directors met and the general manager was in daily attendance. The company had also many branch banks each with its own manager. The course of business was this: Each branch manager sent weekly to the head office what is called a weekly state—that is, an account shewing how the assets and liabilities of the branch stood, what advances or overdrafts had been made or allowed, and to whom, what securities the bank held, and other matters. Every quarter each branch manager made a more formal return to the head office shewing the position of the branch and the business done during the past quarter. It was the duty of the general manager to examine these documents, and to report to the board anything disclosed by them which required their attention. The weekly states or quarterly returns were in the board room for reference in case of need, but unless attention was called to them the directors did not think it necessary to examine them. The chairman of the directors was Mr. Thomas Cory, a brother of Mr. John Cory. The chairman and the general manager (Mr. Collins) visited each branch bank every year; and in addition, two skilled inspectors frequently went round and inspected the accounts and reported to the general manager. The accounts of the branch banks appear, however, not to have been separately audited by professional accountants. The auditors employed to examine the company's accounts, and to certify the annual balance-sheets and accounts laid before the shareholders only saw the head-office books and the returns from the branch offices certified by their respective managers to the head office. These certified returns formed part of the weekly states, but *omitted* much that they contained. The minutes of the directors' meetings shew that, speaking generally, they attended with reasonable regularity and transacted a large amount of business. No director, unless it was the chairman, attended to any details not brought before the board either by the chairman or by the general manager. Mr. John Cory stated in his affidavit the general course of business at board meetings, and his cross-examination does not substantially differ from the account he there gives. But it is suggested that Mr. Cory is responsible because this and other portions of the system were not faithfully adhered to. And, indeed, what is really made the test of his responsibility is that he did not find out what was fraudulently withheld from his knowledge. So the warning letters of the auditor, which were never suffered to reach him, are suggested as warnings to him which he ought not to have neglected. Again, reliance is placed by the appellant on the insufficient striking out of bad and doubtful debts by which the amounts paid in dividends to himself and other directors, as well as shareholders, are by a process of reasoning and calculation assumed to be payments out of capital. These things are all assumed to have been done as though done with knowledge and intention, while at the same time the admission is made that there was no evil mind or conscious fraud.

Now I think such things, if done with evil mind and intention, would be fraud, and it comes back again to the proposition that the responsibility must be based upon the assumption that Mr. Cory is responsible because he did not find out the fraudulent knaves by whom he was

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surrounded. One was his own brother, another was the general manager, and once I arrive at the conclusion that there were those about him whose interest and object was to deceive him, I certainly do not think that the things which were designedly concealed from him are things which ought to be relied upon as matters for which he was responsible. In the view I take, the whole of the evidence which is relevant and important to the question whether Mr. Cory knowingly permitted the things to be done which were done, becomes to my mind entirely immaterial if one is to start with the assumption that he knew nothing about them.

Dealing with the several heads of charge as they have been formulated in the judgment of Mr. Justice Wright—namely, negligence, breaches of trust in respect of advances made contrary to the articles of association, and payments of dividends out of capital—I think each and all of them may be disposed of by the proposition that Mr. Cory was not himself conscious of any one of these things being done, and that unless he can be made responsible for not knowing these things, and as Mr. Justice Wright put it, he is to be held thereby to have exhibited a complete neglect of the duties he had undertaken, the charges are not made out. The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, as to how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors managing directors, and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to this—that he ought to have discovered a network of conspiracy and fraud by which he was surrounded, and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers—and the theory of his being free from moral fraud assumes under the circumstances that he was—there appears to me to be no case against him at all. The provision made for bad debts, it is well said, was inadequate, but those who assured him that it was adequate were the very persons who were to attend to that part of the business—and so of the rest. If the state and condition of the bank were what was represented, then no one will say that the sum paid in dividends was excessive. If I assume, as I do, that Mr. Cory acted upon representations made to him which he believed, and coming from the officers of the bank, to whom he was, in my judgment, justified in giving credit, the discussion of whether the dividends actually paid were or were not properly divisible has no bearing on Mr. Cory's liability, and I am very reluctant to give any opinion upon it, inasmuch as the question may arise when it may be necessary to decide it. I deprecate any premature judgment.

I am, as I have said, very reluctant to enter into a question which for the reasons I have given does not arise here, and into which the Court of Appeal has entered at some length. The only reason why I refer to it at all is lest by silence I should

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be supposed to adopt a course of reasoning as to which I am not satisfied that it is correct. I doubt very much whether such questions can ever be treated in the abstract at all. The mode and manner in which a business is carried on, and what is usual or the reverse, may have a considerable influence in determining the question what may be treated as profits and what is capital. Even the distinction between fixed and floating capital which in an abstract treatise like Adam Smith's *Wealth of Nations* is appropriate enough, may with reference to a concrete case be quite inappropriate. It is easy to lay down as an abstract proposition that you must not pay dividends out of capital, but the application of that very plain proposition may raise questions of the utmost difficulty in their solution. I desire, as I have said, not to express any opinion, but as an illustration of what difficulties may arise the example given by counsel of one ship being lost out of a considerable number, and the question whether all dividends must be stopped until the value of that lost ship is made good out of the further earnings of the company or partnership, is one which one would have to deal with. On the one hand, people put their money into a trading concern to give them an income, and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve its ruin. On the other hand, companies cannot at their will and without the precautions enforced by statute reduce their capital; but what are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve. When the time comes that these questions come before us in a concrete case we must deal with them, but until they do I for one decline to express an opinion not called for by the particular facts before us, and I am the more averse to doing so because I foresee that many matters will have to be considered by men of business which are not altogether familiar to a Court of law.

I move that this judgment be affirmed, and the appeal dismissed with costs.

LORD MACNAGHTEN.—I have had an opportunity of reading the judgment of

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holding, I need not repeat them. As regards the third head of claim, the case as presented at the Bar has been very much narrowed by the admission of the appellant's counsel that the respondent ceased to be a director in December, 1890, and his acceptance of the decision of the Court of Appeal that the Statute of Limitations applies so as to bar the recovery of any sums paid away prior to six years before the commencement of the proceedings. The claim is thus confined to the three dividends paid in July, 1889, December, 1889, and July, 1890.

I think it appears from the evidence that in the balance-sheets upon which these dividends were recommended by the directors, bad and irrecoverable debts were in fact included amongst the assets of the company, and that if those debts had been written off (as they ought to have been), the balance-sheets would not have shewn any profit out of which the dividends could have been paid. But before proceeding to discuss the evidence upon which it is sought to fix the respondent with responsibility, I will say a few words with regard to the law upon the subject with a view to ascertain exactly what it is the appellant must establish.

I need only refer to three cases which seem to me to contain the whole law upon the subject. In *Mercantile Trading Co., In re; Stringer's Case* [1869],[16] the business of the company in question was of an extremely speculative and hazardous character, and the directors had paid a dividend on their estimated value of assets which were afterwards totally lost. It was held that the estimate, having been made *bona fide*, and without any intention to defraud anybody, a director could not be made liable, when the company was wound up, to replace the money. In *Rance's Case*[3] Lord Romilly laid down the principle which he thought governed cases of this description, thus: "When an improper payment has been made, if it be a mere error of judgment, it cannot be recovered; if it be a fraudulent payment, then it can." The learned Judge explained what he meant by a fraudulent payment: "I mean one where the person who makes it, or is concerned in making it, is at the time aware of the impropriety of making it, but does so in order to obtain a benefit for himself"; and he adds, "The director may be ignorant of this fact, but if his ignorance arises from his wilfully shutting his eyes to the facts which are before him he is equally guilty." I think that this statement of the law is very nearly but not quite accurate. In my opinion it is not necessary that the motive of the improper payment should be to obtain a benefit for the director himself. I also understand Lord Romilly to include in the expression "wilfully shutting his eyes" culpable negligence or reckless indifference by the director in the performance of his duties. Lord Romilly decided that case in favour of the director. The Court of Appeal took a different view of the facts from that taken by Lord Romilly, and held that the directors in the preparation of the so-called balance-sheet had not followed the directions in their articles of association, and the balance-sheet did not in fact purport to shew a profit out of which a dividend could be paid. In such a case there can be no doubt of the liability of the director who took part in the payment of the dividend. The case of the *Leeds Estate &c. Co.* v. *Shepherd*,[6] before Mr. Justice Stirling, was a case of the same description. The directors had not followed the directions contained in the articles of association. The learned Judge, in the course of his judgment, states the law thus: "It seems to me that the views expressed by the learned Judges who decided *Rance's Case*[3] are consistent with the proposition that directors who are proved to have in fact paid a dividend out of capital fail to excuse themselves if they have not taken reasonable care to secure the preparation of estimates and statements of account such as it was their duty to prepare and submit to the shareholders, and have declared the dividends complained of without having exercised thereon their judgment as mercantile men on the estimates and statements of account submitted to them." I agree in this statement of the law, and I do not think it inconsistent with that of Lord Romilly, properly understood, and subject to the observation which I have already made

(16) 38 L. J. Ch. 698; L. R. 4 Ch. 475.

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which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in *Wincham Shipbuilding and Boiler Co., In re; Hallmark's Case* [1878],[17] and by Mr. Justice Chitty in *Denham & Co., In re*,[9] that directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration, but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference. The case is no doubt one of some difficulty, but the appellant has not made out to my satisfaction that the respondent wilfully, as that term is explained in the cases I have referred to, misappropriated the company's funds in payment of dividends.

What I have said is sufficient for the decision of this appeal. But I desire to express my dissent from some propositions of law which were laid down in the Court of appeal, and upon which this House thought it right to hear the respondent's counsel. The learned Judges seem to have thought that a joint-stock company, incorporated under the Companies Acts, may write off to capital losses incurred in previous years, and may in any subsequent year, if the receipts for that year exceed the outgoings, pay dividends out of such excess without making up the capital account. If this proposition be well founded, it appears to me a company whose capital is not represented by available assets need never trouble itself to reduce its capital, with the leave of the Court and subject to the other conditions imposed by the Act of 1877, in order to enable itself to pay dividends out of current receipts.

It may be that I have misapprehended the statement of law intended to be made by learned Judges in the Court of Appeal. I think that is possible, because I find that in *Verner* v. *General and Commercial Investment Trust*[7] Lord Lindley says: "Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law."

I reserve my opinion as to the effect of an actual and ascertained loss of part of the company's fixed capital, as in the case put by counsel for the respondent of a loss of a ship uninsured. But, subject to this observation, I think that the statement of law in the passage I have quoted is not open to objection, and it is only because the learned Judge appears to me to have departed from it in his judgment in the present case that I have troubled your Lordships with these remarks.

I agree that the appeal should be dismissed.

LORD BRAMPTON concurred.

Appeal dismissed.

Solicitors—Riddell & Co., agents for Thomas Williams, Neath, for the appellant Cory; Burton, Yeates & Hart, agents for Johnsons, Barclay & Rogers, Birmingham, for the appellants, the Metropolitan Bank (of England and Wales); Michael Abrahams, Sons & Co., for the respondent.

[*Reported by J. Eyre Thompson, Esq., Barrister-at-Law.*

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(17) 47 L. J. Ch. 868; 9 Ch. D. 329.

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under the powers conferred on her by the Settled Land Acts, and the proceeds had been paid into Court and invested.

By an indenture dated February 20, 1901, and duly enrolled as a disentailing assurance, Lady Cardigan and Lord Robert Bruce (being the Robert Thomas Bruce mentioned in the second codicil), with her consent as protector of the settlement made by the will and codicil, purported to grant the sum of 100,000*l.* 2½ per cent. consolidated stock (part of the proceeds of sale in Court), and the real estate in the purchase of which such sum was liable to be invested or which it was in equity considered to be, in fee-simple discharged from all estates tail of Lord Robert Bruce and all estates to take effect after the determination or in defeasance of such estates to such uses as Lady Cardigan and Lord Robert Bruce should appoint.

By an indenture of April 19, 1901, Lady Cardigan and Lord Robert Bruce purported, under the power contained in the disentailing deed, to appoint the property comprised therein to trustees upon certain trusts.

This was a petition by Lady Cardigan, mortgagees of her life estate, and the trustees of the deed of appointment, for payment out of the appointed fund.

With regard to the trust for accumulation after Lady Cardigan's death, all the mortgages save one on the settled estates had been paid off with the proceeds of sale made under the Settled Land Acts of various parts of the estates. There would be sufficient funds remaining in Court to satisfy the remaining charge. The case was argued on the footing that the trusts for accumulation either had ceased to take effect or could never arise.[1]

Rowden, K.C., and *Cyprian Williams*, for Lady Cardigan and trustees of the deed of appointment.—The effect of the second codicil is to give Lord Robert a vested equitable estate tail in remainder expectant on the determination of the trusts for Lady Cardigan for her life. Upon the construction of the will read alone, George Thomas Bruce took a vested equitable estate tail in remainder expectant on the determination of the aforesaid trusts with a gift over "in defeasance of" that estate tail,[2] in case he should be dead at the time indicated by the word "then" in the will. There is nothing in the mere direction to the trustees to convey to make the estate given by the will to George Thomas contingent. It is well settled that, under a trust to convey, the equitable estate indicated by the direction vests immediately. There are no words in the will to make the estate given to George Thomas contingent. The Court leans in favour of vesting, and will certainly not supply words which would make an estate contingent when otherwise it would appear to be vested. But even supposing that a contingency is imported with regard to George Thomas's estate by the words used in the will, still, when the second codicil is read into the will, all doubt on this point is at an end, for the second codicil contains a direct devise to Lord Robert in tail male after Lady Cardigan's death. The effect of the will and second codicil together must therefore be to give Lord Robert a vested equitable estate tail simply expectant on the determination of the trusts for Lady Cardigan's benefit.

As to the subsequent limitations, there are no words in the second codicil to confer a gift to the person who shall be the first heir male of Lord Robert in substitution for the gift to the person who shall

(1) *Note.*—It was assumed that, as the trusts for accumulation had ceased to be capable of taking effect for the purpose of the discharge of debts, they could not be kept on foot any longer for the purpose of recouping the capital fund out of which the debts were actually discharged. See *Tewart* v. *Lawson* [1874] (43 L. J. Ch. 673; L. R. 18 Eq. 490), and *Norton* v. *Johnstone* [1885] (55 L. J. Ch 222, 224; 30 Ch. D. 649, 653).

(2) The Fines and Recoveries Act, 1833, s. 15, enacts: "after the 31st day of December 1833 every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons . . . whose estates are to take effect after the determination or in defeasance of any such estate tail. . . ."

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fact that upon one possible construction of the will the limitations now sought to be construed will not take effect till after Lady Cardigan's death, has the Court jurisdiction to decide the question now? Secondly, if it has, are all persons interested sufficiently represented, considering, upon that possible construction, that some of them cannot be ascertained till Lady Cardigan's death? In the interests of unascertained persons the benefit of the arguments advanced on behalf of Lord Cardigan is craved.

Rowden, K.C., in reply.—There is no contingency at all attached to the estate given to George by the will—*Stanley* v. *Stanley* [1809][7] and *Phipps* v. *Ackers* [1842].[8] He took a vested equitable estate tail liable to be defeated by a gift over on a particular event. It is monstrous, from a conveyancer's point of view, to say that his estate was contingent. Nothing in the law of real property postpones the vesting. It is impossible to find anything in the codicil which makes the estate given to Robert contingent. Whatever may be the meaning of the will, Robert took under the codicil a vested estate in tail male with remainder over.

Cur. adv. vult.

July 4.—On the case coming on for judgment, Byrne, J., said that, though he had prepared a judgment, he was not satisfied that the time was ripe for decision, and, if it was, that all parties were sufficiently represented; and he wished these questions to be considered, and directed the case to come into the list two days later. On its coming on accordingly,

Rowden, K.C, submitted that the application was not premature, and cited *Fussell* v. *Dowding* [1884][9] in support of the view that unascertained persons were represented by the trustees of the will.

BYRNE, J.—As the petitioners are claiming immediate relief in the way of payment out to them of a fund, on the ground that they have derived through the assignment of Lady Cardigan and Lord Robert together an absolute title to the fund, I think I have jurisdiction to decide now the question of the construction of the limitations to take effect after Lady Cardigan's death. All unascertained persons are, in my opinion, sufficiently represented by the trustees of the will. But I direct that the petitioners shall ascertain who is entitled under the ultimate limitation to the testator's right heirs, and that the person or persons so ascertained be added as respondent, and given a fortnight within which to come in and object to the order which I propose to make.

The question arises in reference to the testator's estates in the counties of Northampton, Leicester, and York, all of which were legally vested in trustees upon certain trusts. [His Lordship stated the trusts and limitations of the will and second codicil, and continued:] It appears to me that Lord Robert Bruce is now entitled to a vested equitable estate tail in remainder expectant upon the decease of Lady Cardigan. I think that this estate is vested, because there is a present capacity in Lord Robert to take, although it is uncertain whether it can ever take effect in possession; it is therefore not contingent. The next remainder, whether it be to the first heir male of the body of Lord Robert in tail male (George having died without issue) or to the Earl of Cardigan, is contingent, being dependent upon the death of Lord Robert in the lifetime of Lady Cardigan, and there being no present capacity in any person to take, Lord Robert being alive. Lord Robert, having duly disentailed, claims that the assignees (the trustees) of himself and Lady Cardigan are now absolutely entitled in fee-simple subject only to Lady Cardigan's life interest. He claims first under a direct legal devise to him in the codicil; which, as I understand, he says supersedes the equitable estates given by the will to George, and to the first heir male of George or Robert in a certain event. In my opinion, however, upon the true construction of the will and codicil, the legal estate remains vested in the

(7) 16 Ves. 491.
(8) 9 Cl. & F. 583.
(9) 53 L. J. Ch. 924, 926; 27 Ch. D. 237, 240

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ALEXANDER'S TIMBER CO., IN RE.

A. W. Johanning as joint managing director of the company for the term of five years.

2. The salary to be paid to the said A. W. Johanning shall be 400*l.* per annum, and one-half of the annual net profits of the company which shall remain after payment of the fixed dividends of the several classes of shares in the company's capital for the time being.

On the same day Alexander's Timber Co. was registered. A. W. Johanning was one of the signatories of the memorandum of association.

The articles of association contained provisions that the company should forthwith adopt the above-mentioned agreement, among others, and that the directors should forthwith carry the same into effect, and that the number of directors should not be less than two or more than seven; that W. Riley and A. W. Johanning should be the first directors; and that until otherwise determined two directors should constitute a quorum; and also contained the following clauses:

"13. The company, by its directors, may make contracts with any or either of the directors upon such terms as the directors shall think proper, having regard to the interests of the company; and a director shall not, by virtue of the fiduciary relation subsisting between him and the company, be accountable for any profit made by him in respect of such contracts, nor (subject to the following proviso) in respect of any other contract, made with the company in the profit of which he participates, or in which he is otherwise interested, provided that, the fact of his being so interested therein, and the nature of his interest be fully and fairly disclosed by him or be otherwise known by the directors."

"87. Each of them the said Wm. Riley and A. W. Johanning shall be a managing director of the company subject to the terms of the agreement of February 27, 1899."

Other clauses exempted a managing director from retirement by rotation, and gave the directors power to fix his remuneration, subject to any contract with him, and to delegate to him any of their powers.

Riley and Johanning met as directors on March 11, 1899, and passed a resolution that the above-mentioned agreement of February 27, 1899, should be approved, signed, and sealed. And an agreement between the company and Johanning approving and adopting the said agreement, and declaring that it should be binding on Johanning, was duly signed and sealed accordingly.

Johanning and Riley acted as managing directors of the company from February 27, 1899, until its winding-up.

On November 21, 1900, an order was made for the compulsory winding-up of the company.

Johanning claimed to prove for 713*l.* 15*s.* 6*d.* fees, salary, and expenses during the time he had served as managing director, against which he set off 667*l.* 9*s.* 3*d.* paid on account, and for 1,000*l.* damages for breach of the agreement to employ him as managing director for five years.

The case was adjourned into Court and came before Wright, J., on May 22. Only the agreement of February 27, 1899, was then produced, and the Court dismissed the claim for damages on the ground that there was no written agreement binding on the company, and part performance did not make any verbal contract binding; but liberty was given to the applicant to have the case set down for further argument on this question if he desired it. In the meantime, the adoptive agreement was discovered and the case now came on again.

Martelli, for A. W. Johanning.—Now that the adoptive agreement has been found, Johanning's claim is clear. The two directors had full power to bind the company; and besides, this contract is specially referred to in, and adopted by, the articles of association.

Gore-Browne, for the official liquidator.—The agreement is not sufficient within the Statute of Frauds. There is no date fixed for the commencement of Johanning's services, and that is a fatal objection—*Marshall* v. *Berridge* [1881].[1]

(1) 51 L. J. Ch. 329; 19 Ch. D. 233.

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That was a case of a lease, but the ground of the decision was that an important term of the contract was left out. That applies here. Again, there is no consideration. The agreement does not bind Johanning to act. There is no description of what services he is to render. And lastly, it is against natural equity that Johanning and Riley, as agents for the company, should make a contract on its behalf with themselves as principals.

The provision in the articles cannot make such a contract good.

Martelli, in reply.—The cases as to omission of the commencement of the term are all cases of leases, and were decided on the ground of uncertainty.

Those cases have never been extended to contracts of service. There is no uncertainty here; Johanning is named as director in the articles of association, and his service as managing director was to begin from the incorporation of the company. What the services of a managing director are to be is clearly stated in the articles, and the use of the phrase "managing director of the company" in the agreement incorporates the articles with it.

WRIGHT, J.—Unless there is a valid agreement between Johanning and the company providing otherwise, it must be taken to be a term of his employment as managing director that such employment should cease when he ceased to be a director by the winding-up of the company. Is there such an agreement? It was denied that there was any written agreement binding the company. Now an agreement has been produced, and the question is, Is it sufficient? The first objection taken to the contract by the liquidator is that it does not shew when the employment is to commence. I think that is a good objection. The original agreement was signed on February 27, and the company was registered on the same day. The adoptive agreement was executed on March 11. It is not a very long interval. But there must be certainty on this point, as the statute has been construed to require. I do not know on which date the employment was to commence.

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[IN THE COURT OF APPEAL.]

RIGBY, L.J.
COLLINS, L.J.
ROMER, L.J.
1901.
July 8, 9. Aug. 1.

HAYES, *In re*; TURNBULL *v.* HAYES.

Will—Construction—Special Power of Appointment—Appointment by Will Dated Prior to Will Creating Power—Personalty—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 24 *and* 27.

H. by his will gave "all the residue of the property over which at the time of my death I shall have a disposing power" to trustees upon trust for sale and conversion and investment, and he directed his trustees "to pay the yearly income or produce arising from my trust estate" to his wife during her life or widowhood; and in case she should marry again he directed his trustees "to pay to her out of the income of my trust estate in addition to the provision made for her by marriage settlement an annuity of 50*l. payable half yearly instead of the whole of such income." The will contained further trusts for the benefit of his children.*

H.'s father by his will empowered each child of his by will or codicil to appoint to or in favour of his or her wife or husband the whole or any part of the yearly income of his or her share in the father's residuary estate for life or for any period determinable on or before death, and declared the trusts of a sum of 4,000*l. by reference to the trusts of the residue.*

The father's will was dated after that of the son, but the father predeceased the son. The son had no power of appointment in favour of his widow other than that contained in the will of the father:—

Held, *that the case was not within section* 24 *or section* 27 *of the Wills Act*, 1837, *and there was no legal presumption of an intention on the part of the son to exercise the power contained in the father's will; and the son's will could not fairly be construed as disclosing an intention to exercise a non-existent special power, supposing it were possible to exercise such a power by anticipation.*

Decision of BYRNE, J. (69 L. J. Ch. 691; [1900] 2 Ch. 332), *affirmed.*

Quære, *whether it is possible as a matter of law to exercise by anticipation a special power which has not been created until after the alleged exercise.*

Appeal from a decision of Byrne, J. (reported 69 L. J. Ch. 691; [1900] 2 Ch. 332).

Henry Hayes the younger, by his will dated December 29, 1884, after appointing trustees and executors, and giving pecuniary legacies to his wife and to his executors, proceeded as follows: "And subject to the payment of the said legacies I give all the residue of the property over which at the time of my death I shall have a disposing power, unto my trustees, upon trust in their discretion to sell and convert the same into money, in such manner, and upon such conditions as they shall think fit, and to invest the proceeds" as therein mentioned, with power to vary; "And I empower my trustees to continue the existing investments of my estate whether they shall be of the description hereinbefore authorized or not, as they, in their absolute discretion, shall think fit; And upon further trust, and I direct my trustees to pay the yearly income or produce arising from my trust estate unto my said dear wife for her life if she shall so long continue my widow, for her own use absolutely. But in case my said wife shall marry again, then I direct my trustees to pay to her out of the income of my trust estate, in addition to the provision made for her by marriage settlement, an annuity of 50*l.* payable half yearly instead of the whole of such income." Then, after a trust for the maintenance and education of his children, and a trust for accumulation of unapplied income, the testator directed his trustees to stand possessed of his trust estate subject to the trusts aforesaid upon trust for his children as therein mentioned, with an ultimate gift over in default of children living at his decease, or of children afterwards attaining twenty-one, or marrying under that age.

The testator made a codicil dated March 20, 1893, whereby he made a change in the persons to be trustees and executors, and in all other respects confirmed his will.

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before the happening of the event upon which it arises—*Cave* v. *Cave* [1856][10]; but if a codicil had been made after the father's death confirming the will it would clearly have operated as an execution of the power—*Blackburn, In re; Smiles* v. *Blackburn* [1889].[11] It is really a question of intention. The son had at his death power to appoint a life interest in this property to his widow, and he has shewn an intention to do so. He refers to his power—*Cowx* v. *Foster*,[1] *Thornton* v. *Thornton*,[5] *Von Brockdorff* v. *Malcolm* [1885],[12] *Sharland, In re; Rew, In re; Rew* v. *Wippell* [1899],[13] *Mayhew, In re; Spencer* v. *Cutbush* [1901],[14] *Cotton, In re; Wood* v. *Cotton* [1888],[15] *Milner, In re; Milner* v. *Bray* [1899],[16] and *Sugden on Powers* (8th ed.), p. 262, par. 5.

H. Terrell, K.C., and *D. D. Robertson*, for the infant son of Henry Hayes the younger, and for the trustees.—The decision of Byrne, J., was right. A special power of appointment is a power in the nature of a trust, and cannot be exercised in anticipation, whatever the intention of the donee may be. He must wait till the time for its exercise arrives, and then he must use his discretion—*Walker* v. *Armstrong* [1856],[17] *Cowper* v. *Mantell* [1856],[18] *Thomas* v. *Jones* [1862],[19] *Doyle* v. *Coyle* [1894],[20] and *Sugden on Powers* (8th ed.), p. 901. *Stillman* v. *Weedon* [1848][21] went entirely upon the operation of sections 24 and 27 of the Wills Act, and Lord St. Leonards seems not to have agreed with the decision—*Sugden on Powers* (8th ed.), pp. 306, 307, pars. 48, 49. He seems to have thought that a will would not operate as an execution of a limited power which was not in existence at all when the will was made.

The decisions in *Cave* v. *Cave*[10] and *Blackburn, In re; Smiles* v. *Blackburn*,[11] are explicable on the ground that a limited power cannot be exercised in anticipation—*Farwell on Powers* (2nd ed.), p. 226.

Mere republication of a will by a codicil after the acquisition of a new power is not a sufficient manifestation of an intention to exercise the power by the will—*Hope* v. *Hope* [1854].[22]

[COLLINS, L.J.—If a man were to say, "Supposing that I have power to appoint a fund to my wife at my death, I exercise it," would that be a good execution?]

No. It would be an attempt to exercise it in anticipation.

Supposing we are wrong on that point, there has in this case been no exercise of the power. It is a question of intention—*Milner, In re*.[16] There has been no appointment here at all. The gift was only of that over which Hayes (the son) had a disposing power. The donee of a special power has no power of disposing of the subject-matter; he has only a power of selection. The disposal is under the instrument creating the power.

Upjohn, K.C., in reply.—In *Walker* v. *Armstrong*[17] the power was a general power, and the property was real estate. *Doyle* v. *Coyle*[20] was a decision upon the Wills Act, and in both that case and in *Cowper* v. *Mantell*[18] the property in question was the property of the testator at the time when he made his will, not merely subject to a power of appointment, and he made the settlement subsequently himself. The decision in *Thomas* v. *Jones*[19] does not help much, but there is a *dictum* to the effect that a special power is in the nature of a trust. That only means that the donee must exercise it for the benefit of the objects of it, not his own benefit. It is not really a trust. If it were, the donee would be obliged to exercise it, and if he would not, the Court would. In the present case, and most cases, he need not do so unless he wishes—*Topham* v. *Portland* (*Duke*) [1869][23] and *Brown* v. *Higgs* [1803].[24]

There is nothing improbable in a man

(10) 8 De G. M. & G. 131.
(11) 59 L. J. Ch. 208; 43 Ch. D. 75.
(12) 55 L. J. Ch. 121; 30 Ch. D. 172.
(13) 68 L. J. Ch. 747; [1899] 2 Ch. 536.
(14) *Ante*, p. 428; [1901] 1 Ch. 677.
(15) 58 L. J. Ch. 174; 40 Ch. D. 41.
(16) 68 L. J. Ch. 255; [1899] 1 Ch. 563.
(17) 25 L. J. Ch. 402, 407; 21 Beav. 284, 305.
(18) 22 Beav. 223, 229.
(19) 32 L. J. Ch. 139, 140; 1 De G. J. & S. 63, 78.
(20) [1895] 1 Ir. Rep. 205.
(21) 18 L. J. Ch. 46; 16 Sim. 26.
(22) 5 Giff. 13, 25.
(23) 39 L. J. Ch. 259; L. R. 5 Ch. 40.
(24) 8 Ves. 561, 570.

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with property looking forward to having a fund to dispose of in favour of his wife and children, and dealing with that.

[ROMER, L.J.—It seems to be a question of intention. The effect of the authorities is summed up in *Theobald on Wills* (5th ed.), pp. 223 and 224.]

One of the cases referred to there as an example of an intention not being shewn is *Cotton, In re*[15]; but North, J., in a later case of *Denton, In re; Bannerman* v. *Toosey* [1890],[25] seems to have withdrawn what he said in *Cotton, In re*.[15] In *Hope* v. *Hope*[22] there were no words of futurity. *Baily* v. *Lloyd* [1829][26] is a further instance of an intention to exercise a limited power being shewn.

[COLLINS, L.J.—Is there any authority that after-events may be looked at for the purpose of ascertaining the operation of the will?]

For construing a will, only the circumstances and what the testator knew at the time can be looked at; but property acquired after the making of a will can pass under it, and there is no reason why a power acquired afterwards should not be exercised by it.

Hope v. *Hope*[22] cannot be accepted as an authority that the republication of a will by a codicil will not make the will operate to exercise a power acquired between the dates of the will and the codicil. That part of the case is treated by Lord St. Leonards as not establishing any general proposition to that effect—*Sugden on Powers* (8th ed.), p. 310, par. 53—and it is inconsistent with *Blackburn, In re*.[11]

Cur. adv. vult.

Aug. 1.—COLLINS, L.J., read the judgment of the Court:

The question in this case is whether the will of Henry Hayes the younger operated as a good execution of a special power conferred on him by the will of his father, Henry Hayes the elder, whereby he was empowered to appoint a life interest in certain funds to his wife.

Henry Hayes the younger made his

(25) 63 L. T. 105.
(26) 7 L. J. Ch. (o.s.) 98; 5 Russ. 330.

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HAYES, IN RE, App.

In the present case the passage in the will of Henry Hayes the younger, from which the intention to execute the power is to be inferred, if at all, runs as follows. [His Lordship read the first clause of the will above set out, and continued:] There is nothing else in the will which favours the inference. On the contrary, there are difficulties to be got over in the language of the other parts of the will, if they are to be held consistent with the alleged intention. We need not repeat them, as they are pointed out in the judgment of Mr. Justice Byrne. And though, as is usual in these cases, many authorities were cited to shew that these difficulties have severally been surmounted when construed in other contexts in other wills, the result cannot be put higher than as shewing that they would not suffice to defeat an otherwise well-founded inference. Coming back, then, to the words which are said to refer to the power and to shew an intention to exercise it, we think they cannot be fairly construed as disclosing an intention to execute a non-existent special power; and, taking the whole will together, we think the balance distinctly inclines against such an inference. At all events, there is no such clear preponderance in favour of the intention as to warrant us in differing from the opinion of Mr. Justice Byrne. The appeal, therefore, fails.

Appeal dismissed.

Solicitors—Bell, Brodrick & Gray, agents for Buchannan & Sons, Whitby, for all parties.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

[IN THE CHANCERY DIVISION AND IN THE COURT OF APPEAL.]

BYRNE, J. 1901. July 13, 20. RIGBY, L.J. COLLINS, L.J. ROMER, L.J. July 31.

SILKSTONE AND HAIGH MOOR COAL CO. *v.* EDEY.

Costs—Taxation—Order to Tax Costs including Remuneration of Receiver—Costs to be Set off and Balance Certified—Power to make Separate Certificate as to Costs only—Rules of the Supreme Court, 1883, Order LXV. rule 27, sub-rule 25.

An order was made that the Taxing Master should tax the costs of the plaintiffs of the action, including the costs and remuneration of certain receivers, and should tax the costs of the defendants of certain motions, and deduct those costs of the defendants from the plaintiffs' costs and certify the balance, and the defendants were ordered to pay to the plaintiffs the balance so to be certified. The Master certified that he had taxed the plaintiffs' costs, but had not included the costs and remuneration of the receivers, and had taxed the defendants' costs and deducted the amount from the amount of the plaintiffs' costs, and he certified the balance due to the plaintiffs in respect of their costs, not including the costs and remuneration of the receivers, which, when ascertained, he proposed thereafter to certify in addition to the said balance:—Held, *that the Taxing Master had no power under the order for taxation to tax the plaintiffs' costs of the action and the costs and remuneration of the receivers separately.*

Per BYRNE, J.—*A Taxing Master has in a proper case power to make a separate certificate, but he cannot do so without special directions under a judgment directing a particular balance to be certified and paid.*

Appeal from a decision of Byrne, J.

By an order made on November 8, 1899, upon the trial of the action, the Judge (Stirling, J.), after dealing with the merits of the case, ordered that it be referred to the Taxing Master to tax the costs of the plaintiffs of the action up to and including that judgment, including

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the costs and remuneration of certain receivers and managers appointed in the action, and the costs of taking and transcribing a shorthand note of a judgment delivered on March 21, 1899, and discussion on minutes on March 28 and 29, 1899, but not including the costs of the respective motions by the defendants J. Edey and the Silkstone and Haigh Moor Collieries, Lim., to vary minutes. And it was ordered that it be referred to the Taxing Master to tax the costs of the said defendants J. Edey and the Silkstone and Haigh Moor Collieries, Lim., of their said respective motions to vary minutes, and the Taxing Master was to deduct the said costs of the said defendants from the plaintiffs' costs thereinbefore directed to be taxed, and to certify the balance, and it was ordered that the said defendants and each of them should pay to the plaintiffs the balance so to be certified.

The Taxing Master, by his certificate dated June 14, 1901, certified that he had taxed the costs of the plaintiffs, by the said order directed to be taxed at 5,751*l.* 12*s.* 10*d.*, except that he had not included the costs and remuneration of the receivers and managers, the same not having yet been ascertained in the chambers of the Judge to whom this action had been referred, and that he had taxed the costs of the defendants by the said order also directed to be taxed at the sums following—namely, the costs of the defendant J. Edey at 53*l.* 9*s.* 1*d.*, and the costs of the defendants, the Silkstone and Haigh Moor Collieries, Lim., at 44*l.* 17*s.* 5*d.*, and he had deducted the costs of the said defendants from the plaintiffs' said costs. "And I hereby make this separate certificate, and certify that after such deduction there remains a balance of 5,653*l.* 6*s.* 4*d.* due to the plaintiffs in respect of their said costs, not including the amount of the said costs and remuneration of the receivers and managers, which when ascertained I propose hereafter to certify in addition to the said balance of 5,653*l.* 6*s.* 4*d.*"

The defendant J. Edey took out a summons asking that the Taxing Master's certificate might be discharged, upon the ground that, in the absence of special provision enabling him to make two certifi-

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certificates he is not at liberty to issue two certificates.

I have no doubt that the Taxing Master has, in a proper case, a right to make a separate certificate. The point in this case is whether he can make two certificates on a judgment framed in this manner, pointing to one balance to be found and certified, which balance is to be paid. The old practice is referred to and the history of it given in *Daniell's Chancery Practice*. I am quoting from the 5th edition, page 1307: "Originally, all references for the taxation of costs were made to the Masters in Ordinary: who used to be attended for that purpose by the Clerks in Court of all parties. In consequence, however, of the multiplicity of business in the Masters' offices, it gradually became the practice to leave all the details of the taxation to the Clerks in Court, and only to call upon the Master to decide any question of principle that happened to arise. Upon the abolition of the office of Six Clerks, new officers, called Taxing Masters, were appointed for this particular duty: who perform all the duties before that time performed by the Masters in Ordinary in relation to the Taxation of costs; and have, in respect thereof, all the powers and authorities formerly vested in the Master in Ordinary, to administer oaths: examine witnesses and parties: order the production and inspection of books, papers, and documents: proceed *de die in diem*: make separate reports and certificates: require that any party be represented by a separate Solicitor: and direct and adopt all such other proceedings as might formerly be directed and adopted by the Masters in Ordinary, on references for the Taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court." I need only just refer to the General Orders of 1828. I refer to the 70th of them to shew that the old Masters in ordinary had power to make a separate report or reports: "In all matters referred to him, the Master shall be at liberty, . . . to make a separate Report or Reports, from time to time, as to him shall seem expedient; the costs of such separate reports to be in the discretion of the Court." The 71st refers to this case: "Where a Master shall make a separate report of debts or legacies, there the Master shall be at liberty to make such certificate as he thinks fit with respect to the state of the assets." Then under Order IX. of the Orders of 1842 it is provided that the Taxing Master shall perform all such duties as were formerly referred to or performed by the Masters in Ordinary in relation to the taxation of costs; and shall in respect thereof have all such powers and authorities as were formerly vested in the Masters in Ordinary, and, amongst other things, to make separate reports and certificates.

As I have said, I have no doubt whatever as to the power to make separate certificates in proper cases. To give an illustration, not at all intending it as an exclusive example, of a case where I think a Taxing Master could clearly make a separate certificate: Suppose a plaintiff brought an action against two defendants, and at the trial the action is dismissed as against one defendant with costs, but the plaintiff succeeds against the other defendant and an order is made for that other defendant to pay the plaintiff his costs. I see not the slightest objection to an order directing taxation and payment of those costs and to a separate certificate being issued directly one of those sets of costs is ascertained. That is to say, if the costs that the plaintiff has to pay to the defendant A be first ascertained, I see no reason why a separate certificate should not be given. But that is quite different from a case like the present, where the certificate is not in obedience to the exigency of the judgment, and where it clearly does affect the interests of the defendants. I am far from saying that it may not be judicious to have a rule pointing to this very matter, but it is clear that it never has been, nor is it suggested by anybody—and I have enquired with reference to the practice in the Taxing Master's office—that it ever has been the practice, to make a separate certificate without a special direction for the purpose where the judgment directs a particular balance to be certified.

I may mention, because it has some little bearing on the matter, that quite recently, on July 4, 1901, a new rule

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[Order LII. rule 26] has been published (36 L. J. N.C. p. 368; W. N. [1901] p. 235) providing for an interim certificate: "If, during the taxation of any bill of costs or the taking of any account between solicitor and client, it shall appear to the Taxing Master that there must in any event be moneys due from the solicitor to the client," then it is said "the Taxing Master may from time to time make an interim certificate as to the amount so payable by the solicitor. Upon the filing of such certificate the Court or a Judge may order the moneys so certified to be forthwith paid to the client or brought into Court."

The question is, what ought I to do? I think probably the more convenient course to pursue would be to direct this certificate to be taken off the file and embodied in the certificate to be made. I think that is the most convenient way of dealing with it. The only other way would be to leave it on the file and to direct that it is not to be acted upon, but to be embodied in the other certificate; but I am told there is no expense attaching to taking it off the file.

The plaintiffs appealed.

Upjohn, K.C., and *P. F. S. Stokes*, for the appellants.—The Taxing Master has under Order LXV. rule 27, sub-rule 25 of the Rules of 1883, power to make a separate certificate. Under that rule the taxing officers of the Court are in relation to the taxation of costs to perform all such duties as were theretofore performed by the Masters, Taxing Masters, or other officers of any of the Courts whose jurisdiction was transferred to the High Court, and have such powers and authorities as were vested in such officers, including "making separate certificates or allocaturs." Under Order XL. rule 1 of the Consolidated Orders of 1860 the Masters could make separate reports and certificates. That rule was, in substance, a reproduction of Order IX. of the Chancery Orders of October 26, 1842. The power to make separate reports was first given to the Masters by the General Orders of April 3, 1828, Orders LXX. and LXXI. Before that date a Master

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SILKSTONE AND HAIGH MOOR COAL CO. *v.* EDEY, App.

like the present embodies no result at all. A taxation is to go on without interruption until completed, and cannot be split up—Rules of the Supreme Court, 1883, Order LXV. rule 19 (*s*). If the appellants are right, the Master might have certified the costs of the shorthand notes only, or he might even have certified for each page of the bill of costs. When the taxation is completed the Master signs the bill; and if it is intended to enforce payment of the costs by any further proceedings, or evidence of the amount is required, the items are added up and the result of the taxation ascertained, and a certificate of the taxation must be obtained from the Master and filed — 2 *Daniell's Chancery Practice* (6th ed.), pp. 1255 and 1256; and *Morgan and Wurtzburg on Costs* (2nd ed.), pp. 477 and 478. Therefore the taxation must be completed before the certificate is made. There is nothing in the Order in the present case to enable the Master to certify a balance which he was not directed to certify. There has been here not a separate certificate at all, but an attempt to make an *interim* certificate, which is contrary to the practice of the Court.

C. S. Crossman, for the defendant company.

RIGBY, L.J.—I am of opinion that we cannot make the order that is asked for. The order of the learned Judge was right. In fact, he had no choice but to make the order which he did. It may be desirable that the Taxing Masters should have power to make certificates such as the one made in this case, but the question is whether they have power to do so, and I do not think that they have.

COLLINS, L.J., and ROMER, L.J., concurred.

Solicitors—Bell, Brodrick & Gray, agents for Rodgers & Co., Sheffield, for plaintiffs; Clements, Williams & Co., and T. W. Hall, for defendants.

[*Reported by W. A. G. Woods and A. J. Hall, Esqs., Barristers-at-Law.*

BYRNE, J. 1901. July 19, 25. } POWER, *In re*; STONE, *In re*; ACWORTH *v.* STONE.

Revenue — Estate Duty — Incidence — General Power of Appointment by Will — Exercise of Power — Property Passing to the Executor "as such" — Legal and Equitable Assets — Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

Property appointed under a general power of appointment by will does not pass to the executor "as such" within the Finance Act, 1894, *s.* 9, *sub-s.* 1, *and consequently estate duty is, in the absence of any direction to the contrary, payable out of the appointed property and not out of the residuary estate of the appointor.*

Treasure, *In re*; Wild *v.* Stanham (69 L. J. Ch. 751; [1900] 2 Ch. 648), *and* Maddock, *In re*; Llewelyn *v.* Washington (36 L. J. N.C. 307; W. N. (1901) p. 118), *followed.*

Moore, *In re*; Moore *v.* Moore (*ante*, p. 321; [1901] 1 Ch. 601), *dissented from.*

Hoskin's Trusts, *In re* (46 L. J. Ch. 817; 6 Ch. D. 281), *discussed.*

James Stone, by his will dated April 17, 1863, gave all his real estate and the residue of his personal estate to trustees upon trust for conversion, and after the death of his wife (which happened some years ago) to set apart a sum of 2,000*l.* for the benefit of his daughter Ellen Louise Power, and subject thereto one-half of the capital of the trust fund was to be held upon the trusts therein mentioned, and as to the remaining half part of the capital of the trust fund, together with the said sum of 2,000*l.*, upon trust to pay the income thereof to Ellen Louise Power for her life, and in the event of her having no children (which event happened) as to one moiety in trust for such persons for such intents and generally in such manner in all respects as Ellen Louise Power should by will appoint, and as to the other moiety in trust for such persons being of her blood and of kin to her as she should by will appoint.

The testator died on January 4, 1865.

Ellen Louise Power, by her will dated

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May 16, 1896, after reciting the power of appointment given to her by the will of her father, appointed that one moiety of the settled fund should be held by her trustees upon trust to invest the same and pay the income thereof to her brother, the defendant James Doveton Stone, for his life or until the occurrence of any of the contingencies therein mentioned, and after his decease she directed her trustees to stand possessed of the said moiety upon trust to distribute the same equally between the children of her said brother who should be living at her death, and as to the remaining moiety of the settled trust fund she appointed the same equally between her three cousins therein named, and as to the residue of her estate real and personal she devised and bequeathed two-thirds thereof equally between the three defendants, Eugenia Power, Winifred Power, and Kate Power, and the remaining third equally between the two daughter of Frances Unwin, and she appointed the plaintiffs trustees and executors of her will.

The testatrix died on January 31, 1900, and her executors paid the estate duty in respect of the moiety of the settled fund over which the testatrix had a general power of appointment amounting to the sum of 215*l.* 17*s.* 2*d.*

This was an originating summons by the executors asking for the decision of the Court upon the question whether the estate duty ought to be paid out of the appointed fund or out of the residuary estate of the testatrix.

Horsley, for the executors and trustees. —The question is whether the estate duty is payable out of the appointed property or out of the residue. There are conflicting decisions on the point. In *Treasure, In re; Wild* v. *Stanham* [1900],[1] Kekewich, J., decided that the duty was payable out of the appointed fund. In *Moore, In re; Moore* v. *Moore* [1901],[2] Buckley, J., held that the duty was payable out of the residuary estate; but in *Maddock, In re; Llewelyn* v. *Washington* [1901],[3] Kekewich, J., declined to follow *Moore, In re*,[2] and adhered to his former decision.

C. G. Church, for the persons entitled under the appointment.—The appointed property passes to the executors "as such," and the residuary estate of the testatrix is liable for the estate duty—*Moore, In re*.[2] Where the donee of a general power of appointment, whether a married woman or any other person, exercises the power, the appointed fund becomes assets for payment of the debts of the appointor and is receivable by the executors "as such." The executors take such property *virtute officii*, and not as trustees—*Hoskin's Trusts, In re* [1877].[4] In *Treasure, In re*,[1] Kekewich, J., did not attempt to distinguish that case.

R. J. Parker, for the residuary legatees. —Before the passing of the Finance Act, 1894, the expression "passing to the executor as such" had a well-defined meaning.

Formerly it was important to consider whether the assets in the hands of the executors were legal or equitable. Legal assets were assets that the creditor could reach in a Court of law; equitable assets could only be made available in a Court of equity. The nature of the property was immaterial, the test being whether or not it vested in the executor "as such." The property in question here is a purely equitable asset which could only be reached in a Court of equity. It does not vest in the executor *virtute officii*, but by virtue of the appointment. The word "executor," as used in the Finance Act, 1894, s. 9, includes administrator. If the assets are legal assets they are available equally by the executor or administrator in a Court of law. Where, however, the power is exercised the executor takes as a donee under or by virtue of the will, but that principle has never been applied to an administrator. Appointed real estate can be made available by the executor in a Court of equity, although it would not vest in him "as executor."

The general rule as to what are to be considered assets in the hands of the executor is laid down in *Sheppard's Touchstone*, p. 496, which is quoted in *Williams on Executors* (9th ed.), p. 1518. The test

(1) 69 L. J. Ch. 751; [1900] 2 Ch. 648.
(2) *Ante*, p. 321; [1901] 1 Ch. 601.
(3) 36 L. J. N.C. 307; W. N. (1901), p. 118.
(4) 46 L. J. Ch. 817; 6 Ch. D. 281.

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whether assets are legal or equitable is also stated on p. 1547 of the same work, where the cases of *Cook* v. *Gregson* [1856][5] and *Hue* v. *French* [1857][6] are referred to.

Appointed property has always been treated as equitable assets, and nothing vests in the executor *virtute officii* except legal assets—*Att.-Gen.* v. *Brunning* [1860][7] and *Pardo* v. *Bingham* [1868].[8]

Since the Wills Act the mere appointment of an executor will not make property subject to a general power of appointment assets for the payment of debts—*Davies' Trusts, In re* [1871],[9] and *Thurston, In re; Thurston* v. *Evans* [1886].[10]

The property is made assets by the exercise of the power, and where the power is exercised in favour of a volunteer it must be assumed that it was the intention of the donee that his creditors should be paid. For that purpose the executor would be entitled to have the fund handed over to him, but he must first prove the will, the probate being produced as part of the evidence of the title of the executor. That is all that James, L.J., meant to decide in *Hoskin's Trusts, In re*,[4] in which he followed *Philbrick's Settlement, In re* [1865].[11]

There is a distinction between absolute property and a power. Where, therefore, the power is not exercised the property is not assets for the payment of debts, and the want of execution will not be supplied even in favour of creditors, although a defective execution would in such a case be aided—*Holmes* v. *Coghill* [1806].[12]

In the case of a specific legacy of leaseholds the executor gets the leaseholds *virtute officii*, and his assent is necessary in order that the legacy should take effect; but where a fund is appointed to the executor he takes by virtue of the appointment, and not *qua* executor. Foreign assets do not pass to the executor as such, for the Ordinary, by whom the executor was formerly appointed, had no jurisdiction over them.

The Stamp Act, 1815 (55 Geo. 3. c. 184), did not deal expressly with property subject to a general power of appointment; and in consequence of *Platt* v. *Routh* [1841],[13] affirmed in the House of Lords, *sub nom. Drake* v. *Att.-Gen.* [1843],[14] which decided that property appointed under such a power was not subject to probate duty, the Probate Duty Act, 1860 (23 & 24 Vict. c. 15), was passed, the effect of which was to make the probate duty a charge on the appointed property, but not to pass to the executor "as such" any property that would not have previously so passed. By the Finance Act, 1894, estate duty is substituted for the earlier duties, including probate duty; and there is nothing in the Act to shew that it was intended to alter the incidence of the duty or to convert assets, which before that Act were equitable assets, into legal assets so as to cause them to pass to the executor *virtute officii*. *Treasure, In re*,[1] involves no alteration in the incidence of the duties, and is consistent with the earlier cases. It was rightly decided, and the estate duty here is payable out of the appointed fund.

C. G. Church, in reply.—The Finance Act, 1894, draws no distinction between legal and equitable assets; its object was to make the executor responsible for duty on all property coming under his control. Whatever the cases in the past may have decided, the question now is as to the meaning of the words in section 9, and whether they are capable of being watered down so as to apply only to legal assets. *Moore, In re*,[2] is a correct decision.

Cur. adv. vult.

July 25.—BYRNE, J., read the following judgment: The question raised by this summons is whether or not, where a general power of appointment by will over a fund has been exercised, the appointed fund passes to the executor "as such" within the meaning of that expression as used in

(5) 25 L. J. Ch. 706; 3 Drew. 547, 550.
(6) 26 L. J. Ch. 317; 3 Drew. 716.
(7) 30 L. J. Ex. 379, 382; 8 H.L. C. 243, 258.
(8) L. R. 6 Eq. 485.
(9) 41 L. J. Ch. 97; L. R. 13 Eq. 163.
(10) 55 L. J. Ch. 564; 32 Ch. D. 508.
(11) 34 L. J. Ch. 368.
(12) 12 Ves. 206.
(13) 10 L. J. Ch. 131, 133; 3 Beav. 257, 281; s.c. in the Court of Exchequer, 10 L. J. Ex. 105, 118; 6 M. & W. 756, 790.
(14) 10 Cl. & F. 257.

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section 9, sub-section 1 of the Finance Act, 1894. If it does so pass, estate duty is payable out of residue; if not, it has to be borne by the appointed fund.

In the case of *Treasure, In re*,[1] Mr. Justice Kekewich held that the appointed fund does not under such circumstances pass to the executor "as such"; but there was another ground of decision—namely, that the duty fell within the description of "testamentary expenses," which were directed to be paid out of residue, and consequently that, although the fund did not pass to the executor "as such," the duty fell to be paid out of residue. In the case of *Moore, In re*,[2] Mr. Justice Buckley declined to follow the opinion expressed by Mr. Justice Kekewich, and held, in a case where there was no direction as to payment of testamentary expenses, that the appointed fund did pass to the executor "as such," and that the estate duty was on that ground payable out of residue. The point again came before Mr. Justice Kekewich in the case of *Maddock, In re*,[3] there being no direction as to payment of testamentary expenses, when, as I am informed, without fresh argument, he adhered to his opinion as expressed in *Treasure, In re*,[1] notwithstanding the decision in *Moore, In re*.[2]

In this state of the authorities I am bound to express my own opinion upon the question. The rule is that property subject to general powers of appointment becomes assets for the payment of the appointor's debts, if the power is actually exercised in favour of volunteers; and Lord Hardwicke, in *Townshend (Lord)* v. *Windham* [1750],[15] points out that "if there is a power to execute by will or deed, though executed by will, it operates not as a will to that purpose, but as an appointment; not as an appointment of his own assets, but of the estate of another, and takes not place by force of the will."

Prior to the passing of the Probate Duty Act, 1860, property over which the deceased had a general power of appointment only was not subject to probate duty. This was decided in *Drake* v. *Att.-Gen.*,[14] affirming the decision of Lord Langdale in *Platt* v. *Routh*.[13] In *Drake* v. *Att.-Gen.*[14] the Lord Chancellor (Lord Lyndhurst), in giving the unanimous opinion of the House and of the Judges, says, "The property here taken by Mrs. Platt for her life, was taken not subject to any power of appointment for any persons specially named, and is therefore subject to legacy duty in the hands of her appointees. But on the other hand, the property appointed was not property which, within the meaning of the Act as applied to the schedule imposing the probate duty, was so completely her property as to render it liable to that duty; so that the judgment of the Court below appears to be right in both instances." Lord Langdale's decision in *Platt* v. *Routh*[13] was in accordance with the certificate of the Court of Exchequer. Lord Abinger, in giving the judgment of that Court says, "In that case"—referring to a case of *Att.-Gen.* v. *Hope* [1834][16]—"which was very fully considered, the House of Lords held, that probate duty was not payable in respect of such parts of the testator's assets as were situate in America at the time of his death; and the broad ground on which that decision rested was, that probate duty is granted in respect of such part only of the assets as the executor can recover by virtue of the probate, being in fact that property which, but for the will, the Ordinary would in early times have been entitled to apply *in pios usus*. Now, although Judith Ann Platt had what we consider an absolute power of appointment over the property in question; yet it is clear, that the Ordinary never could, under any circumstances, have had any right whatever to interfere with it; and it is also certain, that, whether probate be granted or not, the executor, *qua executor*, can have no title to any part of the property." Lord Langdale, in the course of his judgment,[13] says, "The next question is, whether the residuary estate of John Ramsden, appointed by the will of Mrs. Platt, is chargeable with probate duty upon the probate of the will of Mrs. Platt; and I am of opinion that it is not.

(15) 2 Ves. sen. 1, 10.

(16) 2 Cl. & F. 84, affirming s.c. *sub nom. Hope* v. *Att.-Gen.*, 1 Cr., M. & R. 530.

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It was not the property of Mrs. Platt, and could not be recovered by her executors by virtue of the probate. It would be singular that the rule of this Court, which requires a probate merely as evidence, to shew that the instrument of appointment is a will, should have the effect of subjecting the property to duty as if it had been the property of the testator, which this Court does not consider it to be" (I pass by another passage), "but the 38th section of the Act [Stamp Act, 1815] appears to me to shew that the Act only relates to the estate and effects of the deceased for or in respect of which the probate is granted, and as this was not the property of the deceased, I am of opinion that no duty is payable in respect of it." It is, I think, quite clear that the appointed property was considered not to pass to the executor *virtute officii* or "as such." Vice-Chancellor Kindersley, in *Cook* v. *Gregson*,[5] in considering the difference between what are legal and what are equitable assets says that "every item of property come to the hands of the executor which he has recovered, or had a right to recover, merely *virtute officii*, *i.e.* which he would have had a right to recover if the testator had merely appointed him executor without saying anything about his property or the application thereof," is legal assets. Lord Chelmsford, in *Att.-Gen.* v. *Brunning*,[7] expressly approves of this passage. In the last mentioned case the question was whether or not money paid to an executor under a contract for sale of land entered into by the testator was legal or equitable assets. And Lord Cranworth observes, "With all deference to the Court of Exchequer, I think that Court fell into an error in treating this money as being equitable assets. It is a sum which the executor would take as executor, and which, therefore, would be legal assets in his hands. His right would not depend on anything contained in the will of Mr. Hope. Mr. Hope's administrator would have been entitled in case he had died intestate; and what an administrator is entitled to recover as administrator, *virtute officii*, can never be equitable assets." Lord Cranworth also points out that foreign assets were not liable to probate duty, not being recoverable by virtue of the English probate; and when they come to the hands of the executor they so come because he has established a title in a foreign jurisdiction. In *Davies' Trusts, In re*,[9] Vice-Chancellor Wickens states it as settled law that a testator who has a general power of appointment directing payment of his debts without more, and appointing an executor, makes the appointed fund liable in aid of his own assets for payment of his debts; and he expresses his opinion that the same rule would apply though no executor were appointed. I think that it is also established that the appointment of executor without more would not make the funds assets—*Davies' Trusts, In re*,[9] and *Thurston, In re*.[10]

In this state of the law the Probate Duty Act, 1860, was passed, and the effect of sections 4 and 5 is to make the appointed funds liable to probate duty, but not, as it appears to me, to cause that to pass to the executor "as such" which had not previously so passed. Passing to the case of *Hoskin's Trusts, In re*,[4] I do not myself think that Lord Justice James meant to express the opinion that the executor was entitled to receive the fund "as such," but that he must prove the will and constitute himself executor before he could ask to have the fund handed over. The production of probate would be necessary as proof of title on the part of the executor in his capacity as a person nominated to administer the fund and as shewing an appointment.

Turning to the Finance Act, and bearing in mind that estate duty was intended to be analogous to probate duty, I cannot gather any suggestion of intention to alter the incidence of duty in respect of funds appointed under a general power. Before that Act I consider that the fund in question would have been equitable assets, and not legal. I do not think that by the Act it was intended, or that the effect of the section under discussion is to convert equitable into legal assets or to cause property to pass to his executor *virtute officii* which had not previously so passed; nor, as I have said, do I believe that Lord Justice James, in the case of *Hoskin's Trusts, In re*,[4] meant to decide

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or to express an opinion which would have a similar result.

I need not dwell upon the difficulty I have naturally felt in deciding in opposition to the opinion of Mr. Justice Buckley; but I consider that I ought to decide in accordance with the view expressed by Mr. Justice Kekewich in the cases referred to.

Solicitors—Norris, Allens & Chapman, for all parties.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

COZENS-HARDY, J. 1901. July 31. Aug. 8.

LOWE *v.* ADAMS.

Landlord and Tenant—Sporting Rights—Licence—Tenancy from Year to Year—Successive Tenancies for Single Year—Incorporeal Hereditament — Six Months' Notice—Reasonable Notice.

A lessor purported to lease certain shooting rights for one year from March 25, 1895, *by an instrument not under seal. On December* 31, 1895, *the lessor consented to a future reduction of rent in a letter addressed to the lessee. Subsequently to March* 25, 1896, *the lessee continued for some years longer in tacit possession of the shooting at the reduced rent, but nothing further was agreed between the parties as to the nature or duration of such tacit possession. On February* 26, 1901, *the lessor determined the said possession by verbal, and on March* 23 *by written, notice, as from March* 25 *then instant:*— Held, *that the possession of the lessee subsequent to March* 25, 1896, *was not that of a mere licensee.*

Wood *v.* Leadbitter (14 L. J. Ex. 161; 13 M. & W. 838) *questioned, having regard to* Walsh *v.* Lonsdale (52 L. J. Ch. 2; 21 Ch. D. 9).

Quære, *whether such possession was that of a tenant granted successive rights each year for a single year, or that of a tenant from year to year.*

Held, *however, that the common-law rule as to the necessity of giving six months' notice to determine a tenancy from year to year in a corporeal hereditament does not apply in the case of an incorporeal hereditament such as the one now in question; and assuming that the defendants were entitled to "reasonable notice," that "reasonable notice" had in fact been given in the circumstances.*

Trial of action with witnesses.

By a memorandum of agreement not under seal, dated May 14, 1895, the Rev. Basil James Harold Beridge (thereinafter called the landlord) agreed to let, and the defendants Adams and King (thereinafter called the tenants) agreed to hire, the shooting in White Ash Wood, and the pheasant shooting in the adjoining fields, in the parish of Bocking, in the county of Essex, for the term of one year from March 25 then last to March 25 then next, at the rent of 23*l.* per annum, payable half-yearly—namely, 11*l.* 10*s.* on signing the agreement, and the balance on December 25 then next. The landlord thereby further agreed to pay all outgoings—namely, tithes, rates, and taxes—and also not to kill any game in White Ash Wood or pheasants in the adjoining fields, or to allow any one in his employ to kill the same. It was provided also that the tenants and their keepers should have the right to drive pheasants into the wood from the adjoining fields, and that the landlord and his two woodmen should be allowed to enter the wood for the purpose of cutting underwood or felling timber.

On December 31, 1895, the lessor wrote the following letter to the defendant Adams:

"Dear Sir,—. . . I consent to the rent for White Ash Wood being reduced from 23*l.* to 21*l.* per annum. . . . I do not care to let Turnpike Wood. . . .—Yours faithfully, B. J. H. BERIDGE."

The defendants accordingly continued in possession of the shooting in question at the reduced rent.

On March 23, 1901, the following letter was addressed to the defendants by E. E. Surridge, as agent for the Rev. B. J. H. Beridge:

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"Dear Sirs,

"*Re* White Ash Wood shooting.

"I have been requested by the Rev. B. J. H. Beridge to inform you that it is his intention to revoke the licence you have for some time exercised in respect of the shooting in this wood and adjoining fields.

"Will you be good enough to understand that the said licence will be, and is, revoked, as from March 25 instant.—Yours faithfully,

"ERNEST E. SURRIDGE."

By indenture dated May 23, 1901, the Rev. B. J. H. Beridge purported to demise the exclusive right of hunting, coursing, shooting, and sporting in, over, and upon (*inter alia*) White Ash Wood to the plaintiff from March 25, 1901, for three years then next ensuing, at the yearly rent of 50*l.*

The defendants, however, refused to admit that their right to the shooting in question was legally determined by the letter of March 23, 1901; and on divers occasions, by themselves, their servants and agents, they broke and entered the said lands, and interfered in divers ways with the alleged exclusive right of the plaintiff under the terms of the indenture of May 23, 1901, to shoot and sport over the same.

The plaintiff thereupon commenced the present action, claiming (*inter alia*) an injunction to restrain the defendants, their servants or agents, from wrongfully entering upon the said lands, and from interfering with his exclusive right to hunt, course, shoot, and sport in, over, and upon the same, and from otherwise disturbing the plaintiff in the enjoyment of his sporting rights.

It was alleged by the plaintiff at the hearing of the action that in addition to the notice of revocation contained in the letter of March 23, 1901, already set forth above, verbal notices of revocation were further given to the defendant Adams (which the said defendant consented to receive on behalf of his co-defendant King) on February 26 and March 5, 1901. The learned Judge found as a matter of fact that the said alleged notices were actually given.

Vernon Smith, K.C., and *H. Jacobs*, for the plaintiff.—The letter of December 31, 1895, constitutes at most a licence coupled with the grant of a *profit à prendre*—that is, to carry away the game. Since, however, this grant, which is of an incorporeal hereditament, is not made by deed, the licence is revocable at will—*Rex* v. *Horndon-on-the-Hill* (*Inhabitants*) [1816][1] and *Wood* v. *Leadbitter* [1845].[2] In the latter case, it is true, there was no purported grant of a *profit à prendre*; but the judgment shews that such purported grant, when not duly made by deed, does not render a licence irrevocable.

In the case of a licence there is no need to give reasonable notice. The licence itself is *ipso facto* immediately determined when notice is given, though possibly the licensee may have his remedy against the licensor for breach of contract—*Cornish* v. *Stubbs* [1870],[3] *Mellor* v. *Watkins* [1874],[4] *Aldin* v. *Lattimer, Clark, Muirhead & Co.* [1894],[5] and *Kerrison* v. *Smith* [1897].[6]

In this case, moreover, the notice was reasonable, having regard to the circumstances—*Wilson* v. *Tavener* [1901].[7]

If it be objected that the defendants were not mere licensees, but continued to "hold over" after the expiration of their year of tenancy on March 25, 1896, by an assumed tenancy from year to year, and that they are entitled accordingly to the usual common-law six months' notice, we deny that this right of "holding over," with its attendant incidents, extends to a tenancy in an incorporeal hereditament. The origin of the doctrine of an implied tenancy from year to year on "holding over" is to be found in the fact that rent issues out of land, and that no one who accepts the rent can be heard to deny the interest of the payer in the land—an interest which the law assumes to be for a year. In the case of an incorporeal hereditament there is no land from which

(1) 4 M. & S. 562.
(2) 14 L. J. Ex. 161, 164; 13 M. & W. 838, 845.
(3) 39 L. J. C.P. 202, 205; L. R. 5 C.P. 334, 339.
(4) L. R. 9 Q.B. 400.
(5) 63 L. J. Ch. 601; [1894] 2 Ch. 437.
(6) 66 L. J. Q.B. 762; [1897] 2 Q.B. 445.
(7) *Ante*, p. 263; [1901] 1 Ch. 578.

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rent can issue, and consequently there can be no implied tenancy. According to *Coke on Littleton*, 47*a*, "a rent cannot be reserved by a common person, out of any incorporeall inheritance, as advowsons, commons, offices, corodie, mulcture of a mill, tythes, fayres, markets, liberties, priviledges, franchises, and the like"; and 142*a*, "A rent-service cannot be reserved out of any inheritance but such as is manurable, whereinto the lord may enter and take a distresse . . . and regularly not out of any inheritances incorporeall, or that lye in grant." The distinction comes out very sharply in *Camden (Marquis)* v. *Batterbury* [1859] [8] and *Handcock* v. *Austin* [1863].[9] In short, the money paid for these sporting rights was not technically rent at all, and there arises, accordingly, no implied tenancy, nor any of the incidents of such from any *de facto* holding over. The defendants, therefore, could not, under any circumstances, be entitled to six months' notice.

[They referred also to *Fitzgerald* v. *Firbank* [1897].[10]]

Eve, *K.C.*, and *Martelli*, for the defendants.—The defendants continued in possession after March 25, 1896, on the footing neither of licensees nor of mere "holders over." On the contrary, they were in the position of tenants from year to year by virtue of the letter of December 31, 1895. That letter, not being by deed, did not, it is true, constitute by itself a tenancy of an incorporeal hereditament; but the agreement contained in it was capable of specific performance —*Nunn* v. *Fabian* [1865],[11] *McManus* v. *Cooke* [1887],[12] and *Miller and Aldworth* v. *Sharp* [1899].[13] That being so, the defendants must be treated in all ways as though they were in possession under a properly executed agreement—*Walsh* v. *Lonsdale* [1882] [14]—and are entitled accordingly to a proper six months' notice.

[COZENS-HARDY, J.—You are asking me to extend the common-law rule as to six months' notice in the case of a tenancy from year to year in a corporeal hereditament by analogy to the case of an incorporeal hereditament?]

Yes. As to the letter of December 31, 1896, constituting a mere licence, no case has ever gone to the length of construing such a document as a licence when it refers to a fixed period; and here there is clearly, by implication, a reference to the fixed term of a year. In *Wilson* v. *Tavener* [7] the period was indeterminate.

Assuming that it was a licence, it ought to have been determined by a reasonable notice, and here the notice was most unreasonable. Had the defendants had reasonable notice, they would have left fewer hen-pheasants in the wood at the end of their last season.

Vernon Smith, *K.C.*, in reply.—It is strange if the common-law doctrine of six months' notice in a tenancy from year to year really applies by analogy to an incorporeal hereditament, that no instance of such application has ever hitherto arisen, although the doctrine itself has existed at least since the reign of Henry 8. There is no hint of such a thing in the discussion based on *Clayton* v. *Blake* in *Smith's Leading Cases* (10th ed), 1896, vol. ii. p. 124.

Cur. adv. vult.

Aug. 8. — COZENS-HARDY, J., after stating the facts set out above, continued as follows: Now, various points have been raised in argument, upon which I do not think it necessary to express a decided opinion. Whether *Wood* v. *Leadbitter* [2] is still good law, having regard to *Walsh* v. *Lonsdale*,[14] is very doubtful. But the agreement of May 14, 1895, was something more than a mere licence. It conferred a right to shoot and to carry away the game shot—*Fitzgerald* v. *Firbank*.[10] And it was not revocable at will.

Assuming, then, that the defendants could not have been lawfully deprived of the enjoyment of their shooting rights before March 25, 1896, what was their position after that day? The defendants contend that, by payment of rent, they became tenants from year to year, and were entitled to a six months' notice

(8) 28 L. J. C.P. 187; 5 C. B. (N.S.) 808.
(9) 32 L. J. C.P. 252; 14 C. B. (N.S.) 634.
(10) 66 L. J. Ch. 529; [1897] 2 Ch. 96.
(11) 35 L. J. Ch. 140; L. R. 1 Ch. 35.
(12) 56 L. J. Ch. 662; 35 Ch. D. 681.
(13) 68 L. J. Ch. 322; [1899] 1 Ch. 622.
(14) 52 L. J. Ch. 2; 21 Ch. D. 9.

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ending on March 25, 1902. Now, a general occupation of land was, so long ago as the *Year-Books*, held to be an occupation from year to year, and the tenant could not be turned out without "reasonable notice"—*Doe d. Martin* v. *Watts* [1797][15]; and "reasonable notice" has been settled to be half a year's notice, ending with the period at which the tenancy commenced. This whole doctrine seems to have owed its origin to the prevalence of a strong and natural feeling of the justice and good policy of allowing a tenant who has sowed to reap —see *Smith's Leading Cases* (10th ed.), 1896, vol. ii. p. 126. But I am not satisfied that the rigid rules applicable to a tenancy of corporeal hereditaments ought to be applied to the enjoyment of an incorporeal hereditament such as I have to deal with. I assume in favour of the defendants that they are entitled to "reasonable notice," expiring on March 25. If so, I think the verbal notice given in February, or, at the latest, in the early part of March, after the end of the shooting season, was reasonable and sufficient. I do not feel bound to hold that, in a case of this kind, six months' notice must be given.

It is not necessary to say whether the written notice of March 23 was sufficient, or, indeed, whether any notice was required. It may well be that the proper inference to be drawn is that the landowner granted successive rights each year for a period of one year, ending on March 25, and that no notice was necessary.

The result is that, in my opinion, the plaintiff is entitled to the relief claimed in the action. The defendants must pay the costs of the action.

Solicitors—Griffinhoofe & Brewster, agents for E. E. Surridge, Coggeshall, for plaintiff; Morris & Bristow, agents for Harris, Morton & Harris, Halstead, for defendants.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

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(15) 7 Term Rep. 83, 85.

BYRNE, J. 1901. July 23. } KELLY'S DIRECTORIES *v.* GAVIN AND LLOYD'S (*No.* 2).

Costs—Action against Two Defendants—One Ordered to Pay Plaintiffs' Costs—No Order against Other—Liability to Pay Costs of Plaintiffs' Unsuccessful Claim against Other Defendant.

Where, in an action against two defendants, no order being made against one, the other is ordered to pay the plaintiffs' costs, such costs include the plaintiffs' costs of his unsuccessful claim against the co-defendant.

This case is reported *ante*, p. 237.

The order as drawn up, after reciting that the action came on for trial on January 18, 1901, when no one appeared for the defendant Gavin, although he had been duly served with notice of the action having been set down, ordered that Gavin, his managers, servants, printers, publishers, and agents be perpetually restrained from printing, publishing, selling, delivering, or otherwise disposing of any copy or copies of the book or publication called "Lloyd's Diary for British Merchants, Shippers, and Foreign Buyers for 1900," or causing or permitting any such copies to be so printed, published, sold, delivered, or otherwise disposed of, and from copying or pirating from any edition of the plaintiffs' "Directory" called "Kelly's Directory of the Merchants, Manufacturers, and Shippers of the United Kingdom and Guide to the Export and Import Shipping and Manufacturing Industries of the World," or any part or parts thereof, and from otherwise infringing the plaintiffs' copyright in their said "Directory." It was further ordered that an account of profits should be taken against Gavin, and that he should deliver up unsold copies of "Lloyd's Diary for British Merchants, Shippers, and Foreign Buyers for 1900."

The order proceeded: "And it is ordered that the defendant William Gavin do pay to the plaintiffs their costs of this action up to and including this judgment to be taxed by the taxing master."

Pursuant to the order the Taxing Master taxed the plaintiffs' costs of action,

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making no deduction on account of the defendants Lloyd's being joined.

The defendant William Gavin brought in objections to the taxation, on the ground that the items objected to were costs incurred by the plaintiffs in the action in endeavouring to prove their case against Lloyd's, in which they were unsuccessful, and were not costs affecting Gavin; that the Judge in delivering judgment had refused to allow the plaintiffs any costs against Lloyd's, but had merely granted an injunction against Gavin with costs, and that the costs objected to as taxed were not payable by Gavin to the plaintiffs.

The Taxing Master's answer was that Gavin was ordered to pay the plaintiffs their costs of the action up to and including the judgment to be taxed, and that he was not directed to make any deduction from his taxation on account of Lloyd's being joined; and he overruled the objections accordingly.

Gavin took out a summons that his objections might be allowed, and might be referred back to the Taxing Master to vary his certificate accordingly.

J. Bradford, for the applicant.—Gavin ought not to pay such costs as were solely due to the plaintiffs' unsuccessful claim against Lloyd's.

E. Ford, for the plaintiffs.—The applicant was intended to pay costs solely due to the plaintiffs' unsuccessful claim against Lloyd's. That is in accordance with the true construction of the order. The Court could have ordered the plaintiffs to pay Lloyd's costs and recover them against the applicant. Or it could have given costs against both defendants, in which case the plaintiffs could recover the whole from either—*Stumm* v. *Dixon* [1889].[1] There is no contribution between tort-feasors—*Middleweek* v. *Dearsley* [1881].[2]

The Taxing Master has merely done what the order told him to do. The taxation is right.

J. Bradford, in reply.—Though the Court will construe the order strictly according to its terms, still it will consider the position of the parties and the record at the time it made the order. Upon the facts and the order as it stands the applicant ought to succeed.

BYRNE, J.—In this case an action was brought by "Kelly's Directories, Lim.," against two defendants William Gavin and Lloyd's. When the action came on for trial it was proved that Gavin had been guilty of what the Court considered was a gross fraud in respect of piracy. An injunction was accordingly granted against him. As to Lloyd's, the question really was whether they were liable as partners or agents of Gavin, there having been an arrangement whereby they were to print the book into which got some pirated material, but for which pirated material they were not responsible, nor were they responsible for the printing because it was done by Gavin. Under the circumstances no relief was granted against Lloyd's, and the plaintiffs did not get any costs as against Lloyd's, nor were Lloyd's ordered to pay them their costs. Then the order was drawn up, and it is on this order I am to go. I am bound by the order as drawn up. I am told Gavin attended on the drawing up of the order. After the usual formal preface the order directs a perpetual injunction against Gavin and an account of profits and delivery up of copies, and then goes on: "And it is ordered that the defendant William Gavin do pay to the plaintiffs their costs of this action up to and including this judgment to be taxed by the taxing master." The Taxing Master has taxed and has allowed against Gavin the whole of the plaintiffs' costs of this action. Objection is taken by Gavin that a portion of these costs was incurred by reason of the case sought to be made against Lloyd's, which in fact did not prove successful. It is said the Taxing Master ought therefore to have made some distinction under the order in the taxation so as not to visit upon Gavin such extra costs, if I may use that expression. I have not now to consider what form of order I should have made if the matter were now before me as at the trial. Of course the matter is not as fresh in my mind as it was then, and I

(1) 58 L. J. Q.B. 183, 187; 22 Q.B. D. 529, 534.

(2) 50 L. J. Ch. 777; *sub nom. Dearsly* v. *Middleweek*, 18 Ch. D. 236.

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KELLY'S DIRECTORIES *v.* GAVIN AND LLOYD'S (No. 2).

should certainly require a little consideration about the matter. In the Chancery Division, as was pointed out by Lord Esher, M.R., in *Stumm* v. *Dixon*,[1] "the Judges mould their judgments as to costs so as to meet the circumstances of each particular case." There are well-known forms of orders in which distinctions as to costs are made, and I am referred by the Registrar to a case[3] which Mr. Justice Joyce had before him last sittings, where the circumstances were somewhat similar—that is to say, the plaintiff succeeded against one of two defendants, and not against the other; and a discussion arose during the drawing up of the order, and the Judge directed the order to be drawn up, inserting the words "except so far as they were occasioned by the claim against the second defendant." There is, too, the distinction familiar to all of us on forms of order directing one defendant's costs to be paid by the plaintiff, who is to have them over against another. Here I have a clean order drawn up directing Gavin to pay the plaintiffs' costs of the action. I cannot mould or reframe the order now. I understand Gavin attended, and I should have thought that was the proper time for him to ask for some words to be inserted or to have objected. He was not at the trial. It appears to me the Taxing Master has taken a right view of what this order means, and I cannot interfere.

I dismiss the application with costs.

Solicitors—T. C. Russel, for applicant; Scott, Spalding & Bell, for plaintiffs.

[*Reported by Arthur Lawrence, Esq., Barrister-at-Law.*

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(3) Unreported.

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
ROMER, L.J.
1900.
Nov. 8.

BRENCHLEY *v.* HIGGINS.

Unconscionable Bargain — Expectant Heir—Reversion—Sale at Undervalue—"Unfair dealing"—Sales of Reversions Act, 1867 (31 & 32 *Vict. c.* 4), *s.* 1.

The plaintiff, who was thirty years of age, sold 1,000*l. part of a reversion expectant on the death of his mother, then aged seventy-two, to the defendant for* 300*l., with a condition that the plaintiff might repurchase the same for* 600*l. within two months. The market value of the reversion at the time of the sale was about* 675*l. The plaintiff had no independent advice, and there was evidence that the defendant induced the plaintiff to conceal from the trustees of the settlement and their solicitors the fact that he was selling or raising money on his reversion*:—Held, *that, independently of undervalue, there was evidence of unfair dealing which took the case out of the Sales of Reversions Act*, 1867; *that the plaintiff was in the position of an expectant heir; and that the transaction must be set aside as an unconscionable bargain.*

Decision of FARWELL, J., *affirmed.*

Aylesford (Earl) *v.* Morris (42 L. J. Ch. 546; L. R. 8 Ch. 484) *followed.*

Quære, *how far undervalue alone may amount to evidence of unfair dealing so as to take a case out of the Sales of Reversions Act*, 1867.

Appeal from a decision of Farwell, J.

The plaintiff was entitled under the settlement made on the marriage of his father and mother to a vested reversion expectant on the death of his mother, who was seventy-two years of age, in a sum of about 3,500*l.* The plaintiff was himself thirty years of age. He was without occupation, and was not a man of business habits, and had no independent advice in the transactions presently mentioned, though it appeared that he perfectly understood what he was doing. In 1899 the plaintiff applied to the defendant to borrow 300*l.* It was at first proposed

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that the plaintiff should have the money if he obtained a sufficient surety, but this proposal was ultimately turned into a proposal that the defendant should purchase a portion of the plaintiff's reversion.

The defendant, desiring for his own security to have some information from the solicitors of the trustees of the settlement, suggested to the plaintiff that it was unnecessary to let those solicitors know that he was borrowing money or otherwise dealing with his reversion, and suggested to the plaintiff, as a means of obtaining the necessary information, that the plaintiff should write to the solicitors of the trustees expressing a desire to know whether he (the plaintiff) could make any and what settlement in the event of his marriage; and the plaintiff wrote a letter accordingly, which was dictated to him by the defendant.

The matter was completed as follows: By an indenture dated May 15, 1899, the plaintiff assigned his reversionary interest under the settlement to the defendant upon trust on the death of his mother to pay a sum of 1,000*l.* secured by an existing mortgage, and then to retain for the defendant's own absolute use and benefit the sum of 1,000*l.* together with interest at the rate of 10 per cent. per annum thereon from the date of the mother's death till the defendant should receive the 1,000*l.*, and then to pay the balance to the plaintiff after deducting the expenses incurred in connection with the carrying out of the trusts of the indenture.

The plaintiff received the 300*l.* on executing the deed, and at the same time the defendant gave to the plaintiff the following letter:

"222 Outer Temple, May 15—Dear Sir,—In consideration of the sale to me for 300*l.*, of a charge of 1,000*l.* on your reversion under the settlement executed on your mother and father's marriage, payable at the death of your mother, I hereby agree to resell the same to you within 2 months of this date on payment by you to me of the sum of 600*l.*, and in this respect time shall be of the essence of the contract.—Yours, &c., J. T. Higgins. To Mr. H. S. Brenchley."

The plaintiff, before the execution of the deed, also gave to the defendant the following letter:

"222, Outer Temple, May 15—Dear Sir—I beg to acknowledge the fact that you have thoroughly explained to me that you will not grant me a loan on my reversionary interest under my mother's marriage-settlement which is already liable for 1,000*l.*, and that you will only have business with me by way of purchase with power of redemption within a given time. I further understand that I have agreed to sell to you a reversionary share of 1,000*l.* to be payable on the decease of my mother, the consideration therefor being a sum of 300*l.* I, of course, further understand that if I do not repurchase the said reversionary charge from you within 2 months from date hereof, I have no further interest in the said 1,000*l.* I also understand that I can only repurchase within 2 months from now on payment by me to you of 600*l.* I also understand that the 300*l.* represents something like 10 per cent. per annum on the outlay for the expectation of my mother's life—Yours, &c., H. S. Brenchley. To Mr. J. T. Higgins."

The plaintiff shortly afterwards consulted his own solicitors, and this action was then brought to set aside the transaction as an unconscionable bargain.

Farwell, J., held that the plaintiff must be treated as an expectant heir, and that the bargain was an unconscionable one, and ordered the deed to be delivered up to be cancelled on the terms of the plaintiff repaying the 300*l.*, with interest thereon at 5 per cent.

The defendant appealed.

Hughes, Q.C., and *A. H. Jessel*, for the appellant.—This transaction was a *bona fide* purchase without fraud or unfair dealing, and since the Sales of Reversions Act, 1867,[1] such a transaction cannot be set aside merely on the ground of undervalue. The present case is governed by

(1) Sales of Reversions Act, 1867, s. 1: "No purchase, made *bona fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue."

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BRENCHLEY v. HIGGINS, App.

O'Rorke v. *Bolinbroke* [1877],[2] and not by *Aylesford (Earl)* v. *Morris* [1873][3] and *Tyler* v. *Yates* [1871].[4]

The plaintiff knew what he was doing, and the onus is on him to shew fraud or unfair dealing on the part of the defendant. It is arguing in a circle to say that undervalue alone can be evidence of "unfair dealing" within the meaning of the Act; and such an interpretation would render the enactment of no effect.

Marshall-Hall, Q.C., and *G. Lawrence*, for the respondent, were not called on.

RIGBY, L.J.—This is an appeal from a decision of Mr. Justice Farwell, and depends principally, if not altogether, on the construction of the Sales of Reversions Act, 1867. The construction of that Act has already been considered in this Court, and in *Aylesford (Earl)* v. *Morris*[3] Lord Selborne, L.C., considered it at very considerable length. I shall endeavour to consider it upon the same lines, but very much more summarily.

Now, first of all, the Act provides that "No purchase, made *bona fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue." To come within the meaning of the Act, such a purchase must be made *bona fide* and without fraud or unfair dealing. We have to consider what the law was at the time the Act was passed, and whether, or how far, it has been altered by the Act. As I understand it, the law was that in dealing with expectant heirs (and the plaintiff in this case comes within that description) all persons, whether they were moneylenders or not, were bound to shew, and had the onus thrown upon them of proving, the absence of fraud or unfair dealing. I do not consider that this Act of Parliament in the least alters that. It is incumbent now upon a person who has purchased a reversion to prove substantially that there was no fraud and that there was no unfair dealing, and then if he once establishes that the purchase comes within the Act and the sale is not to be set aside merely for undervalue.

Now the rule, which has always been the rule of the Court of Chancery, operated very hardly in certain cases. I will not attempt to go through all those cases, but this may be said to be a type of them: Where a father purchased a reversion from his son, and there was the most evident fair dealing; for instance, where the reversion had been carefully or in fact valued, where the fair dealing was undoubted, and the father might have been perfectly unwilling to purchase it, but bought it for the benefit of his son. If it turned out, as a matter of fact, that the reversion was undervalued—I do not mean by a mere nominal sum, but to such an amount that the Court looked upon it as material—all the fair dealing in the world was of no use, and the sale of the reversion was set aside; and I think I may say that in some cases the difference between a substantial and a really unsubstantial sum in the valuation was lost sight of, and there were hard cases where, because by accident or even by the fault entirely of the purchaser, the full, fair, and adequate value had not been given, the sale has been set aside. It was, I think, to meet those cases that this Act was passed. It is possible it might include other cases; but in all cases it is incumbent upon the purchaser, resisting an action to set aside the sale, to shew first of all that there was no fraud and no unfair dealing. I rely upon those words "unfair dealing."

Now, first of all, I consider that the very fact of an unfair, inadequate price having been given—not of a trifling inadequacy, but of a very substantial inadequacy—necessarily has to be considered on the question, Was the transaction without unfair dealing? I do not say you could always decide upon that fact that there was unfair dealing so as to take it out of the Act altogether, but certainly it is a very material consideration. The Courts always treated, and until a plain Act of Parliament is passed reversing the rule they always must treat, the seller of a reversion as being fettered and bound, so it is very difficult to establish that a transaction with him is quitefair.

Now let us look at the facts of this

(2) 2 App. Cas. 814.
(3) 42 L. J. Ch. 546; L. R. 8 Ch. 484.
(4) 40 L. J. Ch. 768; L. R. 6 Ch. 665.

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case. The whole of the evidence has not been read to us, but the correspondence has been read. It appears that the plaintiff is a gentleman of about thirty years of age. I do not consider the difference between twenty-one and thirty as for this purpose material. The man of twenty-one may know ten times as much of the world as the man of thirty. I can judge, as the defendant was able to judge, that the plaintiff is not really a clever man of business. He was of no occupation, he lived in London at a club (or made it his address, at any rate), and it was said he was occupied with polo, hunting, and such like things, and occasionally in buying and selling horses. We were asked to infer that he knew all about the world, or that he was in the ordinary sense a man of the world. I do not infer it at all; I find, at any rate, he was not a man of business. I find him writing to the trustees' solicitors to enquire as to the amount of jointure that he was to get—that is a very significant thing, and there are other circumstances. He went to the defendant Higgins to borrow 300*l.*, which, no doubt, he wanted to get as quickly and with as much secrecy as possible. The proposal at first was that he should have it if he got a surety; but the gentleman who was proposed as surety, though not in any way objected to on personal grounds, did not appear to Mr. Higgins to be pecuniarily in such a position that he would accept him as security. It turned out, however, that the plaintiff was entitled to a reversion under the marriage settlement of his father and mother, and the proposal for a loan was ultimately turned into a proposal for the purchase of a portion of that reversion. The plaintiff would become entitled to that reversion upon the death of his mother, a lady advanced in years at the time the transaction was concluded, she being seventy-two years old. I believe she is still living, or her death had not occurred at the time the action came on for trial. That was a capital security—as far as I can see it might be called a gilt-edged security—upon which a man might in easily conceivable circumstances borrow the money beneficially. There could be no doubt as to the nature and sufficiency of the security.

Now, although it is not proved, for the purpose of my judgment I feel bound to assume that the plaintiff knew all that he was doing, and that keeping him in the dark was not anything that Higgins could be charged with; but there are certain things that he might be and must be charged with. In the first place, he helped the plaintiff, by an ingenious letter addressed to the solicitor of the trustees of the settlement, to keep them ignorant of the fact that he was borrowing money. That is a material matter. Is it a fair transaction, not only to act when you know that the person coming to you for money is not going to those who would be in a position to explain the matter to him and to protect him, but actually to assist him in making out a story that would satisfy them and keep them entirely in the dark? I do not think it is. Then, in addition to the assignment, it appears to me material to take note of a collateral arrangement, part of the same bargain, but which counsel for the defendant contended had nothing to do with it. I think it has everything to do with it—it was part of the same transaction. That was an arrangement that the plaintiff might buy back the property that he was selling—the charge on the reversion—at 600*l.* if he did it within the short period of two months. Why 600*l.*? That was about the value of the share, though the defendant gave only 300*l.* for it. I infer from that that he knew the real value of the reversion, and that he did not tell this expectant heir its real value; and I think that is abundant evidence of unfair dealing, quite independently of the important fact that the price given was 300*l.*, and not the real value, 600*l.* Where a man deals with an expectant heir, assisting him to keep the transaction secret, buying from him the reversion at half price, allowing him to redeem only on the terms that he should pay somewhere about the real price—to call such a matter unfair is stating it very mildly. I do not see how it can be otherwise than unfair; and if so, the transaction does not come within the Act. The Act has no reference at all to such a case. I conceive that this is a very plain case, and that the purchase must be set aside. I

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have not heard any objection to the terms upon which Mr. Justice Farwell set aside the transaction, and the appeal must be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I agree. Before the passing of the Sales of Reversions Act, 1867, there can be no doubt that in every case in which there was a transaction of this sort—that is to say, a transaction in the nature of purchase or mortgage with the heir expectant to a reversion—the Courts, considering that the parties were not dealing on equal terms, and the weakness which might be presumed on the side of the heir expectant, used to throw upon the persons so dealing with the expectant heir and reversioner the onus of proving that the transaction was fair, and used, if that onus was not proved, to undo the transaction. Of course, one of the matters which had to be proved by the person who had dealt with the heir expectant was that the transaction was fair in point of price, and the result was that if he failed to prove that the price was an adequate price he had failed to remove the presumption of fraud, which was a rebuttable presumption, arising on the position and relation of the parties. Then this Act of Parliament was passed; and we have to consider what the law is as it is constituted since the passing of that Act of Parliament. The matter was much discussed in the case of *Aylesford (Earl)* v. *Morris*,[3] in which case Lord Selborne delivered the judgment of the Court. Lord Selborne, in speaking of the effect of the statute, says that the Act "is carefully limited to purchases 'made *bona fide* and without fraud or unfair dealing,' and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the *onus probandi* in those cases, which, according to the language of Lord Hardwicke, raise 'from the circumstances or the conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness'—a presumption of fraud." Now, that being the state of things, the onus, as I understand that judgment, is still thrown upon the person dealing with the heir expectant to rebut the presumption arising from the circumstances and conditions of the parties contracting, but it is no longer true that the mere proof of inadequacy of price will render it impossible for him to rebut that presumption, and the statute seems to me to shew what he must do in order to rebut the presumption. He must shew that the purchase was made *bona fide* and without fraud and without unfair dealing. Now so far as actual fraud in fact is concerned, I do not think that the learned Judge found that it existed here. But he found that the price was inadequate, and grossly inadequate. Although the mere fact of the price being grossly inadequate is undoubtedly a material element to take into consideration when dealing with the question whether the onus on the person dealing with the heir expectant has been satisfied—that is, the presumption of fraud has been rebutted—I doubt whether you can merely upon the ground of inadequacy of price since the statute say that the party has failed in the onus which has been cast upon him. But it is not necessary in this case to go that length. Although it may be that in this case there is no proof of fraud, that there is no proof of what Lord Selborne in *Aylesford (Earl)* v. *Morris*[3] refers to as a deceit or circumvention, yet the circumstances quite apart from the inadequate price, considered alone, do shew that there was "unfair dealing." Now what is there that you have to add to the grossly inadequate price here?—because, following the ruling of Lord Selborne, I take into consideration the grossly inadequate price, and I look to see whether there is anything else going to shew that there was "unfair dealing," by which I understand taking an unfair advantage of the weakness of the heir expectant or his desire to avoid publicity or anything of that sort. It seems to me that one only has to look at the correspondence to see it proved to demonstration that Mr. Higgins did take an unfair advantage of the weakness of Mr. Brenchley, because, it being proposed for the security of Mr. Higgins that a reference should be made

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to the solicitors for the trustees of the fund in respect of which Mr. Brenchley's reversion arose, he not only suggests to Mr. Brenchley that it is unnecessary for him to let those solicitors know that he is borrowing money or otherwise dealing with this reversion, but he positively suggests in a letter which was dictated by him the precise misrepresentation which should be put forward in order to keep those solicitors in the dark—I mean the suggestion that Mr. Brenchley should express a desire to know whether he could make any and what settlement in the event of his marriage.

Under those circumstances the conclusion of fact which I draw in this case is that it was the desire of Mr. Higgins, if he could, to prevent Mr. Brenchley getting professional advice. He, of course, knew that if the truth was told to the solicitors for the trustees it was extremely probable that professional advice would be proferred to Mr. Brenchley dissuading him from entering into that transaction. That being so, I will not go into the numerous other matters which seem to me to impeach the fairness of the transaction. But taking that alone, we have here—first, a desire on the part of Mr. Higgins to prevent Mr. Brenchley getting professional advice, actively supported by the suggestions and the dictated letter of Mr. Higgins himself; secondly, the gross inadequacy of price, which is no longer the mere gross inadequacy of price, because it is the gross inadequacy of price *plus* the unfair dealing of Higgins in thus seeking to prevent Brenchley taking professional advice, Brenchley being a man who, according to the doctrines to which I have already referred, was in such a position that he was under a weakness of which advantage might be taken.

Under those circumstances, without deciding that the inadequacy of price, although gross, if it had stood alone, would have been sufficient since the statute, it seems to me that if you take the inadequacy of price *plus* these other matters connected with the transaction, it is impossible to say that this was a purchase *bona fide* made without fraud and without unfair dealing.

ROMER, L.J.—I agree. Counsel for the appellant tried to persuade us to consider a purely academic question, whether since the Sales of Reversions Act, 1867, inadequacy of price, even though gross, would be sufficient in itself to upset the purchase of a reversion apart from all other considerations. It appears to me useless to argue such a point. You must of necessity consider some other circumstances of the purchase to some extent. For instance, it may well be that even gross inadequacy of price may not be sufficient in itself to upset the sale of a reversionary interest under some special and peculiar circumstances that one could imagine. Suppose, for example, a father having a reversion, wishing to give a son an advantage, sells it to the son for, say, half its real value, the father well knowing the value of the reversion and the son being perfectly innocent in the matter and not unduly persuading his father. Of course, in such a case as that you could not lay hold of the gross inadequacy of price and say that in itself is sufficient to enable the father to upset the sale as against the son. To see whether gross inadequacy of price would be sufficient to set aside a sale you must of course look at the general circumstances of the sale—between whom it was made and how it was brought about. Undoubtedly, to my mind, under many ordinary circumstances of the sales of reversions, gross inadequacy of price might in itself be sufficient to enable the Courts to conclude that the purchase was an unfair one as against the purchaser. In such a case the purchaser could not avail himself of the benefit of the Act, for the Act does not apply at all to purchases unless they were made *bona fide* and without fraud or unfair dealing, and in that case the purchaser could not avail himself of the protection of the Act, and the case would have to be dealt with by the Courts upon the ordinary principles of equity applicable to it.

Now in the present case it is sufficient to say that, looking at the unchallenged facts, the sale of this reversion at the price here given for it was under the circumstances unfair, to say the least. We need not consider whether it might not also be stigmatised as being, in the eyes of this

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BRENCHLEY *v.* HIGGINS, App.

Court of equity, a fraud. That being so, the purchaser here cannot avail himself of the protection of the Act. The Act does not apply at all, and therefore we have to consider the ordinary case of the sale of a reversion for a grossly inadequate price—an unconscionable sale and price—effected under circumstances in which it is clear a Court of equity will consider and hold such a purchase as this cannot for a moment stand.

I consider that when the admitted facts of this case are rightly understood, in the eyes of a Court of equity this case was practically unarguable.

Solicitors—Peacock & Goddard, agents for Moody & Woolley, Derby, for plaintiff; C. Perrott-Smith & Co., for defendant.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

COZENS-HARDY, J.
1901.
Aug. 1, 2, 10.

DIXON *v.* STEEL.

Mortgage—Surety—Right of Surety to Security given by Principal Debtor.

The right of a surety against the security given to the creditor by the principal debtor arises at the time of his becoming surety, and does not arise merely if, and when, he discharges the obligation of the principal debtor.

Dicta of PAGE-WOOD, V.C., *in* South *v.* Bloxham (34 L. J. Ch. 369; 2 H. & M. 457), *considered and explained.*

Adjourned summons.

By an indenture of mortgage dated January 12, 1894, John Dixon mortgaged a certain copyhold messuage or dwelling-house known as No. 9 Salem Street South, in the borough of Sunderland, to Thomas Steel to secure repayment of the principal sum of 225*l.* and interest.

By an indenture of mortgage dated March 20, 1896, Mary Anne Dixon, the wife of John Dixon, mortgaged certain messuages or dwelling-houses known as Nos. 26, 27, 28, and 29 Henry Street East, and Nos. 18, 19, 20, and 21 Back Henry Street East, in the borough of Sunderland, to Thomas Steel to secure repayment of the principal sum of 275*l.* and interest.

By an indenture dated August 5, 1896, and made between John Dixon of the first part, Mary Anne Dixon of the second part, and Thomas Steel of the third part, after reciting (*inter alia*) the indentures of mortgage of January 12, 1894, and March 20, 1896, respectively, and that John Dixon and Mary Anne Dixon had requested Thomas Steel to lend John Dixon the further sum of 500*l.*, it was witnessed that, in consideration of the sum of 500*l.* then lent and advanced to John Dixon by Thomas Steel (the receipt and payment of which sum John Dixon and Mary Anne Dixon did thereby respectively acknowledge), John Dixon and Mary Anne Dixon did thereby jointly and severally covenant with Thomas Steel for the repayment to him of the said sum of 500*l.* with interest; and it was further witnessed that John Dixon, as to the messuages or dwelling-houses comprised in the aforesaid indenture of mortgage of January 12, 1894, and Mary Anne Dixon, as to the messuages or dwelling-houses comprised in the aforesaid indenture of mortgage of March 20, 1896, thereby respectively covenanted with Thomas Steel that all the said messuages or dwelling-houses should respectively stand charged with the payment to the said Thomas Steel of the said sum of 500*l.* and interest thereon. And it was further witnessed that, for the consideration aforesaid, Mary Anne Dixon did thereby further mortgage the messuage or dwelling-house known as No. 15 Nicolson Street, in the borough of Sunderland, to the said Thomas Steel by way of further security for the repayment of the principal sums of 225*l.* and 275*l.*, secured respectively by the indenture of mortgage of January 12, 1894, and March 20, 1896, and of the principal sum of 500*l.*, together with interest thereon respectively.

The sum of 500*l.* with interest thereon, secured by the indenture of mortgage and further charge of August 5, 1896, was duly repaid to Thomas Steel prior to April 5, 1898; but no reconveyance had ever been made of the messuages or dwelling-houses comprised in the said indenture.

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DIXON *v.* STEEL.

On April 5, 1898, Thomas Steel consented to make a further advance of 500*l.* for the benefit of John Dixon. The money was actually advanced to Mary Anne Dixon; and it was agreed between the parties that the former indenture of mortgage and further charge of August 5, 1896, should stand as security for this new advance in order to save expense.

In pursuance of the above agreement, a letter in the following terms was signed by John Dixon and Mary Anne Dixon on April 20, 1898, and was handed to Thomas Steel: "We acknowledge to have received from Mr. Thomas Steel the sum of 500*l.*, and the same is to be considered as secured to him by the mortgage deed on our properties dated August 5, 1896, with interest as therein mentioned."

It was alleged by the plaintiff at the adjourned hearing of the summons, but denied by the defendants, that Mary Anne Dixon had become a party to the transaction embodied in the letter of April 20, 1898, only as a surety for John Dixon; and evidence was offered in support of either contention. His Lordship, however, was satisfied on the evidence that Mary Anne Dixon was a surety only.

By a judgment of the Queen's Bench Division of the High Court made in an action of *Dixon* v. *Steel*, on March 4, 1899, the defendants to the present summons became entitled to costs to be paid them by John Dixon, and such costs were taxed and allowed at the sum of 189*l.* 8*s.* 8*d.*, as appeared by the Taxing Master's certificate dated May 19, 1899.

By an order dated June 13, 1899, made in the action of *Dixon* v. *Steel*, a receiver was appointed of the rents, profits, and moneys receivable in respect of the interest of John Dixon in the messuage or dwelling-house No. 9 Salem Street, comprised in the indenture of mortgage of January 12, 1894.

Before this date the defendants had been informed that Mary Anne Dixon had been a surety only for her husband in the transaction of April 20, 1898.

By an indenture of transfer dated August 14, 1899, Thomas Steel transferred to the defendants the principal sums and interest secured respectively by the indentures of January 12, 1894, March 20, 1896, and August 5, 1896, and the benefit of all securities for the same.

By an order made by North, J., on December 2, 1899, on the application of the defendants, and intituled "In the Matter of . . . An Act to amend the law relating to Future Judgments, Statutes, and Recognizances, And in the Matter of John Dixon . . ." certain enquiries were directed to ascertain what was due to the defendants under the aforesaid judgment of March 4, 1899, what interest or interests in land of the said John Dixon had been delivered in execution by virtue of the aforesaid order of June 13, 1899; and whether there were any and what liens, charges, or incumbrances upon the said interest or interests in land, and what were their priorities.

By his certificate dated April 3, 1900, the Master found (*inter alia*) that the interest in land of John Dixon which had been delivered in execution by the appointment of a receiver thereof by virtue of the order of June 13, 1899, was an equity of redemption in the messuage or dwelling-house No. 9 Salem Street, and that the only liens, charges, or incumbrances affecting the said interest were the mortgages of January 12, 1894, and August 5, 1896, and the transfer of August 14, 1899; and that all such liens, charges, or incumbrances were created prior to the said order of June 13, 1899. He found, also, that Mary Anne Dixon claimed to be a party to the indenture of August 5, 1896, as surety only for John Dixon.

Pursuant to a number of subsequent orders, the messuage or dwelling-house No. 9 Salem Street was ultimately sold to a certain Thomas Stockdale for the sum of 375*l.*, and the latter was authorised to pay to the defendants, as transferees of the mortgage of January 12, 1894, the amount due on that mortgage.

The defendants had since received the balance of the purchase-money, amounting to 130*l.* 4*s.* 1*d.*, and claimed to apply it towards satisfaction of the sum of 189*l.* 8*s.* 8*d.*, due to them, as already mentioned, by virtue of the Taxing Master's certificate of May 19, 1899.

The plaintiff Mary Anne Dixon, however, claimed that the said balance should be applied towards payment of the moneys

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DIXON v. STEEL.

due to the defendants under the indenture of mortgage of August 5, 1896; and on March 22, 1901, she, by her agent, tendered to the defendants the amount due under the mortgage, less the said balance of 130*l.* 4*s.* 1*d.*

The defendants, however, refused the tender.

The present summons was thereupon issued by the plaintiff, asking for a declaration that the plaintiff had been discharged as a surety with respect to the amount secured by the indenture of further charge and mortgage of August 5, 1896, or, in the alternative, for a declaration that she had been discharged to the extent of the amount of 130*l.* 4*s.* 1*d.* The plaintiff claimed also that an account might be taken of what, if anything, was due under the two indentures of mortgage of March 20, 1896, and August 5, 1896, and that upon payment of the sum to be found due on taking such account, the defendants might be ordered to reconvey the premises comprised in and subject to the said indentures of mortgage to the plaintiff, or as she should direct, free of incumbrances.

Micklem, K.C., and *T. Douglas*, for the plaintiff.—Mrs. Dixon was surety only for her husband, and a surety is entitled to the benefit of the security given by the principal debtor. Hence Mrs. Dixon is entitled to claim that the balance of 130*l.* 4*s.* 1*d.* now in the hands of the defendants should be applied towards payment of the 500*l.* secured by the mortgage of August 5, 1896.

[They referred to *Arden* v. *Arden* [1885] [1] and *Rouse* v. *Bradford Banking Co.* [1894].[2]]

Martelli, for the defendants.—As to whether Mrs. Dixon was principal debtor or surety is purely a matter of fact; and the real question is, was it the husband or wife who actually received the money?—*Hudson* v. *Carmichael* [1854].[3]

[COZENS-HARDY, J.—That case was commented on in *Paget* v. *Paget* [1898].[4]]

Here the evidence goes to shew that Mrs. Dixon was a principal debtor, and not a surety at all. She cannot, accordingly, be entitled to the balance of 130*l.* 4*s.* 1*d.*

But even supposing that she were only a surety, yet the right of a surety to the security given by the principal debtor arises only if, and when, the surety pays the debt. Till such payment the right of the surety is inchoate only, and is liable to be displaced by or postponed to intervening equities—*South* v. *Bloxham* [1865],[5] *per* Page-Wood, V.C.: "Now what are the rights of a surety? His right arises as soon as he pays the debt due from his principal, and not before. Until such payment, the fact of a person having become surety for a mortgage debt in no way prevents the principal from dealing with the property by assigning it to a second mortgagee"—*Ferguson* v. *Gibson* [1872] [6] and *Toogood's Legacy Trusts, In re* [1889].[7]

Micklem, K.C., in reply.—The evidence shews that Mrs. Dixon was surety, not principal debtor; and it is immaterial whether the creditor knew of this, the true, relation between the two debtors at the time of his advance—*Overend, Gurney & Co., Lim.* (*Liquidators*) v. *Oriental Financial Corporation, Lim.* (*Liquidators*) [1874].[8]

It is not the fact that the right of a surety to the security given by the principal debtor accrues only on payment by him of the mortgage debt. Such a contention is completely disposed of by the decision in *Pearl* v. *Deacon* [1857],[9] the facts in which are practically identical with those in the present case. To the same effect is *Forbes* v. *Jackson* [1882],[10] and the note on *Rees* v. *Berrington* [1795] [11] in *White and Tudor's Equity Cases* (7th ed. 1897), vol. ii. p. 568.

[They referred also to *Green* v. *Wynn* [1869] [12] and *Taylor* v. *Bank of New South Wales* [1886].[13]] *Cur. adv. vult.*

(1) 54 L. J. Ch. 655; 29 Ch. D. 702.
(2) 63 L. J. Ch. 890; [1894] A.C. 586.
(3) 23 L. J. Ch. 893, 894; Kay, 613, 620.
(4) 67 L. J. Ch. 266; [1898] 1 Ch. 470.
(5) 34 L. J. Ch. 369, 372; 2 H. & M. 457, 463.
(6) 41 L. J. Ch. 640; L. R. 14 Eq. 379.
(7) 61 L. T. 19.
(8) L. R. 7 H.L. 348.
(9) 26 L. J. Ch. 761; 24 Beav. 186.
(10) 51 L. J. Ch. 690; 19 Ch. D. 615.
(11) 2 Ves. 540.
(12) 38 L. J. Ch. 220; L. R. 4 Ch. 204.
(13) 55 L. J. P.C. 47; 11 App. Cas. 596.

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DIXON *v.* STEEL.

Aug. 10. — COZENS-HARDY, J., after stating that, on the evidence, he was satisfied that Mrs. Dixon was only a surety for her husband, although the cheque was made payable to her, continued as follows: This case does not seem to present much difficulty. But it was urged by counsel for the defendants, in his very able argument, that, as the surety has paid nothing, her right has not arisen; and he relied upon some observations by Vice-Chancellor Page-Wood, in *South* v. *Bloxham*,[5] in support of this contention.

It is, therefore, necessary to consider what was decided in that case. [His Lordship stated the facts in that case at length, and read all the material parts of the judgment of Vice-Chancellor Page-Wood.] That case only decided that the surety was not entitled to tack to the security, as against a second mortgagee, costs incurred in resisting the creditor's claim, except so far as they were properly incurred for the benefit of the estate. It does not seem to me, accordingly, to have any bearing upon the present point; and the observations of Vice-Chancellor Page-Wood, relied on by counsel for the defendants, must be read with reference to the particular point with which the learned Vice-Chancellor was dealing. It certainly is not the law that a surety has no rights until he pays the debt due from his principal. I must therefore declare that the 130*l.* 4*s.* 1*d.* is to be taken in reduction of the 500*l.* mortgage debt.

I understand that the figures are agreed except as to this sum, and that a proper tender was made by the plaintiff.

The defendants, other than John Dixon, must pay the costs of the action.

Solicitors—Ward, Bowie & Co., agents for C. T. Stockdale, Sunderland, for plaintiff; Maples, Teesdale & Co., agents for Ranson, Nelson & Maling, Sunderland, for defendants.

[*Reported by J. E. Morris, Esq., Barrister-at-Law.*

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AFLALO *v.* LAWRENCE & BULLEN, LIM.

By clause 6 the directors undertook to supply an assistant to F. G. Aflalo, and that he should be entitled to pursue his literary work, in so far as it should not interfere with the due performance of his editorial duties. In pursuance of this agreement F. G. Aflalo contributed to the *Encyclopædia* a signed article entitled "Sea Fishing," and registered himself as proprietor of the copyright in the same. Shortly before the date of this agreement F. G. Aflalo arranged with the second plaintiff, Charles Henry Cook, who was well known under the *nom de plume* of "John Bickerdyke," that he should contribute certain signed articles on angling subjects to the *Encyclopædia*. The terms were set forth in a letter of June 2, 1896, from F. G. Aflalo to C. H. Cook as follows: "I am now requested by Messrs. Lawrence and Bullen to definitely ask you to undertake for their forthcoming *Encyclopædia of Sports and Pastimes* the following work. Of the angling article 5,000 words, and separate articles of 5,000 each on trout and pike. The former (angling) we should want in by the middle of July, the two latter will do later. The remuneration will be at the rate of 2*l.* per thousand, payable ordinarily when the work is passed for press, but if you prefer letting us have all the trout and pike articles in by August I understand the publishers will make no difficulty about paying for the whole by October. Will you see Senior about your share in the angling article, and also let us know if these terms are satisfactory?"

Pursuant to this arrangement, C. H. Cook contributed three articles on "Coarse Fish," "Pike," and "Trout" to the *Encyclopædia*, and the defendants published them therein. C. H. Cook was the registered proprietor of these three articles. In 1900 the defendants, without the knowledge or consent of the plaintiffs, published a book called *The Young Sportsman*, containing copies of each of the articles contributed by the plaintiffs respectively to the *Encyclopædia*. The plaintiffs objected, and by their action claimed an injunction to restrain the defendants from so doing, and damages. By their defence the defendants claimed to be the proprietors of the *Encyclopædia of Sport* and also of the copyright in the articles contributed by the plaintiffs, and said that it was an implied term of the agreement with Aflalo, and also of Cook's employment, that the copyright in the articles should belong to the defendants as proprietors of the *Encyclopædia*. The defendants counterclaimed for an order to expunge the entries of the plaintiffs as registered proprietors of the copyright in these articles.

Hughes, K.C., and *R. J. Parker*, for the plaintiffs.—It has been established for fifty years that the author of an article is entitled to the copyright therein as against the publisher, in the absence of any agreement, express or implied, that the publisher is to have it. This is specially so in the case of an encyclopædia where each article may have a value by itself—*Hereford (Bishop)* v. *Griffin* [1848].[1] It turns upon section 18 of the Copyright Act, 1842,[2] and the inference to be drawn

(1) 17 L. J. Ch. 210; 16 Sim. 190.

(2) The Copyright Act, 1842, s. 18, provides "That, when any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act. . . . Provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns."

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from the dealings between the parties whether these articles were composed on the terms that the copyright therein should belong to the publisher. The defendants may rely upon *Sweet* v. *Benning* [1855],[3] but that was the case of reports for a legal publication, which would be of no value published separately, and the case is capable of being reconciled with the plaintiffs' contention.

The other cases bearing upon the point are *Walter* v. *Howe* [1881][4] and *Lamb* v. *Evans* [1892].[5] In the latter case the principles to be applied in cases like the present were settled. The onus of proof is upon the publishers, as, *prima facie*, the author has the copyright in his own work.

Younger, *K.C.*, and *T. L. Gilmour*, for the defendants.—The inference can be drawn from the dealings between the parties that the copyright in these articles was to belong to the publishers. This work was costly, the plaintiffs were employed at a fixed payment, and the publishers never intended the articles in their forthcoming *Encyclopædia* to be separately published by the writers. The case is exactly within *Sweet* v. *Benning*,[3] and there are here also all the points which were considered to be sufficient in *Lamb* v. *Evans*[5] to enable the Court to draw the inference which we ask.

JOYCE, J.—In this case an Act of Parliament has to be construed. [His Lordship read the Copyright Act, 1842, s. 18.] It is perfectly true that in some cases, where there have been some special circumstances in the nature of the publication or of the terms of employment of the person engaged by the publisher, it has been held by the Court not to be necessary that it should be expressly provided in the agreement between the publisher and the author that the ownership of the copyright should belong to the publisher, and that it can be inferred from the special circumstances of the case that that was to be so.

Now, in the present case, there is no

(3) 24 L. J. C.P. 175; 16 C. B. 459.
(4) 50 L. J. Ch. 621; 17 Ch. D. 708.
(5) 62 L. J. Ch. 404; [1893] 1 Ch. 218.

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AFLALO *v.* LAWRENCE & BULLEN, LIM.

to the order which they ask. There will de an injunction and an enquiry as to damages.

Solicitors—Field, Roscoe & Co., for plaintiffs; Dixon, Elkin & Dixon, for defendants.

[*Reported by G. Macan, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
COLLINS, L.J.
ROMER, L.J.
1901.
Aug. 2.

HILDESHEIMER *v.* W. F. FAULKNER, LIM.

Copyright — Infringement — Penalty — Aggregate Sum — Minimum for Each Offence—Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *s.* 6.

In an action to recover penalties for several infringements of copyright under the Fine Arts Copyright Act, 1862, *s.* 6, *the Court can award a sum of money which in relation to each of the several offences may represent only a fractional part of the lowest coin in the realm as the penalty for each offence, and is not bound to award such a sum as will represent a farthing at the least in respect of each offence.*

Ellis *v.* Marshall & Son (64 L. J. Q.B. 757); Baschet *v.* London Illustrated Standard Co. (69 L. J. Ch. 35; [1900] 1 Ch. 73); *and* Nicholls *v.* Parker (17 Times L. R. 482) *overruled on this point; and the decision of the majority of the Court in* Green *v.* Irish Independent Co. ([1899] 1 Ir. R. 386) *dissented from.*

Each infringing copy constitutes a separate offence under section 6.

Beal, *Ex parte* (37 L. J. Q.B. 161; L. R. 3 Q.B. 387), *approved.*

Appeal from a decision of Kekewich, J.

This action was brought by the plaintiffs against the defendants for infringement of copyright in a series of small pictures, which were used as stiffeners for and sold with small packets of cigarettes. A large number of copies of the pictures were originally sold by the plaintiffs to the defendants at the rate of 2*s.* 6*d.* per 1,000 copies.

The defendants, acting in the *bona fide* belief that they had bought the copyright as well as the pictures, afterwards ordered 1,012,600 copies of another firm, who supplied them at 2*s.* per 1,000.

The infringement was established at the trial, and an enquiry ordered as to the number of copies bought in infringement. A summons was then taken out to fix the amount of the penalties. The plaintiffs claimed penalties at the rate of ½*d.* a copy, amounting in the whole to 1,054*l.* 15*s.* 10*d.*, the value of the copies at their own charges being 126*l.* 11*s.* 6*d.*

The lowest coin which the Coinage Act, 1870 (33 Vict. c. 10), directs to be coined is a farthing.

Kekewich, J., held that the plaintiff was entitled to a penalty for each copy circulated, and that this penalty must be some recognised actually existing sum, and not merely a sum which could be expressed in figures but did not represent any actually existing coin of the realm. He, therefore, felt obliged to fix the penalty at a farthing for each copy, though he would have been glad if he could have avoided coming to a conclusion which would give an extravagant amount for pictures which were of merely ephemeral value. He also stayed execution pending an appeal, on the terms of the defendants paying 200*l.* to the plaintiff, and paying the rest of the amount into Court.

The defendants appealed. They did not dispute that 200*l.* was a proper sum if the circulation of each copy constituted a distinct offence.

Warmington, K.C., and *A. J. Walter*, for the appellants.—There are two questions raised by this appeal—First, whether under the Fine Arts Copyright Act, 1862, s. 6,[1] the circulation of each copy con-

(1) Fine Arts Copyright Act, 1862, s. 6: "If the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or disposed of such

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stitutes a separate offence; and secondly, if so, whether the Court is bound to award a farthing at the least for each offence. We admit that *Beal, Ex parte* [1868],[2] decides the first point against us, and shews that the circulation of each copy constitutes a separate offence; but, assuming that decision to be correct, it does not follow that the Court cannot award a less sum than a farthing for each offence where one action is brought in respect of all the offences. The view taken by Kekewich, J., involves as a consequence that the smallest amount to be awarded under the Fine Arts Copyright Act, 1862, must vary according to the Coinage Act in force for the time being. It is suggested against us that this must be so, because execution cannot issue for a smaller sum than the lowest coin which is legal tender, but that does not apply where one action is brought in respect of all the penalties. It is enough if execution can issue in respect of the total sum awarded. The word "sum" can mean the fraction of a farthing. It appears from the *Century Dictionary* that up till 1854 half-farthings were coined and put in circulation, and there was also a smaller coin known as a "mite," which is

copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding 10*l.*; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright."

(2) 37 L J. Q.B. 161; L. R. 3 Q.B. 387.

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him to pay for such offence the penalty of 2*l.*, being a cumulative penalty at the rate of two shillings for each repetition, was held good under 19 Geo. 2. c. 21.]

RIGBY, L.J.—In this case it has been agreed that if we do not consider the plaintiffs entitled to the amount of penalties which has been given by the learned Judge, then they are to receive 200*l.*, and we are not under the obligation of considering what amount they are to receive. Now I am of opinion that we are not bound, and therefore, of course, that the learned Judge in the Court below was not bound to give the separate sums given by him so that there might be in each case, considered as it were separately, a sum recovered such as would be recovered if the action were on one case only. In my opinion there is no such necessity. The action is one for breach of copyright; the breach of copyright is admitted, and the question is what penalties should be given. And I am of opinion that it is not necessary in each instance to levy a sum which would be the proper sum if there were only one instance. I think that it is sufficient to say that we accept the agreed sum of 200*l.* as sufficient, and that we do not feel ourselves bound to go through the operation of summing up all the amounts which would be due in single actions if there were so many single actions brought. I think, therefore, that this appeal must be allowed.

COLLINS, L.J.—I am of the same opinion. The appellants here have no doubt technically brought themselves within section 6 of the Fine Arts Copyright Act, 1862, and they have become liable, as is now admitted, to a million penalties in respect of the distribution—distribution is the particular offence that they have committed—of a million copies of a copyright picture. It being admitted (subject to something I will say in a moment) that there are one million offences, and that one million penalties must be levied, the question is, at what rate per copy ought that penalty to be imposed. Now the words of the statute are these: "Such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding 10*l.*" And, to begin with, that leaves a discretion in the Court obviously between 10*l.* and something less; but it is said for the respondents that that must be "a sum," and that nothing is "a sum" which has not an equivalent in a coin of the realm. And it is therefore contended—and the learned Judge felt himself bound to give effect to that argument—that in assessing the sum payable in respect of each of these million copies, he was bound to assess it at not less than a farthing, in which case the aggregate of the million amounts to something over 1,000*l.* At the same time the learned Judge considered that on the merits of the matter, if he were at liberty to give effect to his view of them, the ultimate penalty—that is, the aggregate of all the million penalties—should not be more than 200*l.*—that is to say, that the penalty for each should not be more than a millionth part of 200*l.*, whatever fraction of a pound that would be. That was his view of what the penalty ought to be if he were at liberty to impose it; but he felt himself bound, as I understand, by authority, to assess it at a rate of not less than a farthing per copy.

Now, is there anything in the statute that obliges us to do what the learned Judge has considered to be a great injustice, and what certainly seems to me to be a very great injustice—namely, to mulct a man in 1,050*l.* when he ought to be mulcted in not more than 200*l.* Unless the statute obliges us to do it, it is something we should not be justified in doing. And we have the authority of Lord Esher in the case of *Tuck* v. *Priester*,[7] which counsel for the appellant cited in reply, to the effect that if there are two possible constructions in the case of a penalty, one which would mitigate, and the other which would aggravate the penalty, we ought to adopt that which is in favour of the smaller sum Now, why are we bound to say that by the word "sum" the Legislature intended necessarily a coin? It has not said so, and I do not see any reason or

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principle why it should mean it. In this particular case the action was brought not in respect of the distribution of one copyrighted picture—it was the case of a million. There was one judgment sought, and one sum recovered—that sum, no doubt necessarily being a sum arrived at by assessing so much as a penalty for each offence. But there was no question of having to levy more than one sum, and there was no necessity, therefore, so far as relates to levying and giving effect to the decision, to assess for each particular offence a sum which, if that offence had been the only one, would have been the subject-matter of an execution. It has been pointed out in a dissenting judgment of Lord Justice Fitzgibbon in *Green* v. *Irish Independent Co.*,[4] in the Court of Appeal in Ireland, that the only reason why a farthing is adopted generally speaking as the lowest measure of recoverable damages, is that a farthing is the lowest sum for which execution can issue, and I think at the present moment it is the lowest sum that is actually coined. But where there is no necessity to issue execution for that special sum, where is the necessity that the sum assessed as the proper sum for the penalty should be a coin? It seems to me that where execution is not contemplated or sought for, as the particular remedy in the particular case for the particular penalty, there is no reason in principle or common-sense why that penalty should not be measured as it ought to be—namely, by some relation to the offence, and not by reference to the possibility of levying execution, which is the only justification for doing it, where justice would require something less. In this case the only execution sought by the proceedings, and the only execution which could be had under the proceedings, would be in respect of the aggregate sum for which one judgment is given and one execution would issue. Is there anything in law to prevent us from saying that the proper penalty in this case is the one that the Judge thinks just—namely, a millionth part of the sum for which judgment is given? It seems to me that that is justice, and when I come to criticise the statute,

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penalty. We are not dependent on the fluctuating standard of the coinage of the country as to what sum we are to assess where we are bound to exercise our discretion in giving what we think right in a particular case. Why are we to be fettered by the arbitrary standard which may from time to time regulate the coinage of the country? I see no reason for it.

I think that the judgment of Mr. Justice Kekewich ought to be reversed. The learned Judge felt himself bound by authority, and I think he was right. He really did not give expression to his own view in his judgment, but he felt himself restrained by the authority of the Court of Appeal and also by the decision of another Judge of first instance; and in reversing his decision we are really giving effect to his own view.

ROMER, L.J.—I agree. I should have been sorry had we felt bound to affirm the decision of Mr. Justice Kekewich in this case, especially as in affirming it we should, as has been pointed out by Lord Justice Collins, be doing that which I think the Judge, if he had not felt himself fettered by authority, would have wished not to have done. If the respondents were correct in this case the act would certainly lead to very great and unnecessary hardship; for, in the first place, as was pointed out, in a case where the number of infringements was extremely large the Court might feel itself bound to award a sum in respect of penalties which would be obviously far beyond anything that in justice ought to be awarded, which indeed is the very case here; secondly, the judgment of the Court below would have done that which I think the Act of Parliament, according to its wording, has carefully refrained from doing—for example, the judgment puts a million farthings as the amount of penalty to be awarded, whereas, though the Act of Parliament does limit the maximum for each penalty, it appears to me to have taken great pains not to have specified a minimum; and thirdly, the construction put upon the Act in the Court below would have led to this curious result, that the minimum penalty to be awarded would fluctuate according to the coinage of the country. I think these reasons shew why, unless we are bound to do so, we should not put such a construction on the Act as is contended for by the respondents. In my view we are not bound to put such a construction on the Act.

I agree in two respects with the arguments on behalf of the respondents. I agree that the Legislature, in the Act in question here, did in favour of the owner of the copyright regard each infringing copy as constituting a separate offence. I also agree with the respondents that any judgment of this Court awarding a sum of money to be paid to a plaintiff or an applicant ought to be for a sum of money which is recognisable in this country, and which would be the proper subject of execution. But, going with them so far, why are we bound to give a sum beyond what we think just in a case like the present, where the action is brought for penalties in respect of several infringements? So long as the judgment obtained in this action is for a sum in respect of which execution can issue, is there anything that obliges the Court, in fixing the total amount of the penalties, to take care and see that the amount divided by the number of the offences must give to each offence a recognisable coin or coins, and must in no case give less than a farthing? I cannot see that there is anything in this Act of Parliament which compels us so to hold. It is noticeable, as has been pointed out, that the Act does not speak of any lowest limit to the amount of the penalty, nor does it speak of any coin to be awarded; it simply speaks of "a sum not exceeding 10*l.*" in respect of each offence.

I see no reason why for the purpose of a judgment in a case where there have been several infringements, the sum to be dealt with as a penalty in respect of each offence should not be some fraction of a recognised coin of the country. As I asked in the course of the argument, would a judgment for 100*l.* in an action where there had been thirteen infringements, be on the face of it bad? I think not. Nor do I think a judgment for 2*s.* 5*d.* where there had been a hundred

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offences would be on the face of it bad, if the Court, on consideration of the circumstances, came to the conclusion that that was, as distributed amongst the hundred offences, a proper amount to be awarded in respect of each offence. It is said that the Court has no power to do that, because, in this case, where the number of offences amounted to over one million, you must treat the case as one where there were a million actions brought—one in respect of each offence. I decline so to consider this action. It is not necessary for us to do so. It is then said the plaintiff might have brought a million actions or taken a million proceedings. I am not prepared to admit that. But if he did, it by no means follows that this Court would be bound to make a million separate judgments on those actions or applications. There would be means by which this Court could prevent such an abuse of the process of the Court. It appears to me that, so long as the plaintiff gets a judgment in right form, as he does in this case, there is nothing in this Act of Parliament which prevents us from awarding a proper sum in respect of several offences, though the amount awarded, as distributed among those offences, might not give a perfect coin, but only a fraction of a coin, in respect of each offence.

For these reasons I agree in thinking that this appeal succeeds. I ought to add that I am not even satisfied in this case (though my judgment does not proceed on that) that a farthing is the least coin recognised in this country.

Solicitors—Rehders & Higgs, for appellants; Cartwright & Cunningham, for respondent.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*

COZENS-HARDY, J. 1901. July 17, 19. Aug. 6.

FLEMING v. LOE.

Contract — Assignment — Vendor and Purchaser—Money Paid by Purchaser to Assignee — Rescission — Failure of Consideration—Money Had and Received.

Payments made by a purchaser, on account of moneys payable to the vendor under the contract, to a third person who is assignee of or interested in the vendor's contract can, on total failure of the consideration, be recovered by the purchaser in an action for money had and received to his use from such third person, though he was not a party to the contract.

Aberaman Ironworks v. Wickens (L. R. 4 Ch. 101) *distinguished and explained.*

By an agreement dated July 16, 1896, made between J. Neill and the defendant Loe, Neill agreed to sell and Loe agreed to purchase certain mining leases and claims in Western Africa for 42,500*l.*, payable partly in cash and partly in shares in a company to be formed. The vendor agreed to continue to work and develop the mines, and to comply with the obligations of the leases and the mining laws of the colony until November 1, 1896. The purchaser agreed to pay a monthly sum of 400*l.* towards the expenses incurred since January, 1896, and to be incurred in working and developing the mining properties. Upon completion of the purchase the vendor was to account for all moneys received by him in respect of these monthly payments and repay to the purchaser any unexpended balance remaining. November 4, 1896, was fixed for completion, and the agreement contained a clause giving the purchaser liberty to rescind if the vendor failed to show a title.

By an agreement dated July 18, 1896, Loe agreed to sell the same mining properties to Mackusick for 65,000*l.*, payable 500*l.* in cash and the residue partly in cash and partly in shares. This agreement contained similar clauses to the former agreement, except that the monthly sum to be paid by Mackusick was only 230*l.*, Loe continuing liable to pay the balance of 400*l.*

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FLEMING *v.* LOE.

Loe was known by all parties to be impecunious, and the plaintiff Fleming gave Mackusick a guarantee, dated July 16, 1896, in the following terms:

"Referring to the contract entered into by Mr. Loe with you for the sale to you of the Lombardy group of mines in West Africa, I hereby guarantee performance by Mr. Loe of the obligations by him to you under such contract."

Loe about the same time gave to Fleming the following document:

"In consideration of your having at my request guaranteed the performance by me of my contract with Mackusick for sale of the Lombardy group of mines I hereby undertake and agree to assign to you, or any person you may appoint, the contract made by me for purchase of such mines; which contract I now deposit with you; and also to assign to you or to any such person the contract between Mr. Mackusick and myself which I also deposit with you."

This document was not communicated to Mackusick.

Mackusick paid the 500*l.* payable in cash, and four monthly sums of 230*l.*, to Fleming's solicitors, as his agents and by his directions, Fleming claiming these payments on the ground that he had guaranteed and had to pay the 400*l.*

In July, 1897, Fleming brought an action against Loe and Mackusick for specific performance of the agreement of July 18, and damages. He sued as assignee of the contract.

Loe did not defend the action. Mackusick put in a defence that he had been induced to enter into the contract by misleading statements by Loe, and had repudiated the contract. He counterclaimed against both Loe and Fleming for repayment of the 500*l.* and the four sums of 230*l.* The case came on before Cozens-Hardy, J., in October, 1899, at which time the mining leases or claims had been determined or ceased to exist. Cozens-Hardy, J., gave judgment for specific performance, and ordered the counterclaim to stand over. This order was reversed on appeal, and the counterclaim and defence thereto were amended, and now came on for trial. Loe had died since action brought, and no personal representative had been appointed.

As amended, the counterclaim asked for payment by Fleming, as assignee of Loe's contract. The amended defence denied that the contract had ever been assigned to Fleming.

Upjohn, *K.C.*, and *D. D. Robertson*, for the defendant Mackusick.—The action for specific performance having been dismissed against Mackusick, he is entitled to be repaid the moneys which he paid to Fleming as assignee of the contract. Fleming himself gave the defendant notice to pay them to him as such assignee. An assignee of a contract takes subject to all the burdens—*Werderman* v. *Société General d'Electricité* [1881] [1] and *Aspden* v. *Seddon* [1876].[2]

[COZENS-HARDY, J., referred to *Rose* v. *Watson* [1864].[3]]

That case shews the defendant should have had a lien on the property as against Fleming, and it follows that he is liable to repay the money.

Aberaman Ironworks v. *Wickens* [1868] [4] will be cited against the defendant; but that case only decided that persons who had been paid by the vendor part of the purchase-money paid by the purchaser could not, when the contract failed, be sued in the old Court of Chancery for the money. That merely means there was no equity.

In this case the money was paid to Fleming for a consideration which wholly failed, and the defendant is entitled to get it back as money had and received to his use—*Moses* v. *Macferlan* [1760].[5] The defendant is also entitled to succeed on Fleming's guarantee. The obligation of Loe to repay this money was an obligation under his contract.

Eve, *K.C.*, and *Martelli*, for the plaintiff.—The right, if any, of a purchaser to return of a deposit or other money paid to the vendor is contractual only, and cannot affect the plaintiff, who was no party to the contract. *Aberaman Ironworks* v. *Wickens* [4] is conclusive on that point; and

(1) 19 Ch. D. 246.
(2) 46 L. J. Ex. 353; 1 Ex. D. 496.
(3) 33 L. J. Ch. 385; 10 H.L. C. 672.
(4) L. R. 4 Ch. 101.
(5) 2 Burr. 1005.

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Tasker v. *Small* [1837] [6] shews that persons not parties to the contract ought not even to be made parties to a suit for specific performance. The contract was never assigned to the plaintiff.

The plaintiff's guarantee covers only obligations under the contract. The obligation now insisted on by the defendant arises from the rescission of the contract, and he can only succeed on the ground of novation. But there was no contract or intention that the plaintiff should return these moneys. The agreement was that, as he and the defendant were both interested in the mining rights, they should share the cost of keeping them alive.

Upjohn, K.C., replied.

Cur. adv. vult.

Aug. 6. — COZENS-HARDY, J. (after stating the facts as above).—Mackusick now seeks to recover from Fleming the various sums paid by him under the contract. Fleming repudiates all liability, on the ground that he was not a party to the contract with Mackusick, and that Mackusick's only remedy is against Loe's representatives when constituted.

It is reasonably clear that Mackusick cannot claim anything under Fleming's guarantee. Nothing is due from Loe in respect of any obligation undertaken by him under the contract. Mackusick is not suing for breach of the contract.

But Mackusick alleges that the deposit and the several sums of 230*l.* were paid by him to Fleming as assignee of the contract, and not as agent of or on behalf of Loe, and that, although there was no contract of sale between him and Fleming, yet he is entitled to recover the money so paid on the ground of total failure of consideration. The facts are not really in dispute, although the inferences to be drawn from the facts are disputed.

Now it is plain that Mackusick only signed the agreement with Loe upon having Fleming's letter of guarantee, and that Mackusick was anxious that not a penny of his money should reach Loe's hands. [His Lordship then read certain letters from Fleming's solicitors requesting

(6) 7 L. J. Ch. 19; 3 Myl. & Cr. 63.

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BUCKLEY, J. 1901. July 24, 25, 26. } ATT.-GEN. *v.* ESHER LINOLEUM CO., LIM.

Highway—Obstruction—Public Footway—Private Carriage-way along Same Line—Presumption as to Extent of Public Right of Footway.

Where a public right of footway exists across land, and a certain amount of the surface of land lying along the course of the public footway is devoted to traffic, even if it be private traffic, the presumption is that the owner of the soil must be taken to have dedicated to the public so much of the surface as he has in fact devoted to traffic, even if it be private traffic.

The principle laid down in Grand Surrey Canal Co. *v.* Hall (9 L. J. C.P. 329; 1 Man. & G. 392, 406) *applied.*

Trial of action.

Action by the Attorney-General on the relation of the Urban District Council of Esher and the Dittons for an injunction to restrain the defendant company from committing any inclosure of or encroachment upon a strip of land alleged to be part of a public highway.

The strip of land in question, which was of rectangular shape, was situated in the parish of Esher, on the north side of the London and South-Western Railway main line, and ran from an arch under the railway on the east to the river Mole on the west. It was bounded on the north by fences and walls, including the wall of the defendants' mills, which were situate at the north-west end of the strip, and on the south by a post-and-rail fence erected at the foot of the railway embankment. The width of the strip varied from forty to fifty feet. The defendants were the owners of the soil of so much of the strip as was opposite their premises. At the north-west corner of the strip there was a footbridge across the river Mole, over which and along the strip to the arch there existed a public right of footway. A private carriage-way also existed along the strip from the arch to the mill gates.

In January, 1900, the defendants inclosed the greater portion of the strip opposite their premises with a wire fencing, leaving open a narrow footway leading to the bridge along and close to the south boundary wall of their premises. They alleged that the inclosed strip did not form part of the highway, although it had been used as a private carriage-way, and that the right of footway was confined to a well-defined track which ran along the footway left by them from the bridge to the mill gates, and then crossed the strip and continued along by the railway fence to the arch. On the other hand, the plaintiffs contended that the right of public footway was not confined to the pathway left by the defendants, but extended over the whole of the inclosed strip. The case only calls for a report on this point.

Macmorran, K.C., H. Terrell, K.C., and *E. S. Ford,* for the plaintiffs.—Where an ordinary highway runs between fences, one on each side, the passage which the public have along it extends *prima facie,* and unless there be evidence to the contrary, over the whole space between the fences. The public are entitled to the use of the entire space—*Reg.* v. *United Kingdom Electric Telegraph Co.* [1862].[1] Here the public right of footway extends to the whole of the area inclosed by the defendants.

Astbury, K.C., and *G. Henderson,* for the defendants.—There can be no such presumption as that contended for in the present case. The fence on the south of the strip was put up by the railway company, and the presumption is, therefore, that it was put up on their own land. There can, therefore, be no presumption that it was put up to bound the highway.

Macmorran, K.C., in reply.—There may be an occupation-way and a public highway over the same road—*Brownlow* v. *Tomlinson* [1840][2] and *Wells* v. *London, Tilbury, and Southend Railway* [1877].[3] Here there is nothing to distinguish the footway from the occupation-way. There is no apparent limitation of the public right, and therefore the presumption is that the public are entitled to go any-

(1) 31 L. J. M.C. 166; 3 F. & F. 73.
(2) 1 Man. & G. 484.
(3) 5 Ch. D. 126.

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where between the hedges—*Grand Surrey Canal Co.* v. *Hall* [1840].[4]

BUCKLEY, J., stated the facts and continued: The question I have to determine is a pure question of fact; but in determining that question I am bound to proceed upon certain legal presumptions, and I desire to state in the first instance what it appears to me those legal presumptions are. In the first place, I presume that the public right of footway existed before the private right of carriageway existed. In the second place, it seems to me that where you have a public right of footway across land, and you find a certain amount of surface of land lying along the course of the public footway devoted to traffic, even if it be private traffic, then *prima facie* the owner of the soil must be taken to have dedicated to the public so much of the surface as he has in point of fact devoted to traffic, even if it be private traffic.

In all these cases of rights of way it is necessary to remember that the thing to be established always is dedication, not user. A highway is not acquired by user. You cannot acquire a right of public way under the Prescription Acts. If you want to acquire a right by prescription you must go back to the time of Richard 2—to a time before legal memory. What you have to find is dedication. In most of these cases dedication is proved by user; but user is the evidence to prove dedication: it is not user, but dedication, which constitutes the highway. Therefore, what you have always to investigate is whether the owner of the soil did or did not dedicate certain land to the use of the public. Where you find a certain amount of land laid out for the purpose of carriage traffic, even though it be private carriage traffic, and there be along the same line a right of public footway, it seems to me that, in the absence of evidence to the contrary, I ought to presume that the landowner intended to dedicate, for the purpose of all traffic, and not private traffic only, so much as he devoted to traffic in fact. I have asked, and I am told that really there is little or no authority upon that question; it seems to

(4) 9 L. J. C.P. 329; 1 Man. & G. 392, 406.

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public as a footway of all the surface which he devoted to traffic going to the cottages.

[His Lordship then dealt with the facts, and came to the conclusion on the evidence that the plaintiffs had established a right of footway over the whole of the inclosed strip, and that they were entitled to succeed in the action.]

Solicitors—C. M. Barker, for plaintiffs; Wilson & Son, for defendants.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
COLLINS, L.J.
ROMER, L.J.
1901.
Aug. 2.

ANGLESEY (MARQUIS), *In re*; WILMOT *v.* GARDINER.

Administration—Debt to Tradesman—Claim for Interest—Course of Dealing—Evidence of Agreement.

In the administration of the estate of a deceased debtor a contract to pay interest on a tradesman's bill may be implied from the acts of the debtor in his lifetime, as, for instance, where bills had been sent in from time to time shewing that interest was being charged, and the debtor had never objected to the charge and had from time to time made payments on account generally.

Decision of COZENS-HARDY, J., *who followed* Lloyd Edwards, *In re*; Williams *v.* Trench (61 L. J. Ch. 22), *reversed.*

Appeal from a decision of Cozens-Hardy, J.

This action was brought for the administration of the estate of the late Marquis of Anglesey. Messrs. Skinner & Co., a firm of tailors, whom the testator had employed, brought in a claim for 3,318*l.* 5*s.* 3*d.*, of which 2,162*l.* 9*s.* 3*d.* was for goods delivered and 1,155*l.* 16*s.* was for interest on overdue accounts.

The executors disputed the claim for interest on the ground that there was no agreement for payment of interest. It appeared that during a period of ten years the claimants had delivered to the testator a yearly account, in which they had debited him with interest on sums which had been due to them for three years and longer, that the testator had never objected to the charge of interest, and that he had from time to time made payments on account generally.

The evidence filed in support of the claim consisted of an affidavit by a member of the firm, to which were exhibited some letters written to the firm by an agent who had for many years had the entire management of the testator's affairs. No evidence was filed in opposition to the claim.

Cozens-Hardy, J., was inclined to think that the course of dealing was sufficient evidence of an agreement to pay interest, but considered himself bound by the decision of Kekewich, J., in *Lloyd Edwards, In re; Williams* v. *Trench* [1891],[1] to decide against the claim for interest.

The claimants appealed.

Neville, K.C., and *R. J. Parker*, for the appellants.—A contract to pay interest may be implied from usage of trade or other circumstances—*Calton* v. *Bragg* [1812][2] and *Bruce* v. *Hunter* [1813].[3] In the present case bills were sent in from time to time during the debtor's lifetime, from which it appeared that interest was being charged, and the debtor made payments on account generally. This is enough to establish an implied contract. Cozens-Hardy, J., was in favour of the plaintiffs on the facts, but felt himself bound to decide against them on the authority of *Lloyd Edwards, In re; Williams* v. *Trench*[1]; but if that case decides that in the administration of the estate of a deceased debtor such a contract cannot be implied from the acts and admissions of the debtor in his lifetime, it was wrongly decided.

Eve, K.C., and *Ashworth James*, for the executors.—It is not denied that there is some evidence of an agreement, but it is

(1) 61 L. J. Ch. 22.
(2) 15 East, 223, 228.
(3) 3 Campb. 467.

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insufficient to establish the claim fo interest against the estate of a deceasec person.

RIGBY, L.J.—I think that there i evidence of an agreement to pay interes on the terms on which it was actuall charged—that is to say, not immediately but after the lapse of three years—an that the appellants are entitled to recove on that agreement.

COLLINS, L.J. — I am of the sam opinion. It is true that the claim i against the estate of a deceased person but I do not think that that is reall material in the sense that the fact of person being dead is generally material i such a case. It is not a question of some thing that he is alleged to have said o done, as to which there is no evidence a all, except the evidence of one livin person against the deceased person. It i a case where the evidence is the acts an admissions of the deceased person himsel These are facts as to which there is n dispute. The fact that the bills wer sent in, the fact that on those bills th claim for interest was made, and th fact that payments were made thereupon stand outside controversy altogether; an that being the case, what are those fact evidence of? That is a question for jury, and it could not be withdrawn fron a jury. It seems to me that the reason able inference from those facts is that th deceased dealt with the appellants on th footing that he was to pay interest afte three years.

ROMER, L.J.—I agree, and have nothin to add.

Appeal allowed, the appellants' cost in the Court of Appeal and in th Court below to be added to thei claim.

Solicitors—Maude & Tunnicliffe, for appellants Farrer & Co., for respondents.

[*Reported by A. Cordery, Esq Barrister-at-Law.*

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1,300*l.* on mortgage. The contract then proceeded as follows: "The vendor's title is accepted by the purchasers who undertake to pay all the costs of this transaction. The purchase is to be completed on or before the 24th day of January, 1901, when the purchasers will be let into possession of the rents; all outgoings to be apportioned on the day of completion."

There was no condition in the contract as to the forfeiture or return of the deposit. When the abstract of title was delivered it was discovered that the leases under which the property was held contained covenants—(*a*) not to erect upon any part of the ground demised by the leases any buildings besides those already erected without the licence of the lessor; (*b*) not to make any alteration in the structural plan or elevation of the premises nor in any of the principal or bearing walls or timbers without such licence as aforesaid; (*c*) not to carry on or permit upon the premises or any part thereof any trade or business, but to use the messuages strictly as private dwelling-houses and for private use and occupation only, and not to do or permit to be done any act or thing which might be or become a nuisance to the lessor or to the neighbourhood; (*d*) to deliver to the lessor or his solicitor an extract from all assignments of the property and to pay a fee of 10*s.* 6*d.* therewith, and also a proviso enabling the lessor to enter into possession of the premises on the breach of any of the covenants contained in the leases.

Prior to the signing of the contract the purchasers were not informed of the covenants contained in the leases and had no knowledge of their existence. Neither the leases nor copies nor abstracts thereof nor extracts therefrom were produced to the purchasers before they entered into the contract. The purchasers by their requisitions objected to the vendor's title on the ground that the leases contained various unusual covenants and obligations of which they had no notice when the contract was entered into, and they claimed the right to rescind the contract and a return of the deposit with interest at 4*l.* per cent.

The vendor declined to rescind the contract and to return the deposit, and this summons was thereupon taken out.

Stewart-Smith, for the purchasers.—The covenants in these leases are onerous covenants—*Midgley* v. *Smith* [1893].[1]

Acceptance of title means in the absence of any express stipulation acceptance of title to an ordinary lease—*Dart's Vendors and Purchasers* (6th ed), p. 496, and *Bousfield* v. *Hodges* [1863].[2]

It is the duty of the vendor to disclose anything affecting the subject-matter of the contract which is within his own knowledge and which is not known to the purchaser—*White and Smith's Contract, In re* [1896][3]—or at any rate to give the purchaser a reasonable opportunity of inspecting the leases for himself before the contract is signed—*Reeve* v. *Berridge* [1888].[4] The vendor has failed to perform his duty in this respect and cannot enforce the contract. The purchasers are entitled to the relief asked by the summons—*Hargreaves and Thompson's Contract, In re* [1886].[5]

Alexander, *K.C.*, and *E. Ford*, for the vendor.—The covenants in these leases are admittedly unusual covenants, but we rely on the stipulation that "the title of the vendor is accepted by the purchasers." The Court is asked on behalf of the purchasers to strike this out of the contract and to treat the contract as an open contract. The existence of the covenants in question constitutes an objection to title—*Davis and Cavey, In re* [1888],[6] *Higgins and Hitchman's Contract, In re* [1882],[7] and *White and Smith's Contract, In re*.[3] In that case there was a distinct misrepresentation that the premises were business premises, and the purchaser was held not bound for that reason. There has been no misrepresentation in the present case.

The existence of a restrictive covenant in respect of freeholds is regarded as a defect of title, and in this respect no distinction can be drawn between freeholds

(1) W. N. (1893), 120.
(2) 33 Beav. 90, 94.
(3) 65 L. J. Ch. 481; [1896] 1 Ch. 637.
(4) 57 L. J. Q.B. 265; 20 Q.B. D. 523.
(5) 56 L. J. Ch. 199; 32 Ch. D. 454.
(6) 58 L. J. Ch. 143; 40 Ch. D. 601.
(7) 51 L. J. Ch. 772; 21 Ch. D. 95.

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and leaseholds. The purchasers are bound by their contract to accept such title as the vendor has, and are precluded from raising any objection as to the covenants. The express stipulation here takes the case out of the general rule that the vendor is bound to disclose the state of his title—*Marsh's Purchase, In re* [1894].[8] The passage in *Dart on Vendors and Purchasers* which is relied on deals with a question of waiver of title after the contract was signed and the abstract delivered, which is a very different question.

But assuming that the purchasers are entitled to the declaration asked for as to the title, they cannot recover their deposit on this summons. They can only do so by an action challenging the validity of the contract—*Davis and Cavey, In re.*[6] The purchasers have repudiated the contract by not accepting the vendor's title, and could not recover the deposit even at law—*Hamand* v. *Best* [1879].[9] In that case there was a condition for forfeiture of the deposit. Here there is no such condition, but that makes no difference—*Howe* v. *Smith* [1884].[10]

Stewart-Smith, in reply.—In *Marsh's Purchase, In re*,[8] and also in *Davis and Cavey, In re*,[6] the purchasers respectively had contracted themselves out of the rule. As to the question of the return of the deposit, *Hargreaves and Thompson's Contract, In re*,[5] has been followed in *White and Smith's Contract, In re*,[3] and in *Marshall and Salt's Contract, In re* [1900].[11] In *Hamand* v. *Best*[9] there was an express stipulation that a particular blot on the title should not be investigated, and it was held that there had been no breach of it.

Cur. adv. vult.

Aug. 10.—BYRNE, J., read the following judgment: This is a purchaser's summons under the Vendor and Purchaser Act, 1874, asking in effect for a declaration that a good title has not been shewn and for a return of the deposit. Beyond certain matters which I do not think can be made the subject of decision on a vendor and purchaser summons, the substantial point raised by the applicants is that the property, which consists of ten leasehold houses, is subject to onerous and unusual covenants contained in the leases under which they are held, and to provisoes for re-entry on breach of any of the covenants. I am of opinion that the leases do contain covenants which in the absence of special stipulation or condition in the contract would entitle a purchaser to say that a good title has not been shewn, inasmuch as the applicants were not informed and did not know that the leases contained any unusual covenants, nor were they afforded any opportunity of seeing the leases prior to signing the contract.

It is, I think, now well established that, whether the sale be by private contract or public auction, it is the duty of the vendor to disclose the existence of onerous and unusual covenants contained in the leases of the leasehold property sold, or at least to afford the purchaser an opportunity of inspecting the leases—see *Reeve* v. *Berridge*[4] and *White and Smith's Contract, In re.*[3] Undoubtedly, also, a purchaser may bind himself by a contract to accept a bad title, as, for example, if he chooses to contract to take such a title as the vendor has. In the present case the contract, which is very short, runs as follows, omitting the more formal parts; it refers to the ten leasehold houses with sixty years unexpired, let to weekly tenants at sums therein mentioned, and after providing for the purchase-money and acknowledging the receipt of a deposit of 75*l.*, proceeds: "The vendor's title is accepted by the purchasers who undertake to pay all costs of this transaction. The purchase is to be completed on or before the 24th day of January, 1901, when the purchasers will be let into possession of the rents; all outgoings to be apportioned on the day of completion." The point is whether the stipulation that "the vendor's title is accepted by the purchasers" precludes them under the circumstances from insisting that a good title has not been shewn.

(8) 64 L. J. Ch. 255; *sub nom. National Provincial Bank of England and Marsh, In re*, [1895] 1 Ch. 190.
(9) 48 L. J. Ch. 503; 12 Ch. D. 1.
(10) 53 L. J. Ch. 1055; 27 Ch. D. 89.
(11) 69 L. J. Ch. 542; [1900] 2 Ch. 202.

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I am not aware that the effect of the precise words used in the present case has ever been the subject of decision, although there have been cases where the effect of somewhat similar words has been discussed. It appears to me that, starting with the proposition that the vendor is bound to disclose the existence of such onerous covenants as exist in the present case, or at least to afford the purchaser an opportunity of examining the lease for himself, it requires more than a condition couched in such general terms as in the present case to bind the purchaser to take the title. As was said in *Bousfield* v. *Hodges*,[2] "a purchaser is only bound by his acceptance of the title, so far as he is made cognisant of it, and that if anything is kept back by the vendor, he is not, as to that, bound by his acceptance"; and in the case of *Jenkins* v. *Hiles* [1802],[12] which was referred to in *Bousfield* v. *Hodges*,[2] Lord Eldon says: "Where the vendor is plaintiff, if the rule is founded in a principle of conscience, and requiring all possible security to be given to the purchaser, the Court will at least take care, that, where it is contended, that the defendant has waived his right to a reference, it shall be clear, that there was no surprise upon him, and that there has been a full and fair representation as to the title on the part of the plaintiff; not merely that representation, which a conscientious man would make after due diligence, but that, which a conscientiously diligent man would make. But, where from fraud or surprise on the part of the plaintiff there has been deficient information, the Court will take care, that a defendant shall never be surprised by the effect of a submission made upon want of full information." Lord Eldon was dealing there with a case of specific performance, but the same principles as to the necessity for full disclosure apply. I think the purchaser has a right to assume, when a condition in the terms of that under discussion is inserted, that the vendor has disclosed what it is his duty to disclose, and that the conditions must be read as precluding objection upon that footing. It appears to me that the purchasers in this case are entitled to succeed, and, although not without some hesitation, I think I may also, as in the case of *Hargreaves and Thompson's Contract, In re*,[5] order the return of the deposit with interest and the costs of investigation of title.

(12) 6 Ves. 646, 655.

Solicitors—J. Howard Smith, for purchasers; Emanuel & Simmonds, for vendor.

[*Reported by W. A. G. Woods, Esq., Barrister-at-Law.*

FARWELL, J. 1900. March 16, 17, 27. } MANCHESTER BREWERY CO. *v.* COOMBS.

Landlord and Tenant—Tied House—Lessee's Covenant to Buy Beer from Landlord and His Successors in Business and not Elsewhere—Assigns not Mentioned——Lease Executed by Lessee only—Sale of Landlord's Business — Enforcement of Covenant by Purchaser—Specific Performance—Yearly Tenancy.

A covenant by a tenant of a tied house that he "will at all times during his tenancy purchase from the landlords and their successors in business all beer, ale, porter, &c., whether sold or consumed on or off the demised premises, and that he will not at any time directly or indirectly sell or dispose of on the premises any beer, ale, &c., other than such as shall have been so bona fide purchased," is a covenant which will run with the land and be enforceable by the purchasers of the reversion and the landlords' brewery business, although the purchasers have at the time of action brought ceased to carry on such business at the original landlords' brewery.

Where an agreement for a yearly tenancy containing such a covenant has been executed by the lessee only, but the lessor or his assigns are in a position to compel the acceptance by the tenant of a duly executed lease, either of them can enforce performance of such a covenant, notwithstanding that the agreement is not a lease by deed within 32 Hen. 8. c. 34.

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MANCHESTER BREWERY CO. *v.* COOMBS.

Walsh *v.* Lonsdale (52 L. J. Ch. 2; 21 Ch. D. 9) *and* Swain *v.* Ayres (57 L. J. Q.B. 428; 21 Q.B. D. 289) *followed.*

Clayton *v.* Illingworth (10 Hare, 451) *distinguished.*

Semble, *such a covenant is a personal contract binding on the lessee, and the benefit of it could have been assigned in equity before the Judicature Act*, 1875, *and the assignees could sue upon it if there had been an absolute assignment thereof to them in writing signed by the assignor, of which express notice in writing had been given to the lessee.*

Trial of an action with witnesses for an injunction to restrain the defendant from committing any breach of a covenant to buy beer, &c., from the plaintiffs.

The facts were as follows: On December 10, 1892, the defendant executed under seal an agreement with Broadbents, Lim., therein called the "landlords," to take the Midland Hotel, Withington, as tenant from year to year from December 25, 1892, at the yearly rent of 400*l.*, and covenanted with the landlords (*inter alia*) that he would at all times during the tenancy purchase of Broadbents, Lim., or their successors in business all beer, ale, porter, stout, mineral waters, and cigars sold or consumed either on or off the premises, and would not at any time, directly or indirectly, sell and dispose of on the premises any beer, ale, porter, stout, mineral water, and cigars other than such as should have been so *bona fide* purchased. This document was executed by the defendant alone, and there was nothing on the face of it to shew that Broadbents were brewers, nor were there any words extending the phrase "the landlords" to the successors and assigns of Broadbents.

The defendant entered into possession of the Midland Hotel and occupied it under the agreement as tenant to Broadbents, who were, in fact, at the time carrying on business at the Steam Brewery in Manchester as brewers, wine and spirit merchants, cigar dealers, and mineral-water manufacturers, and ale and porter bottlers.

On March 29, 1899, Broadbents agreed to sell to the plaintiffs the Steam Brewery and the various tied houses belonging to them, including the Midland Hotel, and also (clause 26) the goodwill of their business, and "all other the property assets and effects (except money and securities for money) belonging to the vendors and used by them in connexion with the said business." The agreement for sale also included the goodwill, trade name, and trade marks of Broadbents. By two deeds, each dated June 24, 1899, the property comprised in the contract was conveyed to the plaintiffs, but there was no express conveyance of the goodwill or of the benefit of any tied-house covenants. Neither the agreement nor the conveyances contained any reference to the defendants' tenancy. On June 28, 1899, the plaintiffs sent by post a notice in writing to the defendant that they had taken over the business of Broadbents. This notice did not reach the defendant until the end of July, and in acknowledging the receipt of it he said, "This is the first official notice of the change in landlords." At that time the defendant was indebted to Broadbents in a considerable sum for goods supplied and also for rent. Broadbents ceased to carry on business from and after the month of June, 1899. The plaintiffs carried on at the Steam Brewery the brewery business formerly carried on there by Broadbents until Christmas, 1899, when they closed the Steam Brewery and removed the business to their own brewery about two miles off, where they had since carried it on. The plaintiffs also collected Broadbents' book debts for them. The defendant purchased ale and beer, &c., from the plaintiffs until November 29, 1899, when he ceased to do so and began to purchase them elsewhere. On January 20, 1900, the plaintiffs commenced this action to restrain the defendant from committing a breach of his covenant. In his defence the defendant alleged that the plaintiffs supplied him with bad and absolutely unmarketable beer, and he maintained that the covenant in question was personal to the original landlords and that the tenant was only bound to take beer brewed in their brewery either by them or their successors in the business, and further that the plaintiffs could not maintain any action on the covenant in question because the original landlords, through

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whom they claimed as assigns, had not executed the agreement.

At the trial the defendant adduced evidence to prove that the beer was bad, but his Lordship ultimately held that the defendant had failed to substantiate this allegation. On the other two points raised in defence the following arguments and judgment were given. The evidence given at the trial with reference to the relationship of landlord and tenant existing between the plaintiffs and defendant sufficiently appears from the following judgment.

E. H. Carson, Q.C., *Hughes, Q.C.*, and *O. L. Clare*, for the plaintiffs.—This is not a personal covenant, and the plaintiffs are entitled to enforce it. These premises were let for a particular user in a particular way, and a covenant of this kind is appurtenant to the thing demised, so that even without mention of the word "assigns" the assignees of the reversion can enforce the covenant—*Clegg* v. *Hands* [1890],[1] *White* v. *Southend Hotel Co.* [1897],[2] *Fleetwood* v. *Hull* [1889],[3] and *Friary Holroyd* v. *Singleton* [1899].[4] *Doe* v. *Reid* [1830],[5] which will be cited by the other side, was a special case and laid down no general principle. The plaintiffs also rely upon section 10 of the Conveyancing and Law of Property Act, 1881.

Younger, Q.C., and *Dodson*, for the defendant.—On the questions of law the plaintiffs cannot succeed. This covenant was personal to Broadbents and their successors carrying on business at that particular brewery, and is not enforceable by the plaintiffs, because there is no mention of "assigns" in the covenant. *Clegg* v. *Hands*[1] is distinguishable because there "assigns" were expressly mentioned in the covenant, and there was an assignment of the house in question with the benefit of the covenant. That was not so in this case. The plaintiffs are not even the successors to Broadbents' business; they are carrying on business elsewhere and cannot sue—*Birmingham Breweries, Lim.* v. *Jameson* [1898][6] and *Doe* v. *Reid*.[5]

(1) 59 L. J. Ch. 477; 44 Ch. D. 503.
(2) 66 L. J. Ch. 387; [1897] 1 Ch. 767.
(3) 58 L. J. Q.B. 341; 23 Q.B. D. 35.
(4) 68 L. J. Ch. 13, 622; [1899] 2 Ch. 261.
(5) 8 L. J. (o.s.) K.B. 328; 10 B. & C. 849.
(6) 67 L. J. Ch. 403.

Moreover, the agreement of December 10, 1892, was not executed by Broadbents, and is therefore not a lease. The plaintiffs must derive their right to sue from the statute 32 Hen. 8. c. 34; they have no right to sue at common law or apart from that statute. But in order to avail themselves of the statute, the lease under which they claim must be under seal—*Standen* v. *Chrismas* [1847],[7] *Cardwell* v. *Lucas* [1836],[8] *Soprani* v. *Skurro* [1602],[9] and *Rose* v. *Poulton* [1831].[10]

[FARWELL, J.—Is not *Morton* v. *Woods* [1869][11] against the defendant?]

That was a case of estoppel, and does not apply here, where the question is, Can the plaintiffs sue upon the covenant? This is not a question of equity but of strict common law. The authorities shew that such a covenant is unenforceable unless there is a lease under seal—*Pitman* v. *Woodbury* [1848][12] and *Swatman* v. *Ambler* [1852].[13]

[FARWELL, J.—But is not the relationship between the parties in reality that of landlord and tenant?—*Smith* v. *Egginton* [1874][14] and *Cornish* v. *Stubbs* [1870].[15] The plaintiffs are in a position to obtain specific performance of this agreement and compel the acceptance of a duly executed lease, and then sue.]

There was nothing in the way of payment of rent until repudiation. The plaintiffs might not have succeeded in obtaining specific performance of this agreement. Section 5 of the Conveyancing and Law of Property Act, 1892, extending the meaning of "lease" so as to include "an agreement for a lease where the lessee has become entitled to have his lease granted," only applies to section 14 of the Act of 1881 and not to section 10 of that Act, which section therefore does not give to the plaintiffs, as assignees of the reversion, the benefit of the lessee's covenants.

Hughes, Q.C., in reply.—The plaintiffs

(7) 16 L. J. Q.B. 265; 10 Q.B. 135.
(8) 6 L. J. Ex. 52; 2 M. & W. 111.
(9) Yelv. 19.
(10) 1 L. J. K.B. 5; 2 B. & Ad. 822.
(11) 38 L. J. Q.B. 81; L. R. 4 Q.B. 293.
(12) 3 Ex. 4.
(13) 22 L. J. Ex. 81; 8 Ex. 72.
(14) 43 L. J. C.P. 140; L. R. 9 C.P. 145.
(15) 39 L. J. C.P. 202; L. R. 5 C.P. 334.

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rely on *Walsh* v. *Lonsdale* [1882].[16] This is an agreement for a lease under which possession has been given, and that decision applies here. The plaintiffs are in a position to compel the defendant to accept a duly executed lease—*Swain* v. *Ayres* [1888].[17] Moreover, the plaintiffs are entitled to enforce this covenant because they are persons entitled, subject to the term, to the income of the landlord within the meaning of section 10 of the Conveyancing and Law of Property Act, 1881. By virtue of section 58 of that Act this is a covenant expressly made with the assigns of the lessor.

March 27.—FARWELL, J., after reviewing the evidence and coming to the conclusion that the defendant had failed to establish his contention that the beer was bad, continued: The defence on the facts having failed, the defendant relies on two points of law. He contends that the agreement is a personal contract and is confined to beer and ale brewed at the particular brewery either by Broadbents or their successors, and he relies on the fact that there are no words referring to assigns in the covenant. The covenant is to purchase from the landlords trading as Broadbents, Lim., and their successors in business, all beer, ale, porter, stout, mineral waters, and cigars. True it is that Broadbents were brewers, but they were not manufacturers of mineral waters or cigars; there is nothing on the face of the agreement to shew that they were brewers, and, even if there were, there is nothing to shew that the beer, &c., to be taken by the defendant was beer to be brewed by them. In fact, part of the beer supplied to the defendant under the agreement at his request has been Bass. The question is one of construction—see *Clegg* v. *Hands*[1] and *White* v. *Southend Hotel Co.*[2] In the case of *Doe* v. *Reid*,[5] relied on by the defendant, the form of covenant shewed that the beer to be taken was beer to be brewed by the covenantees—see p. 851—and the observation of Mr. Justice Bayley, at p. 857, must be taken *propter subjectam materiam*, and not as an enunciation of a general rule.

(16) 52 L. J. Ch. 2; 21 Ch. D. 9.
(17) 57 L. J. Q.B. 428; 21 Q.B. D. 289.

Birmingham Breweries, Lim. v. *Jameson*,[6] the other case relied on by the defendant, is really in the plaintiffs' favour, for the Master of the Rolls expressly says that the difficulty in that case was created by the severance of the business from the reversion, and that when the business and the reversion remain together there is no difficulty. In the case before me the plaintiffs are undoubtedly the successors in business of Broadbents, Lim., and as such are within the very words of the covenant. The defendant has, in fact, contracted to deal with the persons who purchase the business from Broadbents, not from persons who brew beer at the same brewery as Broadbents. On this point, therefore, the defendant also fails.

The last point taken by the defendant's counsel rests on the fact that the agreement of December 10, 1892, was not executed by the landlords. Having regard to the construction that I have put on the covenant, it could not be contended that it is not of such a nature as to run with the land. But it is said that in order to arrive at the conclusion that it does run with the land, the Court must first find that an estate has been duly created at law in the land with which the covenant can run, or, in other words, that there must be privity of estate between lessor and lessee, and that such estate can only be created by deed duly executed by the lessor, and that this is borne out by 32 Hen. 8. c. 34, which applies only to leases by deed. This is undoubtedly sound—for example, it has been held that a lease by mortgagor and mortgagee in which the covenants to repair were with the mortgagor and his assigns did not enable an assign of the mortgagee to maintain an action on the covenant—*Webb* v. *Russell* [1789].[18] Lord Kenyon there says: "It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties. But here Stokes (the mortgagor) had no interest in the land of which a Court of law could take notice; though he had an equity of redemption, an interest which a Court of equity would take notice of." And in *Standen* v. *Chrismas*[7] it was held that the statute

(18) 3 Term Rep. 393.

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of Henry 8 applied to leases by deed only, and that when the lease was not under seal the assignee of the reversion could not maintain *assumpsit* on the contract against the lessee for failure to repair. The reason is obvious. If the contract was regarded as personal, the right to sue on it was not assignable at law, and as it was not by deed there was no estate in which the right to sue could be inherent. The law is stated with great lucidity by Chief Justice Wilde in *Bickford* v. *Parsons* [1848],[19] when he says, "It was well said by Shepherd, *arguendo*, in *Webb* v. *Russell*,[18] that 'There are three relations at common law, which may exist between the lessor and the lessee and their respective assignees: first, *privity of contract*, which is created by the contract itself, and subsists for ever between the lessor and lessee: secondly, *privity of estate*, which subsists between the lessee, or his assignee in possession of the estate, and the assignee of the reversioner: and thirdly, *privity of contract and estate*, which both exist where the term and the reversion remain in the original covenantors.' The statute 32 Hen. 8. c. 34 seems to have created a fourth relation, *a privity of contract in respect of the estate*, as between the assignees of the reversion and the lessees or their assignees. The statute annexes, or rather creates, a privity of contract between those who have privity of estate; and, when the one fails, the other fails with it. At common law, the covenant did not pass by an assignment of the reversion, for, it was a mere personal contract." If, therefore, the plaintiffs had been suing in covenant or in *assumpsit* on contract before the Judicature Acts, I think they would have failed. But it by no means follows that the plaintiffs would have failed in every form of action, even before the Judicature Acts; still less that they must fail now. Before the Judicature Acts the plaintiffs might have succeeded if they had sued on the new contract implied from the conduct of the tenant and the assignee of the landlord, instead of suing on the original contract between the tenant and the landlord. I take the law as stated by Mr. Justice Willes in *Cornish* v. *Stubbs*.[15] He says: "If the letting had been by deed, there would have been no doubt about the defendant being bound, because the statute of Henry 8 would have passed the obligation of the contract to him as assignee of the reversion; and it has been established, and was laid down very clearly, though not, perhaps, for the first time, in *Buckworth* v. *Simpson* [1835],[20] that stipulations pass to successors in the case of yearly tenancies also, when rent has been paid either by the successor of the tenant to the landlord, or by the tenant to the successor of the landlord, and received without objection—that a jury, in fact, may infer from such payment, and from the fact of notice to quit not being given, a consent to go on, on the same terms as before; and a conventional law is thus made equivalent to that of Henry 8 in the case of leases under seal. In this case, therefore, there was abundant evidence that the defendant was in the same position as his father would have been." In this case the defendant, on receiving the notice of June 28, 1899, writes on July 29: "This is the first official notice I have received of the change in landlords." From early in August the defendant carried on negotiations for three months or so with respect to the terms on which he should give up his tenancy; between August and November the plaintiffs' manager applied to him repeatedly for rent; and on November 13 the defendant writes: "If it is a question of your rent, you can have it when you want"; and when a distress for rent was put in on November 15 the defendant paid it out; and although he says it was under protest, this comes to nothing, for he was clearly liable, and he has recognised his liability by not bringing any action for illegal distress. I find, therefore, as a fact, that the defendant agreed that the plaintiffs should occupy the position of landlord to him in the same way that Broadbents had done. There is, however, another point which is fatal to the defendant. The defendant holds under an agreement for a lease from Broadbents, under which he has been in possession and paid rent for several years. The whole contract has been performed up to

(19) 17 L. J. C.P. 192; 5 C. B. 920.

(20) 4 L. J. Ex. 104; 1 Cr. M. & R. 834.

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the present time, except that the legal estate has not been actually demised. The defendant would have no defence to an action for specific performance, the sole object of which would be to compel him to accept the legal estate. If Broadbents had not parted with the legal estate I see no reason why they should not now execute the deed, in order to complete the transaction. The present plaintiffs are the assigns of the benefit of the agreement, both by implication from the conveyance of the land subject to the lease and by the express words of clause 26 of the agreement of March 29, 1899. The plaintiffs could therefore obtain specific performance in this Court of the contract so far as it is incomplete. In saying this I do not forget that this is a yearly tenancy only, and that Vice-Chancellor Wood in *Clayton* v. *Illingworth* [1853] [21] refused to grant specific performance of a tenancy from year to year; but the reasons given by the Vice-Chancellor are inapplicable to the present case. He said there was nothing to shew in that case that there was to be any lease under seal at all; here the tenant executes under seal. He said that equity interposes to grant specific performance in cases where the legal remedy is inadequate, and that there was nothing in the case before him to shew why the remedy at law would not be adequate. Here the defendant's whole contention rests on the ground that the plaintiffs have no legal remedy, and the grant of specific performance is necessary to give them their full rights. It is well settled that the assign of one of the parties to a contract can obtain specific performance of that contract against the other contracting party; and although it is usually necessary in such an action to make the assignor a party, I do not think that it is essential in a case like the present, where the sub-contract is no longer *in fieri*, and there are no equities between the parties to the original contract and no suggestion of any reason for making the original contractor a party. The managing director of Broadbents was called as a witness, and no question was put to him suggesting any reason for Broadbents being made parties. Holding, therefore, as I do, that the parties could obtain specific performance against the defendant, I find it laid down by the Court of Appeal that since the Judicature Act there are not in such a case as this two estates as there were formerly, one at common law by reason of the payment of the rent, and another in equity under the agreement. But the tenant holds under the same terms, and has the same rights and liabilities as if a lease had been granted—*Walsh* v. *Lonsdale*,[16] approved by Lord Justice Cotton in *Lowther* v. *Heaver* [1889],[22] and explained by Lord Esher in *Swain* v. *Ayres* [17] and *Foster* v. *Reeves* [1892].[23] Although it has been suggested that the decision in *Walsh* v. *Lonsdale* [16] takes away all differences between the legal and the equitable estate, it, of course, does nothing of the sort, and the limits of its applicability are really somewhat narrow. It applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which such contract relates. It involves two questions—first, Is there a contract of which specific performance can be obtained? Secondly, If yes, will the title acquired by such specific performance justify at law the act complained of, or support at law the action in question? It is to be treated as though before the Judicature Acts there had been, first, a suit in equity for specific performance, and then an action at law between the same parties, and the doctrine is applicable only in those cases where specific performance can be obtained between the same parties in the same Court, and at the same time as the subsequent legal question falls to be determined. Thus in *Walsh* v. *Lonsdale* [16] the landlord under an agreement for a lease for a term of seven years distrained. Distress is a legal remedy and depends on the existence at law of the relation of landlord and tenant, but the agreement between the same parties if specifically enforced created that relationship. It was clear that such an agreement would be enforced in the same Court and between the same parties; the act of distress was therefore held to be

(21) 10 Hare, 451.

(22) 58 L. J. Ch. 482, 485; 41 Ch. D. 248, 264.

(23) 61 L. J. Q.B. 763; [1892] 2 Q.B. 255.

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lawful. So in the present case I have already stated that specific performance can be granted between the parties to this suit. I must treat it, therefore, as granted, and I then find that the result justifies this action. It is not necessary to call in aid this doctrine in matters that are purely equitable. Its existence is due entirely to the divergence of legal and equitable rights between the same parties, nor does it affect the rights of third persons. Thus a contract by a landowner to sell the fee-simple of land in possession to A would not enable A to maintain an action of ejectment or trespass against a third person, because such actions are purely legal actions, requiring the legal estate and possession respectively to support them, and the contract relied on is not made with the defendant. The case of *Friary Holroyd* v. *Singleton* [4] turned on the construction of the word "assigns." In that case the plaintiffs had a contract to buy from the lessor a public-house subject to a lease, which contained a covenant to sell the freehold at a certain price, on six months' notice being given by the lessor, his executors, administrators, or assigns. The only notice given was given by the plaintiffs, and it was held that they were not "assigns" within the meaning of the clause. *Walsh* v. *Lonsdale* [16] was cited, but Lord Justice Romer held that it had no application. The real point was that the notice was given by the wrong person, that such notice was a condition precedent, and the objection would have been just as fatal if the action had been brought in the name of the original landlord. The reversal in the Court of Appeal turned on a question of fact only. I hold, therefore, on this point that the plaintiffs, being clearly entitled in this Court against the defendant to a specific performance of the agreement under which the defendant has been for years and still is in possession of the land can sue him on the covenants in the same manner as they could have done if Broadbents had actually executed the original lease. There are two other points to which I will refer, although I do not propose to rest my decision upon either of them. It is said that section 10 of the Conveyancing Act enables the plaintiffs to sue. Unless they can do so on the ground last stated (as to which I would refer to *Swain* v. *Ayres* [17]) I should feel some difficulty in so holding. The word "lease" in section 14 has been held not to include an agreement for a lease, and section 18, sub-section 17, expressly contrasts "lease" and "agreement for a lease." There are considerable difficulties in construing the section, and I express no final opinion upon it. The last point is this—the covenants in the original agreement by the defendant were personal contracts binding on him, on which he could have been sued at law in the name of Broadbents, Lim., after the assignment to the plaintiffs—see *Bickford* v. *Parsons*.[19] Since the Judicature Act, 1875, the right to sue on those covenants is a *chose in action* within section 25, sub-section 6. The term *chose in action* in that section has been said in the Privy Council—*King* v. *Victoria Insurance Co.* [1896] [24]—to include all "rights the assignment of which a Court of law or equity would before the Act have considered lawful." I adopt this definition, and I hold that the benefit of these covenants could undoubtedly have been assigned in equity before the Act. The plaintiffs could, therefore, sue in respect of these covenants, if there had been an absolute assignment thereof to them in writing signed by the assignor, of which express notice in writing had been given to the defendant. I express no further opinion on this as it has not been argued, and it may be that no sufficient notice has been given. The result is that I grant the injunction as asked, and order the defendant to pay the costs of the action.

Solicitors—Chester, Broome & Co., agents for Farrar & Co., Manchester, for plaintiffs; Pritchard, Englefield & Co., agents for Mann & Rooke, Manchester, for defendant.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

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(24) 65 L. J. P.C. 38, 40; [1896] A.C. 250, 254.

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COZENS-HARDY, J. 1901. Aug. 6, 8. } MAGDALEN COLLEGE, OXFORD, *In re.*

Compulsory Purchase—Costs—Brokerage—Payment Out to Person Absolutely Entitled—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 80.

Where an interim investment in stock has been made of moneys paid into Court under the Lands Clauses Act, and a person absolutely entitled petitions for payment out, the company or party who paid the money in must pay the brokerage on sale of the investments.

Petition by Magdalen College, Oxford, for the sale of a sum of 8,755*l.* Midland Railway debenture stock, in which moneys, paid in by the London County Council for purchase of lands of the college under the Lands Clauses Act, had been invested by order of the Court; and for the sale of a sum of 4,438*l.* New Consols, in which moneys paid in by the London School Board in the same manner had been so invested; and for payment of the proceeds to the Board of Agriculture in order that the same might be invested with other moneys belonging to the college in the hands of the Board in the purchase of lands.

The only question raised in the petition was whether the Council and Board ought to pay the costs of brokerage upon the sale of the stocks.

Vernon Smith, *K.C.*, and *Borthwick*, for Magdalen College.

F. Thompson, for the London County Council.—Brokerage has been paid where the money is reinvested by the Court, because section 80 of the Lands Clauses Consolidation Act, 1845, directs payment of the costs of the investment and the reinvestment of the moneys, "and of all proceedings relating thereto." But the only direction in that section applicable to moneys paid out to a person absolutely entitled is "the costs of obtaining the proper orders . . . for the payment out of Court of such moneys or of the securities whereon the same shall be invested." Payment out of Court of securities must mean transfer. There is no authority for payment of brokerage in case of payment out.

C. T. Mitchell, for the London School Board.

Vernon Smith, *K.C.*, in reply.—Payment out of securities is an inapt word for transfer. It is admitted that if the petitioners had put the Council and Board to all the expense of investing in land they must have paid the brokerage. It is unreasonable that they should lose the brokerage because they have adopted the much less burdensome course of asking for payment to the Board of Agriculture.

[COZENS-HARDY, J.—I think the practice must be settled. I will have enquiry made in the Registrar's office.]

Aug. 8.—COZENS-HARDY, J.—The only question on this petition was whether the parties who paid the money into Court were bound to pay the brokerage on sale of the interim investments for the purpose of paying out the money. I expressed some surprise that a point of this kind should be still open. I have caused enquiries to be made of the Registrars, and am told that the distinction taken by counsel for the County Council has never been, so far as they know, raised before; and in practice the brokerage has in all cases been treated as part of the costs and paid by the party who paid the money in. And though there is no direct authority, the practice seems to me to be right. Section 69 of the Lands Clauses Consolidation Act provides several ways in which the money paid into Court may be applied. Now it has been settled long ago that in cases where there has been an interim investment in securities, and the money is required to be invested in land, all the costs of getting the money required for investment, including brokerage, must be paid. In other words, the money which is to be applied for the purposes mentioned in the section is the whole purchase-money, or the value of the interim investments regarded as a net sum, without any deduction. It is said that this brokerage is not within the reasonable costs the payment of which is provided for by section 80. [His Lordship read the section shortly down to the words "payment out of Court of the principal of such moneys or of the securities whereon the same shall be invested."] I think that means that the person

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MAGDALEN COLLEGE, OXFORD, IN RE.

entitled is to have an option whether he will have the stock or the money. If he chooses the latter, I cannot see anything in principle, and certainly there is nothing in the authorities, to make me draw any distinction between a case where the money is to be invested and one where it is to be paid out. The brokerage must be paid as part of the costs.

Solicitors—Routh, Stacey & Co., for petitioners; W. A. Blaxland, for London County Council; C. E. Mortimer, for London School Board.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

JOYCE, J. 1901. July 3, 4, 27. } TURNER *v.* MOON.

Vendor and Purchaser—Implied Covenants for Title—Beneficial Owner—Good Right to Convey—Undisclosed Easement—Breach of Covenant—Measure of Damages—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 7 (A).

Where a breach of a covenant for good right to convey, implied by virtue of a conveyance by the grantor as beneficial owner, is occasioned by the existence of a right of way over the property conveyed, such a breach is not a continuing breach, but occurs and is complete upon the execution of the deed of conveyance in which the covenant is implied.

From the moment of the delivery of the deed of conveyance the Statute of Limitations in respect of the breach commences to run.

The measure of damages for such a breach is the difference between the value of the property as purported to be conveyed and that which the grantor had power to convey.

Spoor *v.* Green (43 L. J. Ex. 57; L. R. 9 Ex. 99) *followed.*

Trial of action with witnesses, in which (*inter alia*) damages were claimed for breach of implied covenants for title in the following circumstances:

In the year 1898 the plaintiff purchased from the defendant, the owner of the Westbrook estate at Godalming, certain building land forming part of that estate, and laid out for building purposes, and by an indenture of conveyance of December 9, 1898, the same was conveyed by the defendant "as beneficial owner" to the plaintiff in fee-simple, subject, however, to the rights of way specified in the second schedule thereto over a certain portion of the private road therein mentioned and forming part of the property sold. The rights of way specified in the schedule had been granted to three adjoining owners, but through inadvertence all mention of a right of way over the portion of road in question granted to the Countess of Meath in a deed of conveyance of June 24, 1891, had been omitted from the schedule, and no notice of the right of way had been given to the plaintiff. The plaintiff built upon the land, and subsequently discovered the existence of the Countess of Meath's right of way.

The plaintiff thereupon brought this action against the defendant for (*inter alia*) damages for breach of his implied covenant for good right to convey.

The defendant denied liability, but paid 50*l.* into Court.

At the trial a quantity of conflicting evidence was given as to the amount of depreciation in the value of the property caused to the plaintiff by the additional right of way.

Younger, K.C., and *G. Cave*, for the plaintiff.—Clearly there has been a breach of the implied covenant for good right to convey, and the plaintiff is entitled to damages. In assessing damages the purposes for which the land was sold ought to be taken into account as well as the mere breach of contract, and also damages subsequent to action brought if they were the natural and necessary result of the breach.

Hughes, K.C., and *Manby*, for the defendant.—If any damages are payable by the defendant they will be amply covered by the 50*l.* already paid into Court. All that the plaintiff is entitled to, if he succeeds, is such damages as may reasonably be supposed to have been contemplated by both parties at the time when they entered into the contract as the probable

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result of a breach—*Hadley* v. *Baxendale* [1854].[1]

G. Cave, in reply.—In considering the measure of damages the Court ought to take into consideration the purposes for which the land was sold. In *Bunny* v. *Hopkinson* [1859][2] the purchaser had been evicted from building land after he had built houses on it, and he was held entitled to recover upon the covenants not only the value of the land, but also that of the houses subsequently built thereon. Sir J. Romilly, M.R., there said that the measure of damages upon the covenant included the amount expended in converting the land to the purposes for which it was sold. The plaintiff is entitled to recover damages which are the natural and immediate consequence of the defendant's breach of covenant—*Rolph* v. *Crouch* [1867][3] and *Lock* v. *Furze* [1866].[4]

July 27.—JOYCE, J., in giving judgment, read the operative part of the conveyance by the defendant as beneficial owner, and continued: Now, under section 7 of the Conveyancing Act, 1881, there is an implied covenant in that conveyance to this effect: "That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed." It turns out now that the piece of road in question is subject also to a certain right of way which was not mentioned in schedule 2 of the conveyance to the plaintiff, but which had been granted by the deed of June 24, 1891, to the Countess of Meath, who then purchased a portion of this building estate with a residence thereon, which is at present used by her as an institution for the reception of epileptic women and girls. By an unfortunate accident this right of way was omitted to be mentioned in the conveyance to the plaintiff, although no fraud or deceit on the part of the vendors is alleged or suggested. Now, notwithstanding what the plaintiff says, looking at all the circumstances of the case, considering what rights of way there were that were disclosed over the particular portion of the road in question, and considering what rights of way there were over the rest of the road, of none of which rights the plaintiff is entitled in any way to complain, I doubt very much whether the existence of the Countess of Meath's right of way over the particular portion conveyed would, if it had been remembered and mentioned, have made any difference. On the whole, I believe that the plaintiff would have purchased what he did purchase just the same. Undoubtedly, however, there was a breach of that part of the implied covenant for title to which I have particularly referred. There has been no breach of any other part of this covenant, for the plaintiff has not been evicted or disturbed in any way; in fact, the plaintiff has not sustained any actual damage at all. There is no evidence that the Countess of Meath, or any occupier or inmate of her institution, has ever sought to exercise the right of way which was granted to the Countess by the deed of 1891. In other words, there has been no actual interference with the enjoyment of what the deed of December 9, 1898, purported to convey to the plaintiff. Such breach as there has been of the part of the covenant for good right to convey, in my opinion, occurred and was complete upon the execution of the conveyance of December 9, 1898. It was single, entire, and perfect in the first instance. From the moment of the delivery of the conveyance, the Statute of Limitations in respect of this breach commenced to run—see Preston's edition of *Sheppard's Touchstone*, p. 170, and especially the judgment of Baron Bramwell in *Spoor* v. *Green* [1874].[5] In the course of his judgment in that case Baron Bramwell said: "assuming the breach to be correctly stated and proved, I am of opinion that the Statute of Limitations is a bar to it. It

(1) 23 L. J. Ex. 179; 9 Ex. 341.
(2) 29 L. J. Ch. 93; 27 Beav. 565.
(3) 37 L. J. Ex. 8; L. R. 3 Ex. 44.
(4) 35 L. J. C.P. 141; L. R. 1 C.P. 441.
(5) 43 L. J. Ex. 57, 64; L. R. 9 Ex. 99, 110.

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was completed, if it ever existed, at the time the deed was executed. If Jamieson had recovered on it, or released it, no further action on it could have been maintained by him, nor, consequently, by his assignee. It is not what is called a continuing breach, any more than not paying money is a continuing breach. The covenant remains broken indeed, but broken once for all. In the case of a covenant to repair, the breach is continuing, because the covenant is broken afresh every day the premises are out of repair, and when an action is brought for breach of such a covenant, the plaintiff does not recover the value of the repairs, because he may recover again if the want of repair still continues. Nothing like that exists as to this covenant. If the words of the breach are looked at, it will be seen that they are, that neither the defendant nor Pearson had good title, but, on the contrary (and this is the breach), Smith and Sharp at the time of making the deed, and thence continually had title, etc. It is true that the Court in *Kingdon* v. *Nottle* [1815] [6] speak of the breach as a continuing breach. Oddly enough, the breach assigned there is express, that the defendant at the time of the execution of the indenture was not seised, etc. But the Court having in the previous case of *Kingdon* v. *Nottle* [1813] [7] held that the executor could not maintain an action on this covenant, now held that the real representative could, and it is in reference to this that they use the language I mention." With this judgment of Baron Bramwell I desire to express my entire concurrence. The concluding sentence of the passage I have read supplies the key to the true explanation of the judgment of Lord Ellenborough in *Kingdon* v. *Nottle*,[6] which has been a good deal discussed in this country and has been vigorously assailed on the other side of the Atlantic—see *Rawle on Covenants for Title*. Fortunately the plaintiff is still living, and we have not to consider who could have sued or how the case would have stood in the event of his decease before action brought, or pending the action—see *Williams on Executors* (9th ed.), pp. 712 *et seq.* In my opinion the proper measure of damages in the present case is the difference between the purchase-money or price paid upon the purchase of December, 1898, and the value of the premises as conveyed, such difference being caused by the defect in the title to the strip of road in question, or, in other words, to the existence of the Countess of Meath's right of way over that strip—that is to say, the difference between the value of the property as purported to be conveyed and that which the vendor had power to convey—see *Gray* v. *Briscoe* [1607] [8] and *Dart on Vendors and Purchasers* (6th ed.), pp. 891 *et seq.* In *Bunny* v. *Hopkinson* [2] there had been eviction and a breach, not only of the covenant for title, but also of the covenant for quiet enjoyment; and the claim made and adjudicated upon in that case was upon the covenants for title generally, including the covenant for quiet enjoyment.

Now, with respect to the amount of damages which ought to be awarded, the defendant has paid 50*l.* into Court. I am not at all impressed with the evidence of the surveyors or valuers called on behalf of the plaintiff. [His Lordship proceeded to discuss the evidence of the expert witnesses called on behalf of the plaintiff, and after coming to the conclusion that their estimates of depreciation were extravagant, continued:] Upon the whole, in my view of the case, and whatever may be the true measure of damages, I think that the sum of 100*l.* will be ample compensation to the plaintiff for the breach of the covenant for good right to convey, and I award that amount accordingly, including interest—that is to say, including anything the plaintiff might be entitled to in respect of interest from the date of the covenant being broken. Then with regard to the costs, having regard to the nature of the evidence on behalf of the plaintiff, most of which I consider to be expensive evidence and altogether upon a wrong principle, I say the plaintiff must bear his own costs of the action.

Solicitors—G. R. Fletcher, for plaintiff; Crowders, Vizard & Oldham, agents for R. H. Mellersh, Godalming, for defendant.

[*Reported by R. J. A. Morrison, Esq., Barrister-at-Law.*

(6) 4 M. & S. 53.
(7) 1 M. & S. 355.
(8) Noy's Rep. 142.

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COZENS-HARDY, J. 1901. July 26. Aug. 6. } VAN STRAUBENZEE, *In re*; BOUSTEAD *v.* COOPER.

Tenant for Life—Apportionment—Reversionary Fund—Marriage Settlement—Rule in Howe *v.* Dartmouth (Earl).

The rule in Howe *v.* Dartmouth (Earl) (7 Ves. 137), *and the corollary established in* Chesterfield's (Earl) Trusts, *In re* (52 L. J. Ch. 958; 24 Ch. D. 643), *respecting the apportionment between tenant for life and those absolutely entitled in remainder of a reversionary fund which falls into possession, has no application where the fund is subject to the trusts of a marriage settlement.*

By a settlement dated November 13, 1841, and made between General Richardson of the first part, Miss Richardson of the second part, Captain Van Straubenzee of the third part, and the trustees of the fourth part (being a settlement executed upon the marriage then intended and shortly afterwards solemnised between Captain Van Straubenzee and Miss Richardson), a sum of 2,000*l.* East India stock, the property of General Richardson, was settled upon trust for the wife for life, and then for the husband for life, with usual trusts for the issue of the marriage; and in the event, which happened, of there not being any child of the marriage, then the trustees were to transfer one moiety to the husband, his executors, administrators, and assigns absolutely, and to transfer the other moiety to General Richardson, his executors, administrators, and assigns. The settlement contained a covenant by the husband and wife to settle after-acquired property upon such and the same trusts, and to and for such and the same ends, intents, and purposes, and with, under, and subject to such and the same powers, provisions, and limitations, declarations, and agreements, as were thereinbefore mentioned, expressed, and declared of and concerning the said sum of 2,000*l.* East India stock, or as near thereto as the nature of the property or other intervening circumstances should permit. The settlement did not contain any power to vary securities.

General Richardson, by his will dated April 13, 1847, and proved in 1849, gave all his residuary personal estate to trustees, upon trust as soon as conveniently might be to sell and convert into money all such parts of his estates and effects as should not consist of money, and to stand possessed of the moneys which should arise from the said sale of his said residuary estate and effects, as to one equal third part in trust for his daughter Mrs. Ellis, for her separate use; as to another equal third part for Lady Van Straubenzee (formerly Miss Richardson) absolutely; and as to the remaining third part in trust for his daughter Catherine Frances Richardson absolutely. His Lordship at an earlier stage of the case held that the one-third share which Lady Van Straubenzee took in her father's residuary estate was bound by the covenant to settle after-acquired property. This residue included one moiety of the settled property contained in the settlement of November 13, 1841, which, on her death in 1900, a widow and without issue, fell to General Richardson's executors. A question was raised by the representatives of Lady Van Straubenzee upon an originating summons whether or not the reversionary interest in the moiety of the fund settled by the settlement of November 13, 1841, which became subject to the trusts of General Richardson's will should be apportioned as between tenant for life and remainderman.

J. T. Prior, for the plaintiffs.

Vernon Smith, *K.C.*, and *Wrangham*, for the representatives of the husband.—There should be no apportionment—*Milford* v. *Peile* [1854].[1] *Vaizey on Settlements*, p. 421, where the contrary view is expressed, cites no authority. The rule in *Howe* v. *Dartmouth* (*Earl*) [1802][2] depends upon an implication that all should share equally in the testator's bounty. That implication is absent in the case of parties contracting at arm's length.

Eve, *K.C.*, and *Frank Russell*, for the representatives of Lady Van Straubenzee.—*Milford* v. *Peile*[1] is merely a decision

(1) 17 Beav. 602; 2 W. R. 181.

(2) 7 Ves. 137; 1 Wh. & T. L.C. Eq. (7th ed.), p. 68.

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on the words of a particular settlement, and affords no guide in the present case. *Howe* v. *Dartmouth* (*Earl*) [2] is not cited in argument nor referred to in the judgment. No sound distinction can be drawn between a settlement and a will respecting enjoyment of property. The parties to the settlement may well have contracted, having regard to the rule in *Howe* v. *Dartmouth* (*Earl*).[2] *Milford* v. *Peile* [1] had not been decided at the date of the settlement. *Milford* v. *Peile* [1] is not cited in the notes to *Howe* v. *Dartmouth* (*Earl*) [2] in *White and Tudor's Leading Cases*. The property should be apportioned on the principle of *Chesterfield's* (*Earl*) *Trusts, In re* [1883].[3]

Ashton Cross and *George Cave*, for other defendants.

Vernon Smith, K.C., replied.

Cur. adv. vult.

COZENS-HARDY, J., read a written judgment, which, after stating the facts as above set out, continued as follows: Now, so far as I am aware, the rule in *Howe* v. *Dartmouth* (*Earl*) [2] has never been applied except to a disposition by will of residuary personal estate given *en masse* to be enjoyed by several persons in succession. The Court assumes an intention that the legatees should enjoy the same thing in succession, and, as the only mode of giving effect to such intention, it directs the conversion into permanent authorised investments of all such parts of the residuary estate as are of a wasting or reversionary or unauthorised character —see *Pickering* v. *Pickering* [1839] [4] and *Macdonald* v. *Irvine* [1878].[5] But the rule does not apply to any bequest which is specific, as distinguished from residuary. On principle, I can see no ground for applying the rule to the present case. The covenant to settle after-acquired property is a contract which has to be performed in strict accordance with its terms. It operates upon that which must be regarded as a specific property—namely, the lady's share in her father's estate. This share is to be vested in the trustees upon the same trusts as are declared with reference to the India stock. Those trusts do not include a trust for the sale of the India stock, nor is there even a power to sell it, apart from legislation since 1841. I cannot imply a trust to convert that which is brought into the settlement, whether it be real estate or personal estate.

It is remarkable that there is no direct authority on the point. Mr. Vaizey, in his book on *Settlements*, page 421, says: "There are two cases in which, probably, the rule is applicable to trusts in settlements created by deed. One is that in which the unrealized estate of a deceased person, or of the share in such an estate to which the settlor is entitled, is settled. The other is the case of a covenant to settle after-acquired property." In support of this view no judicial decision is cited, and there are two cases which tend in the opposite direction. In *Milford* v. *Peile* [1] the point seems to have arisen. By a settlement made in 1848, on the marriage of Mrs. Milford, a sum of 10,000*l.* Consols was held by trustees upon trust either to retain the same in its then present state of investment, or to sell the same and invest the proceeds in other securities, with power to vary securities, and upon trust to pay the income to the wife and husband during their respective lives. The settlement contained a joint and several covenant by Mr. and Mrs. Milford that, in case any real or personal estate to the amount of 100*l.* sterling should at any time during the coverture by gift, devise, bequest, or intestacy, from or of her father, Mr. T. L. Lewis, come to or devolve on her, then the same real and personal estate should, by such acts, deeds, and assurances as should be necessary for the purpose, be duly vested in the trustees or trustee for the time being of the marriage settlement, their and his heirs, executors, administrators, and assigns, and be held upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisos, and declarations (as far as the nature of the property would admit) as were thereby declared of and concerning the premises thereby assigned and settled by and on the part of the said Frances Harriott Lewis, and the dividends and annual produce

(3) 52 L. J. Ch. 958; 24 Ch. D. 643.
(4) 8 L. J. Ch. 336; 4 Myl. & Cr. 289.
(5) 47 L. J. Ch. 494; 8 Ch. D. 101.

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thereof, or such and as many of the same as should be subsisting and capable of taking effect. Mr. Lewis, the father, died in November, 1852, having by his will bequeathed a certain leasehold house and premises, and all the furniture and effects therein, to trustees, in trust for Mrs. Milford for her separate use. The bill was filed by Mrs. Milford against her husband and the trustees to take the opinion of the Court whether the leasehold house and furniture were bound by the covenant, and, if so, whether they should be enjoyed *in specie*, or be converted into money, and the proceeds invested. The Master of the Rolls (Sir John Romilly) held that the property was bound by the covenant, and was of opinion that there was no trust for conversion in the settlement, and that the property should be assigned to the trustees and enjoyed *in specie*. *Howe* v. *Dartmouth* (*Earl*) [2] does not seem to have been cited, and no clear reasons are given for the conclusion arrived at. The decision, however, was inconsistent with the view that the rule in *Howe* v. *Dartmouth* (*Earl*) [2] applied, unless Sir John Romilly relied upon the express option given to the trustees either to retain or to sell.

In the following year the question arose for consideration before Vice-Chancellor Kindersley in *Hope* v. *Hope* [1855].[6] By a marriage settlement certain funds were vested in trustees upon trust to pay the interest of one moiety to the wife for her separate use, and upon trust to pay the other moiety to the husband for life, and upon trust after the death of one to pay the interest of the whole to the other, and trusts were declared as to the trust funds after the death of the survivor for the benefit of the children of the marriage; and in the settlement was contained a covenant to settle after-acquired property upon and for the trusts thereinbefore declared as to the funds vested in the trustees as above mentioned: provided always, and it was thereby agreed and declared that it should be lawful to and for the trustees, at the request in writing of the husband and wife during their joint lives, and of the survivor of them during his or her life, and after the decease of such survivor at the discretion of the trustees absolutely to sell and dispose of all or any of the real estate or personal estate (not consisting of money, stocks, funds, or securities) which under the covenants thereinbefore contained should become subject to the trusts thereof in manner therein mentioned; and that the trustees should stand and be possessed of the moneys which should arise from such sale or sales upon the like trusts and subject to the like provisions and agreements as were thereinbefore declared and contained of and concerning the funds vested in trustees as above mentioned. The lady's father by his will gave and bequeathed to her his leasehold house in which he then resided, together with certain chattels. He died in 1851, and the leasehold house, which was held for a term of which twenty-two years were unexpired, was assigned to the trustees of the settlement. A question having arisen as to whether the leasehold house and the specific chattels bequeathed by the will ought to be retained, or ought to be converted into money and the proceeds invested upon the trusts of the settlement, or whether they ought to be enjoyed *in specie*, a Special Case was submitted to the Court. *Howe* v. *Dartmouth* (*Earl of*) [2] and *Milford* v. *Peile* [1] were cited. Vice-Chancellor Kindersley said he was not aware of any case in which the principle of *Howe* v. *Dartmouth* (*Earl*) [2] had been applied to a settlement, which was a contract between the parties, whilst in a will there was no contract. But whatever might be the general principle, in this particular case, so far from there being any trust, implied or otherwise, for conversion, conversion was only to take place at the request of the husband and wife during their lives, and after their death at the discretion of the trustees, the intention being that the property, whatever it was, coming to the wife should be settled. There would therefore be a declaration that the property was not to be converted during the lives of the husband and wife without their request. *Hope* v. *Hope* [6] is important as indicating that, in the opinion of the Vice-Chancellor, the rule does not apply to a

(6) 1 Jur. (N.S.) 770; 3 W. R. 617.

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marriage settlement, but I cannot treat it as a positive decision to that effect.

Under these circumstances, I feel at liberty to follow my own view. And I therefore hold that the rule in *Howe* v. *Dartmouth* (*Earl*)[2] has no application to the present case.

Solicitors—Norton, Rose, Norton & Co.; Witham Roskell, Munster & Weld; Kingsford, Dorman & Co., agents for Smith, Mammatt, Hale & Quarrell, Ashby-de-la-Zouche; Le Brasseur & Oakley.

[*Reported by A. E. Randall, Esq., Barrister-at-Law.*

[IN THE COURT OF APPEAL.]

RIGBY, L.J.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.
1901.
March 18, 19, 21, 22, 25, 26, 27, 28.
April 1, 2. Aug. 9.

ATT.-GEN. *v.* SIMPSON.

River—Locks and Sluices—Grant by Crown to Owner of Right to Take Tolls—Franchise—Right of Public to Navigate—Dedication to Public—Reasonable Tolls—Duty of Person Taking Tolls to Keep Locks in Repair—Charters of Crown—Validity—Permissive Act of Parliament—Grant of Tolls by—Act for Preserving and Improving the Navigation of the River Ouse, 1719 (6 *Geo.* 1 *c.* 29)—*Practice—Appeal—Varying Order in Matter as to which no Notice of Appeal—Rules of the Supreme Court*, 1883, *Order LVIII. rule* 4.

In the construction of a royal charter reserving a rent to the Crown, which rent has been paid for a considerable length of time, the Court ought to adopt a construction consistent with the grant falling within the powers of the Crown rather than one which would make the grant in excess of the royal prerogative, and to assume, unless there is clear evidence to the contrary, that the state of things at the date of the charter was such as to make the grant of it within the powers of the Crown.

By a charter in 1638 *King Charles* 1 *granted to the predecessor in title of the defendant and his heirs in perpetuity, in consideration (inter alia) of a rent to the Crown, the exclusive right of conveying goods in boats over part of the river Ouse by means of the navigation rendered possible by locks and sluices which had been made by that predecessor and his predecessors, and the profits arising therefrom:—*

Held, *by* VAUGHAN WILLIAMS, L.J., *that by* 1638 *the Ouse in the part in question had become a navigable river by the public availing themselves of the increased facilities of navigation, and the acquiescence therein of riparian owners and others having power to dedicate to the public, and that this dedication was accepted by the Crown by the charter.*

Held, *by* STIRLING, L.J., *that the defendant's predecessor, in applying for and putting in use the charter, had given the public the right to resort to the locks and sluices for the purpose of passing from section to section of the river.*

Held, *by the* COURT, *that the charter was valid, and the public had the right to use the part of the river in question on payment of the tolls, and the defendant receiving the tolls was bound to keep the locks in repair and to provide attendants and appliances necessary to enable them to be used. The tolls to be taken for these duties must be reasonable tolls, and might vary in amount with the value of money.*

Allnutt *v.* Inglis (12 East, 527, 538) *and* Lawrence *v.* Hitch (37 L. J. Q.B. 209; L. R. 3 Q.B. 521) *applied by* STIRLING, L.J.

An Act of Parliament (6 *Geo* 1. *c.* 29) *empowered a predecessor of the defendant to improve the navigation of the Ouse, and for that purpose to repair, rebuild, and maintain a certain stanch and other works, and provided that "forasmuch as the making maintaining and repairing the said stanch" and other works would "necessarily be a great charge and expense" to the predecessor, it should be lawful for him, his heirs and assigns, "from and after" doing the works to take certain tolls for goods carried by boats up and down that part of the river:*—Held, *that the grantee could not collect the tolls unless he maintained the stanch and other works in such repair as to keep the river navigable.*

In 1628 *Charles* 1 *granted to the pre-*

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decessor of the defendant a charter, part of the term of which was contemporaneous with a former charter and part contemporaneous with the term of the charter of 1638, *and thereby he granted to the predecessor certain exclusive rights of navigation in the Ouse and the right to take tolls in respect thereof. This charter had never been put in force:—*

Held, *by* STIRLING, L.J., *that if the acceptance of the later charter did not effect a surrender of the former by operation of law, the Court could, if necessary, presume a lost surrender.*

Held *also, by* STIRLING, L.J., *that this charter never having been put in use, there was no dedication to the public under it.*

The defendant appealed against the whole of the order of the Court below except one declaration. The plaintiffs gave no notice of appeal:—Held, *that the Court had power, under Order LVIII. rule* 4, *to vary the order of the Court below by substituting a different declaration in the place of that in respect of which there was no appeal.*

The action was brought by the Attorney-General at the relation of the County Council of Huntingdonshire and by the County Council as plaintiffs, claiming a declaration—first, that the river Ouse from above St. Neots, to below St. Ives, and thence to the sea, and all parts of it, including six locks or sluice-pens on the river between the towns of St. Neots and St. Ives and the stanch a little below St. Ives and the sluice-pen thereof, and the cuts or channels in which they stood, were a public navigable river and common highway and free and open for all persons to pass and repass as of right over the whole thereof, and as regards the locks and sluices at all reasonable times with their boats, barges, and other vessels, but, as regards the passage of boats and other vessels laden with goods or merchandise, subject however to a statutory toll mentioned in the Act 6 Geo. 1. c. 29, in respect of the passage through the stanch below St. Ives, and subject to the toll of threepence per customary load in respect of the passage through each of the six locks above St. Ives; secondly, that the defendant was bound to maintain all the said locks, sluice-pens, stanch, and other works in an efficient state and condition, and to provide attendants and all other appliances necessary to work the same and to enable the public navigating the river to have free and convenient passage through the same, subject only, in case of boats laden with goods and merchandise, to the tolls aforesaid; thirdly, an injunction to restrain the defendant from obstructing the passage of vessels through the locks and other works at all reasonable times, but subject to the toll as regards vessels laden with goods, and from permitting the locks, sluice-pens, or stanch to remain permanently closed or permanently open, or without such appliances and attendants that they could be used at all reasonable times for the passage of vessels.

The distance between St. Neots and St. Ives is about sixteen miles, and there is a fall in that distance of about twenty-eight feet. As regards the six locks above St. Ives, the question arose under certain charters granted by Kings James 1 and Charles 1.

In 1618 King James 1 granted a patent to John Gason, who had represented himself as having "attained to the skill knowledge and perfection of a more apt commodious and beneficial means for and concerning the framing contriving and making of locks sluices bridges cuts cranes mill-dams and other inventions and additions most fit necessary and convenient for grinding of corn, raising of water, making of rivers streams and waters navigable and passable for boats keels and other vessels to pass from place to place" not yet used within the realm. By this instrument the King granted full, free, and absolute licence, power, authority, and privilege to Gason, his executors, administrators, deputies, assignees, and licensees, that he and they might to his and their own proper use, benefit, and behoof, in (amongst others) any rivers, streams, waters, and places whatsoever and wheresoever within the realm, for the period of twenty-one years from the date of the patent, make and use all manner of locks and sluices and other inventions for (amongst other things) making of rivers, waters, and streams navigable and passable, and also to use and invent all manner

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of engines, tools, instruments, and inventions for the perfecting and performing of the premises or any part thereof. There was also granted not only full and absolute power and authority to take and receive to his and their own proper use all manner of contribution, advantage, and commodity which should during the term be by any of his Majesty's subjects agreed upon for or in respect of the making, setting up, or inventing of any sluices, dams or locks, or other inventions made, set up, or devised by the patentee, his assignees or licensees, upon any stream, water, or place whatsoever within the realm without let by the King, his heirs, or successors, and without any account to be rendered to him or them (except as provided), but also to have, take, and receive all manner of profit which by any means should accrue by means of any vessel or boat which should pass, come, or sail, in, upon, or to any river, stream, or water so to be made navigable, as also of any sluices, and all and singular the premises aforesaid without let and without account

The patent prohibited all persons other than the patentee, his executors, administrators, or assigns, and persons who should give contentment or agreement to him or them, to attempt or presume directly or indirectly to pass, sail, go or remain, to, at, or upon any rivers, streams, or waters made navigable by the patentee, or exercise or use the patented invention: and it contained a proviso enabling the King to revoke the patent, if upon examination had before six or more of the Privy Council, they should declare in writing that the letters patent were inconvenient to the realm.

The patentee assigned his patent to two persons named Spencer and Gerton. Spencer survived Gerton, and having become sole owner of the patent, he assigned it to John Jackson. Before 1625 six sluices or locks (being the six in question in the action) had been erected on the river Ouse. Each was erected at the side of a mill-dam on land acquired by Spencer or Jackson. Complaints were made to the Privy Council that Jackson claimed exorbitant tolls for the use of these locks. Enquiry was made into these complaints by the Council, but the proceedings came to nothing.

A suit of *Thelwall* v. *Jackson* was afterwards, in 1628, instituted in Chancery to establish a right on the part of the public to use these sluices or locks on the payment of a reasonable toll; but, although in the course of the proceedings an injunction was granted, this was afterwards dissolved, and Jackson was (in the language of the Order dated June 16, 1632) "left at liberty to take his remedy at the Common Law," or (according to a later Order of February 16, 1633) "to go on with the work and make what he can thereof."

In 1628 Spencer obtained from the Crown a charter dated January 3 of the third year of King Charles 1 (1627–1628). After a recital that Spencer had informed the King that by his order, direction, invention, pains, and exceeding great charge, the river of Ouse, leading from St. Ives to St. Neots had been made navigable, and that he intended to make other rivers, streams, and waters navigable and passable for boats keels and other vessels to pass from place to place, which had not theretofore been practised or put in use by any others within the realm, it contained a grant by the King to Spencer, his executors, administrators, and assigns, of full licence, power, privilege, and authority during a term of eleven years from July 21, 1628, to exercise, practise, and put in use in all convenient places within the realm the cutting, contriving, erecting, setting up, perfecting, and making of all manner of locks, sluices, bridges, cuts, dams, and other inventions not repugnant to the laws of the realm for making of rivers and streams navigable and passable. After a series of clauses framed for giving effect to this grant, it proceeded as follows: "And for the better encouragement of the said Arnold Spencer his executors administrators and assigns to proceed in so laudable a work with effect, and for that we are informed that the said Arnold Spencer hath already made navigable the said river of Ouse leading from St. Ives to St. Needs (alias St. Neets) in our county of Huntingdon, the benefit whereof the said Arnold Spencer or his assigns now

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have or ought to have and enjoy Know ye further that we for the considerations aforesaid of our more abundant grace certain knowledge and mere motion are graciously pleased to give and grant unto the said Arnold Spencer his executors administrators and assigns as well all the benefit which he hath received or which he shall or may receive for or in respect of the said River so by him the said Arnold Spencer made navigable as aforesaid if the same were so done by the said Arnold Spencer, or at his charge as is alleged, as also all such benefit as shall or may accrue or grow payable for or in respect of any River hereafter during the term aforesaid by him the said Arnold Spencer his deputies or assigns to be made navigable according to the limitation and provisions before in these presents expressed to his and their own proper use and behoof without any account or other thing whatsoever unto us our heirs or successors other than the rent hereafter in these presents reserved to be rendered paid yielded or done"—provided that Spencer should not take for any boat or vessel which should pass through the sluices any greater rate upon the ton than was to be paid and was granted by James 1 to the Corporation of Stamford for vessels passing between the sea and Stamford (alleged to be threepence per ton)—"To have and to hold the said benefit of the said River of Ouse made navigable as aforesaid and all the profits and benefits of all the Rivers by him the said Arnold Spencer his executors administrators or assigns to be made navigable within the term of 11 years aforesaid, and all and singular the premises last before mentioned to be granted to the said Arnold Spencer his executors administrators and assigns from the end and expiration of the said term of 11 years for and during and unto the full end and term of fourscore years from thence next ensuing and fully to be complete and ended." A rent of 5*l.* per annum during the term of eighty years was reserved to the Crown by this grant.

Spencer repurchased from Jackson Gason's patent and all such interest as Jackson had in the locks and works. It did not appear exactly when this was done, but it seemed to have been done after the granting of the patent of 3 Car. 1, but before 1638. Spencer procured from the King a further charter, dated December 11, 14 Car. 1 (1638). It recited that Spencer had informed the King that by virtue of letters patent to him, dated January 3 of 3 Car. 1, he had made navigable the river Ouse from St. Ives to St. Neots, and thence to within four miles of Bedford, to the ease and benefit not only of the inhabitants of the counties of Huntingdon and Bedford, but also of the counties adjacent to the said river, and that he had besought the King to grant to him, his heirs and assigns, the sole benefit of all and singular the water carriage in and upon the river Ouse from St. Ives to St. Neots, and so far as he, his heirs and assigns, should make the same further navigable; and then stated that the King, wishing that Spencer might receive adequate and ready compensation and reasonable satisfaction for his great costs and expenses in carrying out these works, for the reasons aforesaid and in consideration of the yearly rents in those presents reserved, did by those presents for himself, his heirs, and successors give and grant to the said Arnold Spencer, his heirs and assigns (as much as in his Majesty lay), the sole and exclusive passage and transit for boats, barges, and other vessels laden with corn, coal, and other goods and merchandise through all the said river or trench of Ouse leading from St. Ives to St. Neots, and thence to within four miles of the town of Bedford, and so much farther as the said Arnold Spencer, his heirs or assigns, should thereafter make the said river navigable; and also from time to time in perpetuity the sole and exclusive licence and power of carrying and re-carrying, transporting and re-transporting in and through all the river aforesaid from St. Ives to St. Neots, and thence to within four miles of Bedford, and so much farther as the said Arnold Spencer, his heirs and assigns, should make the said river navigable All and all manner of food, coal, goods, and merchandise whatsoever, in ships, boats, barges, and other vessels ascending or descending, and also the sole and exclusive government and disposition of all ships, barges, boats, and other vessels whatsoever sailing or

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navigating in and upon the said river between the towns and places aforesaid; and also all and all manner of profits, commodities, pre-eminences, rights, and privileges whatsoever by reason of the drawing or redrawing or carrying or re-carrying of any corn or coal, wood, underwood, or any other merchandise, goods, or chattels of whatsoever kind, as well all native as foreign kinds, in and upon the said river for the future, in or upon all and all manner of ships, barges, boats, and other vessels whatsoever, between the several towns and places aforesaid, and the same to load and unload in any place or places at pleasure To have, hold, and enjoy the said several passages and transits To the said Arnold Spencer, his heirs and assigns, to the only proper use and benefit of the said Arnold Spencer, his heirs and assigns, for ever, yielding thereout annually to the King, his heirs and successors, for the said passage, 6*l.* 13*s.* 4*d.* And the King further commanded that no other person or persons, at any time after the date of those letters patent, with ships, boats, barges, or other vessels of whatsoever burden or kind, in any part or parcel of the said river, for the carriage of any food, coal, wood, underwood, goods, or merchandise, should presume to enter upon or navigate or do or attempt any other thing in the said river, or in any members of the same, or the banks, ways, ditches, or fences appertaining thereto, which might be to the injury or prejudice of the said Arnold Spencer, his heirs or assigns, without the licence and wish of the said Arnold Spencer, his heirs and assigns. There was further a grant to Spencer, his heirs and assigns, of licence, with all and any vessels or ships in and through the river Ouse aforesaid down from the said town of St. Ives, or in any part or parcel of the same river, from time to time as often as they should think fit, to navigate and pass at the pleasure of them, or any of them, as freely and lawfully and in as ample a manner and form as any other or others of the King's subjects theretofore had been accustomed, or had used or enjoyed or ought to have done.

The rent of 6*l.* 13*s.* 4*d.* reserved by the charter of 14 Car. 1 had been regularly paid ever since it was granted. The rent of 5*l.* reserved by the charter of 3 Car. 1 had never been paid.

As regards the stanch, that was erected by Henry Ashley, a predecessor of the defendant, in 1720, under the powers of "An Act for preserving and improving the navigation of the River Ouse in the County of Huntingdon," 1719 (6 Geo. 1. c. 29). That Act empowered and authorised Ashley, his heirs and assigns, to improve the passage for vessels on the Ouse, and to make the same more navigable, and for that purpose to cleanse, scour, and deepen the river, and to repair and rebuild in such manner as he should think fit the work called St. Ives Stanch, and from time to time repair, use, and maintain the same, or erect such other works in the place where the stanch stood as he should think fit for effecting the purpose or undertaking aforesaid, and to do certain things ancillary thereto; and the Act contained the following provision: "And forasmuch as the making, maintaining, and repairing the said stanch or other work or works herein or hereby aforementioned or authorized to be made, maintained, and repaired by the said Henry Ashley, his heirs and assigns, will necessarily be a great charge and expense to the said Henry Ashley, his heirs and assigns, be it therefore enacted by the authority aforesaid that it shall and may be lawful to and for the said Henry Ashley, his heirs and assigns (and no others), from and after the repairing, building, or erecting the stanch aforementioned or other work or works near the same, from time to time and at all times to demand, receive, and take to his and their own proper use and behoof, over and above the toll due or payable before the making of this Act for all and every the goods and commodities which at any time or times after the repairing, building, or erecting the said stanch or other work or works shall be carried by any boat" up or down that part of the river "the several rates and tolls hereinafter mentioned. . . ."

The defendant Simpson became by purchase, in 1893, the owner of the locks and stanch in question.

The plaintiffs alleged that since the date

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of the patents, and until shortly before the date of this action, the public had continued to navigate the Ouse and pass through the locks, subject as to vessels laden with merchandise to the payment of the toll; that the effect of the charter of 14 Car 1 was to make the right to take the tolls perpetual, and not to confer on Spencer, or his successors, any exclusive right of navigating the river, and that if that was not the true construction of the charter it was beyond the prerogative of the Crown, and void. They also alleged that in two actions of *Jemmatt* v. *Ashley, Sen.*, in 1688, and *Jemmatt* v. *Ashley, Jun. and Wilkes*, in 1695 (the questions raised in which were whether the plaintiffs were entitled to one moiety of the locks and the tolls payable under the charter of 14 Car. 1, or whether Ashley, the predecessor in title of Simpson, was entitled to the whole), the defendant Ashley had admitted that the Ouse was navigable from St. Ives to St. Neots time out of mind before the granting of the patent of 14 Car. 1, and that if such patent had been granted it was void, and had never been put in execution; and that between St. Ives and St. Neots there were six ancient sluices, and a toll of threepence per ton on goods passing through each sluice had been paid to the proprietor.

As regards the stanch, the plaintiffs alleged that Ashley, at or about the time of its construction, dedicated it to the public as part of the navigable waterway of the Ouse, and that the public had ever since used it as such, subject as to vessels carrying commodities to the payment of the tolls provided by the Act; that the stanch had from time to time been kept in repair by Ashley and his successors, and the new works erected in connection therewith from time to time dedicated to the public; and that Ashley and his successors had, by the acceptance of the benefit of the Act and the statutory toll, become bound to maintain the stanch and works in a proper condition, and to provide attendants and appliances so that the same might be used by the public.

The defendant alleged that, at any rate since the first year of Edward 1, there had been six ancient mills between St. Ives and St. Neots, the mill-dams of which, being across the whole breadth of the river, precluded the passage of boats except by certain sluices or locks made by his predecessors in title on their own land as private enterprises, and repaired by them, and that no boat had passed over the sluices except by the leave of the owner and on payment of such toll as he thought fit to charge. He contended that the locks, stanch, and other works were his private property, and had never been dedicated to the public, and denied that the river above the flow of the tide was ever a public navigable river.

The Corporation of Godmanchester had asserted a right to force open the gates of certain of the locks in times of flood without making compensation to the defendant, and in an action of *Simpson* v. *Godmanchester Corporation* it was held by the House of Lords [1897],[1] affirming Wright, J., and the Court of Appeal [1895],[2] that the corporation had such a right. The defendant then closed the locks, and discontinued to use the stanch, alleging that by reason of the damage which must be caused to the locks owing to the right which the corporation had established, the tolls which could be collected on the river would not be sufficient to keep the locks and stanch in repair. The plaintiffs then commenced this action.

The action was tried by Farwell, J. He held that the charter of 14 Car. 1 was bad on the ground that it was beyond the power of the King to grant it, the river having been from time immemorial navigable in sections, and having become, by reason of the dedication by Spencer of the sluices to the public in 1628, by the patent of that date, navigable as a highway from St. Ives to St. Neots before 1638. As regards the stanch, he held that the Act of 1719 was permissive only, and imposed no duties of repair or maintenance on the defendant He, on November 21, 1899, gave judgment declaring that the six locks or sluicepens upon the river Ouse, between St. Neots and St. Ives, and also the stanch, flood-gates, lock, and other works below St Ives, and the cuts, channels, and streams whereon or wherein all the said several locks, stanch, flood-gates, and

(1) 66 L. J. Ch. 770; [1897] A.C. 696.
(2) 65 L. J. Ch. 154; [1896] 1 Ch. 214.

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other works respectively stood, and each of them, formed part of the river Ouse; and that the river Ouse in its course from above St. Neots to below St. Ives, and thence to the sea, including the six locks and the stanch and other works, and the said cuts, channels, and streams, was a public navigable river and common highway, and Queen's high stream, open and free for all her late Majesty's subjects to pass and repass as of right over and along the whole thereof, and all parts thereof, at all times, at their free will and pleasure, with their boats, barges, and other vessels, whether laden or unladen, as regards the six locks above St. Ives without payment of any toll, charge, or imposition whatsoever; and as regards the stanch and other works below St. Ives upon payment in the case of vessels laden with goods or merchandise of such rates, tolls, and charges only as were due or payable under the statute 6 Geo. 1. c. 29, and no other rates, tolls, charges, or impositions whatsoever; and, further, that the defendant was not under any liability to maintain or work any of the said six locks or sluice-pens, stanch, or other works. He also granted an injunction to restrain the defendant from in any way preventing, obstructing, delaying, or interfering with any of her late Majesty's subjects with their boats, barges, or other vessels, whether laden or unladen from or in passing at all times at their free will and pleasure along the said river, through the six locks above St. Ives, and the stanch below St. Ives, and the cuts or channels upon or in which the same stood, without any payment, charge, toll, or imposition whatsoever, except such tolls, rates, or charges as were payable under the statute 6 Geo. 1. c. 29.

The defendant appealed against the whole judgment, except the last declaration, and asked that the action might be dismissed with costs. The plaintiffs did not appeal from any part of the judgment.

Neville, K.C., and *R. J. Parker*, for the appellant.—The river is not and never has been a public navigable river. There have always been mills in the same places as at present. That appears from Doomsday Book. The river was, therefore, only navigable in sections, and could not be a highway.

It is not disputed that the charter of James 1 is valid. At the time when the charter of 3 Car. 1 was granted, Spencer was not owner of the sluices, and so far as it was granted on the assumption that he was, it was granted on a false suggestion and is void No rent was paid under it, and it could have no effect until the expiration of Gason's patent, and it granted no tolls for passage over the Ouse. It therefore cannot be regarded as evidence of dedication to the public. The decree in *Thelwall* v. *Jackson* was inconsistent with the theory that the river is a public navigable river.

As regards the Godmanchester lock, it belonged to the Corporation of Godmanchester until 1689, and neither Jackson nor Spencer was in a position to dedicate it.

The charter of 3 Car. 1, so far as it was valid at all, was superseded by the charter of 14 Car. 1. "If the King lease to A, and afterwards make a new lease to him, without mentioning the first, it will be void, though it operates as a surrender of the former lease"—*Com. Dig.* "Grant," G. 10, p. 426—*Churchwardens of St. Saviour in Southwark Case* [1613] [3]

When a grant by the King is capable of two constructions, it should receive that interpretation which will give effect to it, and it may be good in part though not as to the whole—*Chitty on the Prerogatives of the Crown*, p. 394; *Neill* v. *Devonshire (Duke)* [1882].[4] The mills on the river belonged to the Crown, and the Crown assumed some jurisdiction over rivers; and inasmuch as the use of the locks would diminish the amount of water for the mills, the charter of 14 Car. 1 may be regarded as a valid charter, as enabling the patentee to work the locks without objection by the Crown. It did not create any tolls, but simply allowed the patentee to use the locks, and the charge which he made was not a toll proper, but such charge as he chose to make. In

(3) 10 Co. Rep. 366.
(4) 8 App. Cas. 135.

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Juxon v. *Thornhill* [1628],[5] which was an action in respect of passage of goods over these locks, the action was in *assumpsit*, which shews that the payments could not have been tolls proper. If there was a public right of passage up and down the river before the grant of the charter of 14 Car. 1, that charter would be bad. Farwell, J., came to that conclusion owing to the interpretation which he put upon the charter of 1628; but the fact of the grant of the charter of 1638 is an indication that his view on that was not correct. Apart from the charter of 1628, Farwell, J., thought that there was no public right of passage. It is not, however, essential to the appellant's case that this charter should be valid. His case is that he is a purchaser of the land, and there is no evidence of any dedication to the public. The mere allowance of passage to the public over land on payment of a toll does not amount to a dedication of the land—*Austerberry* v. *Oldham Corporation* [1885][6]; and there cannot be a dedication for a limited time—*Rex* v. *Mellor* [1830].[7] The payment here, if a toll at all, was only a "toll traverse," and such a toll is for a time only. The locks have remained private property, and the charge exacted by each successive owner is an express act of ownership.

This is not a case for the presumption of a lost grant. The origin of the payment for passage through the locks is explained —*Att.-Gen.* v. *Horner* [1884].[8] The rights of the Corporation of Godmanchester declared in *Simpson* v *Godmanchester Corporation*,[1] are inconsistent with the alleged right of passage in the public—*Bourke* v. *Davis* [1889],[9] *Marshall* v. *Ulleswater Steam Navigation Co.* [1871],[10] and *Orr-Ewing* v. *Colquhoun* [1877].[11]

Farwell, J., placed too much reliance on *Jemmatt* v. *Ashley*. Ashley's statement may be evidence against the appellant, but it was made upon a contention upon which Ashley failed.

(5) Cro. Car. 132.
(6) 55 L. J. Ch. 633; 29 Ch. D. 750.
(7) 8 L. J. (O.S.) M.C. 109; 1 B. & Ad. 32.
(8) 54 L. J. Q.B. 227; affirmed, 55 ib. 193; 14 Q.B. D. 245.
(9) 44 Ch. D. 110.
(10) 41 L. J. Q.B. 41; L. R. 7 Q.B. 166.
(11) 2 App. Cas. 839.

As regards the stanch below St. Ives, the language of the Act is permissive and enabling only, and cannot be construed as compulsory—*York and North Midland Railway* v. *Reg.* [1853],[12] *Reg.* v. *Great Western Railway* [1893],[13] and *Darlaston Local Board* v. *London and North-Western Railway* [1894].[14] The appellant is therefore under no obligation to repair or maintain the stanch, and ought to be allowed to remove it if he wishes to do so.

Upjohn, K.C., *Tebbutt*, and *Brooke Little*, for the respondents.—The river is and always has been a navigable river. It is called in the *Hundred Rolls for Huntingdonshire* the "high stream," and "the high river of our Lord the King." It is also called in later documents the "high stream." Those are proper modes of referring to a public navigable river—*Hale*, *De Jure Maris*, c. iii. There was a highway from place to place between the dams, and throughout, subject to the inconvenience of getting over the dams. The river is older than the mills, and the mills were an encroachment upon the public right. The King has no power to authorise any one to divert water from a navigable river except for the public benefit, but he has jurisdiction to reform nuisances in rivers, and so Gason could be empowered to reform nuisances in the Ouse—*Hale, De Jure Maris*, c. ii. and iii., and *Hall's Law of the Foreshore* (3rd ed. by Moore), pp. 373 and 374. The fact of a man making his own river passable for boats does not make it *juris publici*; but if he gets the King's charter to take a toll, and puts it in use, that is a devoting of it to the common use (p. 375). That seems to point to a river being navigable in sections. The toll, where no amount is specified, must be reasonable—*Stamford Corporation* v. *Pawlett* [1830].[15]

The charter of 3 Car. 1 is just such a dedication to the public as seems to have been contemplated by Sir M. Hale, and the threepenny toll established by it has in fact been paid since. It does not appear from the proceedings in *Thelwall* v. *Jackson* that Jackson ever denied the public right

(12) 22 L. J. Q.B. 225; 1 E. & B. 858.
(13) 62 L. J. Q.B. 572.
(14) 63 L. J. Q.B. 826; [1894] 2 Q.B. 694.
(15) 1 Cr. & J. 57, 400.

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of passage, or asserted that the toll was an arbitrary toll. If there is any doubt about the charter it must be explained by contemporaneous and subsequent usage, and that points to a right in the public.

The charter of 14 Car. 1 is bad. The Crown has no power to grant the sole right of the carriage of goods over a public river to any one. Assuming that the river was not public, such a monopoly could not be granted over the lands of private riparian owners—*Haspurt* v. *Wills* [1669].[16] The charter of James 1 expired in 1638, and after that date the only valid charter was that of 3 Car. 1, and the tolls which were thereby granted for eighty years have ceased.

As to Godmanchester sluice, the corporation, prior to 1689, granted several leases one after another, during which terms there was public user, and dedication to the public will be presumed—*Rex* v. *Barr* [1814],[17] *Davies* v. *Stephens* [1836],[18] and *Att.-Gen.* v. *Biphosphated Guano Co.* [1879],[19] *Winterbottom* v. *Derby (Earl)* [1867],[20] and *Wellbeloved on Highways* (ed. 1829), p. 60. There has been a passage by the public through these locks on payment of a fixed toll for more than 250 years, and the Court will presume all that is possible to support such a long-continued practice. There may be a dedication to the public subject to certain rights of the owner—*Arnold* v. *Blaker* [1871][21] and *Elwood* v. *Bullock* [1844].[22] Rights of way over an artificial structure may be dedicated—*Surrey Canal Co.* v. *Hall* [1840].[23] There was a right of navigation over the river subject to payment of a toll on passing through the sluices, but not otherwise—*Bradley* v. *Newcastle Pilots* [1853].[24] The general right of navigation was not interfered with—*Penryn Corporation* v. *Best* [1878].[25] If necessary, a charter would be presumed subsequent to the expiration of that of 3 Car. 1, conferring upon Ashley the right to take the tolls subject to the obligation to maintain the locks. *Att.-Gen.* v *Horner*[8] was not a case like this, where there is a long-continued usage and no existing charter to account for it.

The rights asserted by the Corporation of Godmanchester do not conflict with the rights of the public. They are only exercisable when the river is in flood and not navigable, and the right is to open the locks, not to close them.

As regards the stanch below St. Ives, the tolls are by the Act given expressly in consideration of the repairs being done. The appellant is bound to repair the locks—*Nicholl* v. *Allen* [1862].[26]

Neville, K.C., in reply.—There was no "toll thorough." A toll traverse implies contemporaneous dedication to the public—*Petham (Lord)* v. *Pickersgill* [1787][27] and *Gunning on Tolls* (ed. 1833), p. 27; but there was no established toll in the present case, only a payment which the owners chose to exact for the use of the locks. No charter will be presumed of so modern an origin as the Court is asked to presume here. The records of the charters from the time of Queen Elizabeth are perfect—*Chilton* v. *London Corporation* [1878].[28]

Immemorial user cannot be relied upon, as it was known that the locks were not in existence until the reign of James 1; and the fact of payment prevents any right being acquired under the Prescription Act.

Cur. adv. vult.

Aug. 9.—The following judgment of RIGBY, L.J., was read by Stirling, L.J.: I am of opinion that, notwithstanding all that has taken place, a decree ought to be given in this action, the particulars of which I will indicate. I have read the judgments proposed to be given by Lord Justice Vaughan Williams and Lord Justice Stirling, and I do not think it necessary to repeat at length what is contained in those judgments. In substance they treat the provisions of the charter of 14 Car. 1 as being still operative, and

(16) 1 Mod. 47.
(17) 4 Campb. 16.
(18) 7 Car. & P. 570.
(19) 49 L. J. Ch. 68; 11 Ch. D. 327.
(20) 36 L. J. Ex. 194; L. R. 2 Ex. 316.
(21) 40 L. J. Q.B. 185; L. R. 6 Q.B. 433.
(22) 13 L. J. Q.B. 330; 6 Q.B. 383.
(23) 9 L. J. C.P. 329; 1 Man. & G. 392.
(24) 23 L. J. Q.B. 35; 2 El. & Bl. 427.
(25) 48 L. J. Ex. 103; 3 Ex. D. 292.
(26) 31 L. J. Q.B. 43; 1 B. & S. 934.
(27) 1 Term Rep. 660.
(28) 47 L. J. Ch. 433, 438; 7 Ch. D. 735, 741.

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those of the charter of 3 Car. 1 as no longer in force, which is equally the case whether the latter charter was merged or has expired by effluxion of time, surrender, or otherwise. I do not consider it necessary to enquire how far that charter of 3 Car. 1 operated. The charter of 14 Car. 1, and what was done under it, and the Act of 1719 appear to me fully sufficient for the dedication of the whole bed of the river, within necessary boundaries, for the purposes of navigation.

I agree, so far as is necessary, with the interpretation placed by Lord Justice Vaughan Williams and Lord Justice Stirling upon what was done by the predecessors of the defendant Simpson, and I consider that, as their successor, he became bound thereby, retaining all the time, under the charter of 14 Car. 1, a power (among other things) of increasing in a proper degree the tolls payable to him, but remaining liable for the time being to all the terms of the charter so far as it is binding upon him. I do not think that the informants and plaintiffs are entitled to insist against him that the tolls heretofore payable are fixed in amount, but they are liable to variation within reasonable limits.

There should be no costs of the appeal.

VAUGHAN WILLIAMS, L.J., read the following judgment: I agree with Mr. Justice Farwell in his main conclusion that the river Ouse in the part in question in this action is a navigable river and a public highway, but I do not agree that the charter of 14 Car. 1 (1638) is for any reason void. I further think that the charter (or letters patent) of 3 Car. 1 (1628) is not in force now, and I doubt whether it ever was a valid and effective grant. The rent reserved by it does not appear by the Exchequer Records ever to have been paid, and the charter of 14 Car. 1 seems to have been granted instead of it. The two reasons which Mr. Justice Farwell gives for holding the charter of 14 Car. 1 void are—first, that the Ouse was at the date of the charter a navigable river in sections; and secondly, that the earlier charter of 3 Car. 1 constituted a dedication by Spencer of the river as a public highway. I am of opinion that both these reasons fail. The first fails because a deed of 1467 and all the other documentary evidence shew that the sectional right of navigation was not a public right for all the King's subjects, but a private right belonging to a section of the public. The second reason fails because Spencer had no right to dedicate the river as a public highway. His right at the highest was to dedicate the sluices, and even supposing that the difficulty is got over that the sluices in 1628 were vested in Jackson, and not in Spencer, yet neither Spencer nor Jackson could dedicate more than the sluices. I think that probably the river Ouse by 1638 had become a navigable river up to St. Neots, and nearly to Bedford, but that this had come about by the public availing themselves largely of the increased facilities of through navigation afforded by the sluices constructed under Gason's letters patent, and the acquiescence in this user by the riparian owners, lords of manors, and others who had the power of preventing it, and that this was sufficient evidence of dedication of the river as a common highway by such owners and lords and those concerned, and of the sluices by Spencer and Jackson, and that this state of things, which had been gradually evolving from the increased facility of navigation, and the acquiescence of those having the power to dedicate, was clenched by the Crown by the charter of 14 Car. 1, whereby the Crown accepted the dedication. I think that the charter of 14 Car. 1 is a good charter, and that it is based on the assumption that by 1638 there was, by acquiescence, in the user of the river by the public, evidence of the dedication of the river as a navigable river and public highway, or, at all events, on the assumption that the grantee would suffer all the King's subjects to have in perpetuity the benefit of that franchise of navigation which had been granted to him and his heirs in perpetuity. It may be that the grant was in the nature of a grant of ferry, or that it was in the nature of a "toll thorough" on a public river, or a "toll traverse" in respect of the public right of passage through the sluices. But, be it which it may, Mr. Simpson,

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who, with his predecessors, has paid the rent of 6*l.* 13*s.* 4*d.* reserved by the charter of 14 Car. 1, and asserted and enjoyed the privileges granted by that charter, including the collection of tolls, cannot be heard to say that there is no public right to use the river on the payment of the proper toll.

The charter of 14 Car. 1 begins with a recital that Arnold Spencer, "by virtue of certain letters patent of 3 Charles 1, has made navigable and passable our river of Ouse, between St. Ives, in the county of Huntingdon, and St. Neots, and thence to within four miles of Bedford, in the county of Bedford, to the ease and benefit not only of the inhabitants of the said counties, but also of other counties adjoining the said river"; and then the charter proceeds: "We, therefore, wishing that the said Arnold Spencer may receive adequate and ready compensation and reasonable satisfaction for his great costs and expenses in carrying out these works, . . . have given and granted, and by these presents, for us, our heirs and successors, give and grant to the said Arnold Spencer, his heirs and assigns (as much as in us lyeth), the sole and exclusive passage and transit for boats, barges, and other vessels laden with corn, coal, and all other goods and merchandise, through all that river or trench of Ouse leading from St. Ives to St. Neots, and thence to within four miles of Bedford, and so much farther as the said Arnold Spencer, his heirs and assigns, shall hereafter make, or cause to be made, the said river navigable; to have and to hold the said several passages and transits through the said river Ouse, and all and singular other the premises by these presents granted, and all manner of profits, commodities, advantages, and emoluments whatsoever by reason or on account of the carrying or re-carrying of all and any goods of whatever kind in any ships, barges, boats, or other vessels, yielding throughout annually to us, our heirs and successors, for the said passage in and upon the said river Ouse from St. Ives aforesaid 6*l.* 13*s.* 4*d.*" Now, having regard to these passages, it seems to me impossible for the heirs or assigns of Arnold Spencer to deny that what was granted by this charter was granted so far as relates to the carriage as mentioned in the charter for the benefit of the public generally, and I have no doubt but that the "user" of the river Ouse between St. Ives and Bedford since the making of the said charter and under it, has made the river Ouse in that part a navigable river and common highway and the "King's high stream," open and free for all his Majesty's subjects as against both the successors of Arnold Spencer and all the riparian proprietors, subject, nevertheless, to the right of Arnold Spencer and his successors to charge a reasonable toll for the use of the works erected by Arnold Spencer and his successors for the purpose of making the river navigable above St. Ives. I do not find anything in the charter fixing or limiting the charge to be made by Arnold Spencer and his successors. It must be a reasonable charge, and I see no reason why such charge should not vary with the value of money, and I think that it ought to be based on and include a profit beyond the necessary cost of repair and maintenance. But I do not think we are called on in this action to determine the measure of what would be a reasonable toll.

Before leaving this part of the case relating to the six locks and sluices, other than St. Ives stanch, I wish to say that I fully recognise the difficulties arising in respect of the charter of 14 Car. 1 by reason of its being couched in terms which are inconsistent with the rights of the public in a navigable river. But I think that in the construction of a charter reserving a rent to the Crown, which rent has been paid for such a length of time as this has been, one ought to adopt a construction consistent with the grant falling within the powers of the Crown, rather than a construction which would make the grant a grant in excess of the royal prerogative, and in the same way I think that one ought to presume, unless there is clear evidence to the contrary, that the state of things at the date of the charter was such as to make the grant of it within the powers of the Crown. Take, for instance, the question whether one is to treat the letters patent of the 3 Car. 1 as constituting a dedication of the river

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Ouse as a public highway, or the question how one is to regard the sectional right of passage on the Ouse prior to the making of the sluices. I should say that wherever there was a doubt one ought to draw inferences consistent with the validity of the letters patent rather than those which would be inconsistent. And throughout this case it is to be borne in mind that the letters patent of James 1 were in the nature of a grant of a monopoly, and that the letters of 3 Car. 1 (granted, it is to be noted, after the passing of the Statute of Monopolies for a term inconsistent with that statute) were in their nature temporary grants, which should not easily be taken to affect or limit the prerogative of the Crown to make a subsequent grant in perpetuity, not for the benefit of an inventor, but for the benefit and advantage of the public.

It remains to deal with the question of St. Ives stanch. I cannot agree with the view that the right to take the toll exists independently of the obligation to repair or the maintaining of the stanch in such a condition as to keep the river navigable. It is quite true that the principle established by *York and North Midland Railway* v. *Reg.*[12] that permissive powers contained in an Act of Parliament are not to be construed as compulsory unless there is something in the context or subject-matter justifying such a construction, applies as well to the maintenance of the authorised works as to their construction, as was decided in *Reg.* v. *Great Western Railway*[13]; but it does not follow that the grantee of a toll created by Act of Parliament can levy the toll irrespective of doing and executing the work in respect of which the toll purports by the Act of Parliament to be granted. I think that, if the grantee of the toll fails so to maintain and repair the stanch and other works as to keep the river navigable, he cannot collect the toll.

The result, in my judgment, is that the order of Mr. Justice Farwell must be amended—first, as to the river above St. Ives, by declaring that the defendant Simpson is entitled to a reasonable toll under the charter of 14 Car. 1. But I do not think that toll extends to pleasure boats; it extends only to boats carrying commodities. Secondly, as to the St. Ives stanch, I think the defendant Simpson is only entitled to the tolls so long as he keeps the stanch in such repair as to make the river navigable. I suppose that under the Rules of Court, Order LVIII. rule 4, we can make the proper declaration, notwithstanding the fact that there is no appeal against so much of the order as declares the defendant entitled to the statutory toll in respect of St. Ives stanch.

STIRLING, L.J., read a judgment in which he stated the facts. He referred to the claim made by the plaintiffs in the action, and the order made by Mr. Justice Farwell, and with regard to that said: The plaintiffs thus succeeded in establishing rights differing from those claimed by the writ, the learned Judge holding in substance that the plaintiffs were entitled to the free use of the locks and stanch without any payment except such as may be payable under the statute 6 Geo. 1. c. 29, but were not entitled to insist on the locks and stanch being maintained and worked by the defendant. [He continued:] The case as to the six locks above St. Ives stands somewhat differently from that as to the stanch below that town, and I proceed in the first place to deal with the former alone. Upon the evidence Mr. Justice Farwell arrived at the conclusion, which I accept, that "down to the year 1618 the river Ouse was not navigable in its entirety from St. Ives to St. Neots, but was navigable in sections"; those sections being created by six mill-dams, which still exist, and are thrown across the river at points adjacent to the six locks in question. He also found that there existed, in some places at least, a right of taking the goods from a boat, carrying them over a mill-dam, and placing them in another boat so as to continue the transit. The evidence seems to shew, and the learned Judge has found, that, regard being had to the fall of the river, it would have been impossible to navigate between St. Neots and St. Ives if there had been no dams at all.

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The patent of King James appears to be an inventor's patent, and to be applicable to all rivers, waters, and streams within the realm, whether public or private. I do not think that it grants to the patentee anything in the nature of a toll, though it does prevent the owners of vessels from making use of the invention without the licence of the patentee. [His Lordship then referred to the assignment of the patent to Spencer and Jackson, the erection of the six sluices, and the suit of *Thelwall* v. *Jackson*, and continued:] Jackson's legal rights were twofold—first, those which he possessed as owner of the patent of 1618; and secondly, those which he enjoyed as legal owner of the land on which the sluices or locks were erected. These last seem to me to be recognised in the case of *Juxon* (properly *Jackson*) v. *Thornhill*[5] (which related to the use of the very locks in question), and to have formed part of the basis of the judgment. I may observe that argument in that case was founded on the fact that the Ouse was a public river; but the locks or sluices were held not to be subject to public right, and down to the conclusion of the Chancery proceedings in February, 1633, I see no trace of any dedication of these locks or sluices to the public.

There are many difficulties which arise in connection with the patent of 3 Car. 1. The exact date at which Jackson became assignee of Spencer does not appear; but the proceedings in the Privy Council, already referred to (see orders of June 20, 1627; October 20, 1628; February 11, 1628), appear to shew that on June 20, 1627, Jackson was owner of Gason's patent and of the sluices erected on the Ouse by virtue of it, and continued to be owner of these properties in 1628. Consequently at the date of the charter of 3 Car. 1 Spencer was not owner of the invention for which Gason's patent was granted. At this time the Statute of Monopolies (21 Jac. 1. c. 3) had been passed; and although that statute preserved the rights of patentees who had previously obtained grants for periods not exceeding twenty-one years, it prevented the granting of any fresh patent except for a new invention. If the charter of 3 Car. 1 was intended to confer any fresh right on Spencer, it was bad under that statute. If, on the other hand, it was intended to be confirmatory of Gason's patent, it would seem that it ought to have been granted to Jackson. We are, however, more immediately concerned with the second part of the charter, which has been held by Mr. Justice Farwell to create in favour of Spencer a franchise in the nature of a toll traverse, and to import a contemporaneous dedication by him of the locks to the public. With these legal conclusions I shall deal at a later stage; but I may remark in passing that if, as the evidence appears to establish, Jackson was the owner of the locks at the date of this charter, it is difficult to see how any effectual dedication in favour of the public could then be made by Spencer.

Jackson is stated to have remained owner of the patent and locks for a period of about seven years. The precise date at which his ownership terminated does not appear, but it is conceded that it came to an end before 1638, and that upon the happening of this event Spencer again became the owner.

Mr. Justice Farwell has held that the charter of 14 Car. 1 is bad, on the ground that it was beyond the power of the King to grant it, the river having been from time immemorial navigable in sections, and having become (by reason of the dedication of the sluices to the public) navigable from St. Ives to St. Neots before 1638. Upon the view of the effect of the charters of 3 Car. 1 and 14 Car. 1 taken by the learned Judge, all right on the part of those claiming under Spencer to take any toll ceased on the expiration of the term of eighty years for which the toll was granted by the charter of 3 Car. 1—that is, in 1718. Yet there is evidence that down to shortly before the commencement of the present action tolls were regularly levied on all boats passing through the locks, and carrying merchandise, at the rate of threepence per ton per lock. It is also remarkable that after the recital contained in the charter of 14 Car. 1 no mention of the charter of 3 Car. 1 is found in any document. In particular it is to be ob-

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served that in the two suits of *Jemmatt* v. *Ashley, Sen.* and *Jemmatt* v. *Ashley, Jun., and Wilkes*, which raised questions between persons claiming through or under Spencer, the title to the tolls claimed by the plaintiffs in respect of the sluices is rested on the charter of 14 Car 1, and not on that of 3 Car. 1. In the suit of *Jemmatt* v. *Ashley, Jun., and Wilkes* the plaintiffs claimed to be entitled to one moiety of the locks and the tolls payable under the charter of 14 Car. 1, and alleged that the defendant Ashley, jun. was entitled to the other moiety; but that the latter laid claim to the whole of the locks, and had forbidden the defendant Wilkes and several other persons to pay the plaintiffs any of the tolls. Both defendants denied the existence of the charter. The defendant Wilkes further said that if any such patent was granted, it was against law and void, and was never enjoyed or put in execution; but he admitted that between St. Ives and St. Neots there were six ancient sluices belonging to the proprietors of the soil on which the sluices were built, and that an ancient toll of threepence per ton of goods had from time out of mind been paid for each sluice, and that he was ready to pay to the plaintiffs such toll, or so much as the plaintiffs might make out a title to. The decree declared the plaintiffs entitled to one moiety of the navigation of the river Ouse and the profits thereof both up and down the river between Burford Bridge (four miles from Bedford) and St. Ives, and directed an account of what was due from Wilkes, and that a moiety thereof be paid to the plaintiffs.

It seems to me that in this suit of *Jemmatt* v. *Ashley, Jun.* the plaintiffs put in force as against the defendant Wilkes the rights conferred by the charter of 14 Car. 1. On the other hand, I find no evidence that the rights purported to be conferred by the charter 3 Car. 1 were ever put in force against any one. Looking at all these facts, I think the true inference is that the charter of 3 Car. 1 was never put in force, but was surrendered or deemed to be surrendered to the Crown on the grant of that of 14 Car. 1. Probably the acceptance of the latter charter ought to be held to effect a surrender of the former by operation of law, but, if necessary, I see no difficulty in presuming a lost surrender.

The law as to dedication to the public in such a case is stated by Sir M. Hale at the close of the third chapter of his treatise *De Jure Maris* as follows: "If any person at his own charge makes his own private stream to be passable for boats or barges, either by making of locks or cutts, or drawing together other streams; and hereby that river, which was his own in point of propriety become now capable of carriage of vessels; yet this seems not to make it *juris publici*, and he may pull it down again, or apply it to his own private use. For it is not hereby made to be *juris publici*, unless it were done at a common charge, or by a publick authority, or that by long continuance of time it hath been freely devoted to a publick use. And so it seems also to be, if he that makes such a new river or passage doth it by way of recompense or compensation for some other public stream that he hath stopped for his own conveniency; as in the case of the Abbot of St. Austin's Canterbury, mentioned in the Register. So likewise if he purchaseth the King's Charter to take a reasonable toll for the passage of the King's subjects, and puts it in use, these seem to be devoting and as it were consecrating of it to the common use. As he, that by an *ad quod damnum*, and licence thereupon obtained, changeth a way, and sets out another in his own land; this new way is thereupon become *juris publici*, as well as a way by prescription. For no man can take a settled or constant toll even in his own private land for a common passage without the King's licence."

According to the law there laid down, it is essential to a dedication to the public that a private owner should not merely purchase the King's charter to take a reasonable toll for the passage of the King's subjects, but should put the charter in use. If, therefore (as I find), the charter of 3 Car. 1 was never put in use, there was no dedication to the public under it; and the ground on which Mr. Justice Farwell held the charter of 14 Car. 1 to be invalid fails.

To this latter charter the defendant

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attributes a very narrow operation. At the date of it some, if not all, of the mills on the Ouse belonged to the Crown; and the defendant contends that it was merely intended to take effect as between Spencer on the one hand, and the Crown and the tenants and servants and other persons claiming under the Crown on the other. The peculiar position taken by the plaintiffs on this appeal has prevented them from arguing in support of a different construction of the charter. I feel bound, however, to say that in my judgment the charter is expressed in language appropriate to create a franchise; and that, if the true effect of it be that a valid franchise has been created, it affords a legal origin for the tolls which are proved to have been taken by the plaintiffs and their predecessors in title as already mentioned. It is, therefore, to be considered whether the Crown could by charter confer on a subject such a franchise. I have been unable to find any case in which a similar charter has been the subject of decision by the Courts. The right to a ferry has, however, been frequently considered. Its general nature is explained by Sir M. Hale at the beginning of chapter ii. of the treatise already referred to as follows: "The King by an ancient right of prerogative hath had a certain interest in many fresh rivers, even where the sea doth not flow or reflow, as well as in salt or arms of the sea; and those are these which follow. 1st, A right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the King. He may make a ferry for his own use or the use of his family, but not for the common use of all the King's subjects passing that way; because it doth in consequent tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation; viz. that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these, he is fineable."

It is laid down in *Peter* v. *Kendal* [1827] [29] that it is not necessary that the owner of a ferry should have the property in the soil on either side of the stream. He must have a right to land on both sides, but he need not have the property in the soil on either; and that it is sufficient if the landing-place be a public highway. Now the charter recites that Spencer had made the river Ouse "navigable and passable" within certain limits. This is true in the sense that Spencer by making locks and sluices had made it navigable throughout those limits, whereas it had been before navigable only in sections—that is, from mill-dam to mill-dam. Spencer had erected at the side of each mill-dam, on land belonging to himself, a lock or sluice. He had a right as a member of the public to pass from mill-dam to mill-dam. He could by virtue of his own legal title to the locks and sluices continue his passage beyond the mill-dams. The franchise conferred appears to me on the true construction of the charter to be the exclusive right of conveying goods in boats by means of the navigation Spencer had created—that is, the through navigation rendered possible by the new locks or sluices. This right closely resembles that of a ferry, and I can see no reason why it should not be in the power of the Crown to create it. The exercise of the right would impose on the grantee obligations similar to those of a ferryman; as, for example, to attend at the locks at due times, to keep them in proper working order, and to take reasonable tolls. In *Allnutt* v. *Inglis* [1810] [30] Lord Ellenborough, C.J., says: "There is no doubt that the general principle is favoured both in law and justice, that every man may fix what price he pleases upon his own property or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms." In my judgment, the defendant's predecessor

(29) 5 L. J. (O.S.) K.B. 282, 285; 6 B. & C. 703, 710, 711.

(30) 12 East, 527, 538.

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in title, by applying for and putting in use the charter of 14 Car. 1, gave the public a right to resort to the locks and sluices which were his property for the purpose of passing from section to section of the river Ouse; and inasmuch as the same charter conferred on that predecessor a monopoly for that purpose, he and his successors came under an obligation to perform the duties attached to that monopoly.

The defendant has been since the year 1893, and still is, the owner in equity (subject to a legal mortgage) of the six locks in question and of the rights conferred by the charter of 14 Car. 1, but he holds them subject to the rights of the public and to the performance of the duties imposed by the acts of his predecessors in title; and, according to the law as laid down in the passage from *Hale, De Jure Maris*, c. iii., already quoted, he cannot (any more than his predecessors) apply the site of the locks to his own private use. He is, however, in my opinion, entitled to receive proper and reasonable tolls. Such tolls (as was decided in *Lawrence* v. *Hitch* [1868][31]) may vary in amount with the value of money, and I agree with Lord Justice Vaughan Williams in thinking that upon the terms of the charter of 14 Car. 1 they ought to be such amount as to provide a reasonable profit to the defendant. I also think that the defendant, being entitled to such tolls, is subject to the obligation of maintaining and working the locks—see the cases of *Allnutt* v. *Inglis*[30] and *Bolt* v. *Stennett* [1800].[32]

I agree, as to the stanch below St. Ives, with what has been said by Lord Justice Vaughan Williams.

I think that this Court ought to exercise the powers conferred by Order LVIII. rule 4—namely, "to give any judgment, and make any order which ought to have been made, and to make such further or other order as the case may require." The order confers power to do this, although the appeal may be from part of the judgment only, and although the respondents may not complain of the decision.

(31) 37 L. J. Q.B. 209; L. R. 3 Q.B. 521.
(32) 8 Term Rep. 606.

The following alterations ought therefore to be made in the judgment: In the second declaration for the words "without payment of any toll charge or imposition whatsoever," there ought to be inserted "upon payment in the case of boats barges or other vessels laden with food coal goods or merchandise, of such tolls rates and charges as may from time to time be reasonable." For the third declaration there will be substituted the following: "that the defendant is bound to maintain the said locks above St. Ives in an efficient state and condition and to provide all such attendants and appliances as may be necessary to enable the subjects of his Majesty to have free and convenient passage through the same, and taking the tolls to maintain and repair the said stanch lock and other works below St. Ives, subject only as to the said locks stanch and works in case of boats barges and other vessels laden with food coal goods or merchandize to such tolls rates and charges as are hereinbefore respectively mentioned."

It is further complained that the injunction granted in the terms already stated has been so framed as to prevent the defendant from discharging a duty imposed on him by statute to obey a direction given by the Corporation of Godmanchester to take up and remove the stanch and works in time of flood, so that the waters of the river may have a free and easy passage. If desired, the order now to be made may provide that the injunction shall not have this operation.

Order varied.

Solicitors—Batten, Proffitt & Scott, for appellant; Peacock & Goddard, agents for J. Percy Maule, Huntingdon, for respondents.

[*Reported by A. J. Hall, Esq., Barrister-at-Law.*

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BYRNE, J. 1901. Aug. 2, 8. } KING'S COLLEGE, CAMBRIDGE *v.* UXBRIDGE RURAL COUNCIL.

Local Government—Sewerage System—Entry on Private Land without Notice—Erection of Pumping Station—"Sewer"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 15, 16, *and* 27.

A local authority has no right to carry a sewer under private property without previously giving the notice required by section 16 *of the Public Health Act*, 1875.

A pumping station is not a "sewer" within section 16 *of the Act; but it is, within section* 27, *an apparatus "for distributing or otherwise disposing of sewage," and consequently the land required for such pumping station must be purchased by the local authority.*

Motion on behalf of the Provost and Scholars of King's College, Cambridge, the lords of the manor of Ruislip, in the county of Middlesex, and of Mr. R. H. Deane, an adjoining owner, for an interim injunction to restrain the defendant council from proceeding with a pumping station which was being erected by them upon a strip of uninclosed land in the parish of Ruislip, on the north side of the high road from Uxbridge to London, which was claimed as the property of the plaintiffs or one of them, and from otherwise trespassing on the strip of land.

The defendant council had resolved upon a scheme for the disposal of the sewage of the parish of Ruislip, which embraced the town of Northwood, the hamlet of Eastcote, and the village of Ruislip, under which scheme the sewage of the entire parish was to be conveyed to one common outfall for treatment. Owing to the difference in the levels the sewage of Eastcote could not be conveyed to the outfall site by gravitation alone, and it was consequently necessary to raise it and pump it along a rising main from Eastcote to Ruislip, and for this purpose a pumping station somewhere near the strip of land in question was requisite. The council, without giving any previous notice to the plaintiffs, and alleging that the strip of land was part of the highway, had entered upon the land and were proceeding with the erection thereon of the pumping station, which was a low one-storey building with a pumping engine inside, and was partly below and partly above ground. The plaintiffs considered that the erection of the pumping station would very seriously damage the adjoining land, which was now coming into the market for building purposes, and that it would otherwise be detrimental to them, and they brought this action to restrain the defendant council from going on with the pumping station, which was in an advanced stage of construction.

According to the defendant council's contention, the pumping station was not intended or adapted to be used for receiving, storing, disinfecting, distributing, or otherwise disposing of the sewage within section 27 of the Public Health Act, 1875,[1] but was essentially a part of the

(1) The material sections of the Public Health Act, 1875, are:

Section 4: "'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act."

Section 15: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

Section 16: "Any local authority may carry any sewer through across or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street, and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into through or under any lands whatsoever within their district. They may also (subject to the provisions of this Act relating to sewage works without the district of the local authority) exercise all or any of the powers given by this section without their district for the purpose of outfall or distribution of sewage."

Section 27: "For the purpose of receiving storing disinfecting distributing or otherwise disposing of sewage any local authority may—(1) construct any works within their district, or (subject to the provisions of this Act as to sewage works without the district of the local authority) without their district; and (2) contract for the use of purchase or take on lease any land buildings engines materials or apparatus either within or without their district; . . . . Provided that no nuisance be created in the exercise of any of the powers given by this section."

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sewerage system of the district, and without such pumping station it would be impossible for the present system of sewerage to deliver the Eastcote sewage. There was some evidence that the highway authorities had used the roadside wastes, including the land in question, for depositing stones and gravel for the purpose of repairing the highway.

Norton, *K.C.*, and *R. J. Parker*, for the plaintiffs.—The land in question is either waste and belongs to King's College as lords of the manor, or it is land adjoining inclosures near a highway and belongs to the owners of the inclosures, subject to such rights of way as the public may have over it. It is private property and not a highway. The mere placing of road materials and road scrapings on waste land has been held not to be sufficient evidence of dedication to the highway—*Belmore* (*Countess*) v. *Kent County Council* [1901].[2]

The sections of the Public Health Act, 1875, under which the defendants are acting are sections 15 and 16.[1] Section 4 defines a "sewer."

The defendants gave no notice whatever, and they are dealing with the land as if it were a street.

A sewer need not be actually underground, but may be level with the ground —*Roderick* v. *Aston Local Board* [1877].[3] In *Swanston* v. *Twickenham Local Board* [1879][4] it was held that a manhole was part of a sewer which the local authority had a right to make in a street. This, however, is an actual building and erection for a pumping station.

In *Curtis* v. *Kesteven County Council* [1890][5] it was held that the strips of grass bordering a main road were roadside wastes within section 11, sub-section 1 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), but that the herbage on such strips belonged to the frontagers and not to the county council. There it was admitted that the public had a right of way over the piece of waste, but there is no such admission here. The county council there let the herbage for the purpose of pasture, and an injunction was granted against them on the ground that it was not theirs at all, and that if it was vested in them it was merely for the purpose of the highway authority.

The work in question is not such a work as under section 16 of the Public Health Act, 1875,[1] the defendants have power to proceed with without buying the land.

In *Roderick* v. *Aston Local Board*[3] Sir G. Jessel held that the words "into through or under" in section 16 did not mean necessarily that it must be below the level of the ground.

If the defendants desire to erect this engine house they must buy the land—*Swanston* v. *Twickenham Local Board*.[4]

This is a disposal of sewage within section 27 of the Act of 1875.[1]

The plaintiffs are entitled to an injunction.

Levett, *K.C.*, and *S. G. Lushington*, for the defendant council.—The ownership of the land in question has not been proved, the onus being on the plaintiffs to shew that it is waste of the manor. The real question is, Assuming it to be a high road, are the defendants within section 16 or section 27[1]?

There is no definition of "works" in the Act. Section 27 has no application; it deals with the disposal of sewage, and the work in question is not a work of disposal, but is part of a sewer and comes under section 16.

In *Swanston* v. *Twickenham Local Board*[4] the Court of Appeal held that the word "sewer" in section 45 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), which corresponds with section 16 of the Act of 1875, included not only what was literally the sewer for the carriage of sewage, but also any means of access or other works used solely for the purposes of the sewer to assist in the distribution and conveyance of the sewage through the district. The pumping station here is only an adjunct to the sewer and is used for no other purpose; it is in law part of the sewer itself and need not be underground, and is therefore within the decision in *Swanston* v. *Twickenham Local Board*.[4]

The words "carry any sewer" in

(2) *Ante*, p. 501; [1901] 1 Ch. 873.
(3) 46 L. J. Ch. 802; 5 Ch. D. 328.
(4) 48 L. J. Ch. 623; 11 Ch. D. 838.
(5) 60 L. J. Ch. 103; 45 Ch. D. 504.

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section 16 admittedly do not seem large enough *prima facie* to include a pumping station, but the definition of "sewer" in the Act is obviously not an exclusive one. The word "sewer" in section 16 includes the whole carrying apparatus from the point of reception to the point of outfall.

In *Poplar District Board of Works* v. *Knight* [1858] [6] a wall which ran along a marsh, and had sewer pipes laid through to carry off the sewage, was held to be a sewer. Lord Campbell there said that a "sewer" in its general sense might mean the whole apparatus, and in its specific sense a drain as part of that apparatus. The pumping station in the present case is a mechanical apparatus for forcing the sewage up from one level to another, and so to the point of outfall, and is as much a part of the sewer as the pipe itself.

Section 27 and the other sections up to and including section 31 which are comprised under the head of "Disposal of Sewage," all deal with the ultimate disposal of sewage at the outfall site and not with the carrying of it from one part of the district to another. The sanitary authority have a discretion as to whether they will carry their sewer across the street above ground or underground.

[BYRNE, J.—They must not carry it through other people's land without first giving notice.]

In *Hutchings* v. *Seaford Urban Council* [1898] [7] notice was not given, and yet an injunction was refused, inasmuch as the Court considered that the question was one of money.

[BYRNE, J.—In that case notice was given, but there were some alleged defects in the notice. and the defects, if any, in the notice, and in the report of the surveyor, could be remedied in a very short time. The question was what was a reasonable notice.]

The question here is merely one of the amount of compensation. If the plaintiffs' land is injured under section 15 of the Act of 1875 they will get compensation by an assessment under section 308 of the Act; and if the defendants are obliged to purchase the land under the Lands Clauses Act the plaintiffs will get compensation, but the defendants will be put to great expense and there will be much delay, as there will have to be an enquiry by the Local Government Board before the loan necessary for the purchase of the land can be obtained. Under these circumstances the question ought to be treated as a similar question was in *Roderick* v. *Aston Local Board*, [3] and an injunction ought not to be granted.

BYRNE, J.—This is an action brought by King's College, Cambridge, and Mr. Deane, as plaintiffs, against the Uxbridge Rural District Council, and what is sought for is an injunction to restrain the defendants from making use of a certain piece of land for the purposes of building an engine house and engine and pumping apparatus with the object of lifting the drainage and sewage matter from one portion of a sewer to another portion. The piece of land in question, I think, upon the evidence as it at present stands, belongs, *prima facie*, either to the lords of the manor or to the adjoining owner. They are both plaintiffs, and I think that *prima facie* a good title has been shewn to the land. Really the only evidence I have heard the other way was that one surveyor says that it has occasionally been used for putting some stones upon it. That being so, the question arises whether the defendants have any right, for the purpose of erecting this tenement with the engine therein and other works, without notice to go on the land and proceed to do the work. I do not think they have. The question appears to turn upon whether the work they are doing comes within section 16 or section 27 of the Public Health Act, 1875. [His Lordship read section 16, and continued:] Now no notice has been given in this case, and I do not think that under section 16 the local authority has any right to carry any sewer under private property without first giving the reasonable notice provided for in that section. But is this piece of work in itself a "sewer," or does it come within the description which I find in section 27? It is there provided that for the purpose of receiving, storing, disinfecting, distributing, or otherwise disposing

(6) 28 L. J. M.C. 37, 40; E. B. & E. 408, 429.
(7) 43 Sol. J. 41.

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of sewage, "any local authority may construct any works within their district, or (subject to the provisions of this Act as to sewage works without the district of the local authority) without their district"; and then it provides that they may "contract for the use of purchase or take or lease any land buildings engines materials or apparatus either within or without their district," and certain other powers are given, "Provided that no nuisance be created in the exercise of any of the powers given by this section." I have heard an argument on the construction of section 27, that this work cannot be considered to be for the purpose of receiving or (following the other words) "storing disinfecting distributing or otherwise disposing of sewage," within the meaning of the section; but it appears to me that, if provision is made outside the structure of what is ordinarily known as a sewer or drain for the purpose of taking in the sewage matter which is conveyed down to the place and of removing it into another portion of the sewer, that is receiving the sewage. I think that, even if that be wrong, the words "otherwise disposing of sewage" are ample to cover such a work as this, because it is for the purpose of taking the sewage from one place to another. What for? For disposing of it, and for no other purpose. Therefore I think that the words of section 27 do apply to the case of a work such as the present, and I do not think that the words in section 16 about carrying a sewer through, across, or under any turnpike road, and so on, are meant to apply to such large independent outside structures and works as are referred to in the present case. It is quite true that a manhole, a very large manhole, and a manhole meant to afford a side access to a sewer thirty feet deep with a great deal of brickwork underground, and covered over by an iron trap, has been held under another Act of Parliament to be part of the sewer, and I am not at all prepared to say, if this had been confined altogether to a method of access to the drain underground, on the construction of this section, it would not be exactly the same thing, and it would be part of a sewer; but I do think it would be a great stretch of language to say that a large independent building outside and over the surface or partly over the surface and partly underneath, meant to be used as an engine house and works, is part of a sewer.

I think, therefore, that this is a case in which an injunction ought to be granted, restraining the defendant council from entering upon or taking the strip of land otherwise than in accordance with their statutory powers not being powers under section 16 of the Act.

Solicitors—Withers & Withers, for plaintiffs; Woodbridge & Sons, for defendant council.

[*Reported by W. A. G. Woods, Esq. Barrister-at-Law.*

Buckley, J. 1901. July 11, 12, 20. } Great Western Railway v. Blades.

Railway—Compulsory Taking of Land—"Minerals"—Clay—Railways Clauses Act, 1845 (8 *Vict. c.* 20), *s.* 77.

Clay is not a "mineral" within the meaning of section 77 *of the Railways Clauses Act*, 1845, *if it is, substantially, "the land" itself. Whether it is or not depends on the circumstances of each particular case.*

Land was taken by a railway company under statutory powers. The strata were a thin top layer of a few inches only of ordinary surface soil, and merchantable clay, to a depth of several hundred feet, below:—Held, *that the clay was not a "mineral" excepted out of the conveyance to the railway company under section* 77 *of the Railways Clauses Act*, 1845.

Glasgow Corporation *v.* Farie (58 L. J. P.C. 33; 13 App. Cas. 657) *followed.*

By a deed of conveyance dated August 26, 1852, certain persons, who were the predecessors in title of the defendants, conveyed to the Birmingham, Dudley, and Wolverhampton Railway Co. (which was incorporated by a special Act of 1846 incorporating the Railways Clauses Act, 1845), being the predecessors in title

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GREAT WESTERN RAILWAY v. BLADES.

of the plaintiff company, six acres of land, part of Swan Farm, in the parish of West Bromwich, purchased by the railway company under its compulsory powers for the consideration of 5,500*l*. This sum included compensation for the cost of sinking a new coal pit and the cost of a new engine and plant for working certain unwrought mines of the grantors. There was no mention of any mines or minerals underlying the lands purchased as being expressly included in the conveyance.

The land purchased lay within the district of the South Staffordshire blue brick clays, and at the place to which the issue in this action applied the strata were, according to the evidence, as follows: Upon the top was a layer of vegetable or windblown deposit, made up of decomposed vegetable matter or ordinary surface-soil, of a depth varying from nothing to about two feet. Immediately below that came the South Staffordshire clay. The upmost five feet or thereabouts of that clay had become partially decomposed by exposure to weather, percolation of water, and the like, and was what was called "weathered." Below began the unweathered or virgin South Staffordshire blue brick clay. Subject to some trifling strata of sandstone lying within it, this clay extended to a considerable depth, it might be three hundred feet or four hundred feet or more. The top five feet of weathered clay was good for making ordinary red brick, but it would not without admixture make Staffordshire blue brick. In working it was, in fact, ground up and mixed with the virgin clay of the lower stratum, and from the mixture Staffordshire blue brick was made.

In 1897 the defendants had become entitled to the lands adjoining the part of Swan Farm purchased by the railway company and the minerals lying under it, and on August 11, 1897, they served on the plaintiffs a proper notice under section 78 of the Railways Clauses Act, 1845,[1] of their intention to work the minerals. The plaintiffs did not within thirty days state their willingness to make compensation, and thereupon the defendants stated their intention to work the clay by open workings (which was a proper mode of working), though in so doing they would destroy the surface.

The plaintiffs thereupon commenced this action for an injunction to restrain the defendants from working so as to let down or injure the railway and from entering on and excavating the plaintiffs' land.

Neville, K.C., *Asquith, K.C.*, and *R. J. Parker*, for the plaintiffs.—This clay which the defendants are proposing to work is not a mineral within the meaning of section 77 of the Act of 1845, and, accordingly, it was not excepted from the conveyance to the railway company in 1852. The railway company purchased it without any express mention. The case is governed by *Glasgow Corporation* v. *Farie* [1888],[2] where the House of Lords decided that surface clays are not minerals within the meaning of this Act. That decision is unaffected by *Midland Railway* v. *Robinson* [1889],[3] where the point was whether

(1) The Railways Clauses Act, 1845, s. 77, enacts: "The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals, under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

Section 78: "If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards, therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company, and such owner, lessee, or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

(2) 58 L. J. P.C. 33; 13 App. Cas. 657.

(3) 59 L. J. Ch. 412; 15 App. Cas. 19.

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surface workings could be "mines," not what constituted "minerals." *Midland Railway* v. *Haunchwood Brick and Tile Co.* [1882],[4] in which Kay, J., held that a bed of clay on which a railway had been made was a "mine of a mineral," was prior to the decision in *Glasgow Corporation* v. *Faric*.[2] The inference from the deed itself, in 1852, speaking of unworked mines, meaning coal, is that the clay was not understood to be a "mine" or "mineral." The price paid for the land shews that clay was not, at that period, regarded as a "mineral," to be excluded from the conveyance; if it had been, the price would be utterly preposterous. The railway company paid for the clay as well as the top surface of vegetable mould. The plaintiffs are entitled to an injunction.

Warmington, K.C., and *J. W. Holmes*, for the defendants.—The question is whether the clay which we propose to work is or is not included in the conveyance to the plaintiffs' predecessors—in other words, whether it is or is not a mine of a mineral within the meaning of the statute. The plaintiffs rely on *Glasgow Corporation* v. *Faric*.[2] But that was a Scotch case, and has never been regarded as an authority on the English statute, and does not bind the Court in this case. It was a waterworks, not a railway case. This Court is not entitled to interpret it except so far as to accept what may have been said in interpretation of it by the Court of Appeal. In *Errington* v. *Metropolitan District Railway* [1882][5] clay lying near the surface was considered by Sir G. Jessel to be a mineral within the meaning of the Act. Clay may be a "mineral," and valuable clay, which has a commercial value in itself, must be a "mineral"—see *per* Fry, J., in *Lowsemore* v. *Tiverton and North Devon Railway* [1882].[6] If the thing which it is proposed to work, whether it is underground or on the surface, has a value of its own independently of its being a constituent part of the earth generally, it is a mine or mineral within the statute—*Midland Railway* v. *Haunchwood Brick and Tile Co.*,[4] *Midland Railway* v. *Miles* [1886],[7] and *Jersey (Earl)* v. *Neath Union* [1889].[8] *Hext* v. *Gill* [1872][9] has been accepted as the law, and with the exception of *Glasgow Corporation* v. *Faric*[2] there is no authority which throws doubt upon, while there is a series of authorities in support of, the proposition that clay, at any rate merchantable clay, is a "mineral"—*Errington* v. *Metropolitan District Railway*,[5] *Midland Railway* v. *Robinson*,[3] *Ruabon Brick Co.* v. *Great Western Railway* [1892],[10] and *Johnstone* v. *Crompton & Co.* [1899].[11] The plaintiffs' case therefore fails.

Neville K.C., in reply.—*Glasgow Corporation* v. *Faric*[2] says that the meaning of "mines" and "minerals" in cases of grant does not assist as to the meaning in the Act. The key is found in *Jersey (Earl)* v. *Neath Union*,[8] where it is pointed out that *prima facie* "mines of minerals" mean everything except the decomposed vegetable matter forming the top surface, according to *Hext* v. *Gill*,[9] but that this primary meaning must yield to the particular circumstances of the case. The cases relied on by the defendants are contractual cases and not statutable cases. *Glasgow Corporation* v. *Faric*[2] was a case dependent purely on the statute, not on some supposed contractual relation outside. *Hext* v. *Gill*[9] still stands for cases to which it is applicable. *Glasgow Corporation* v. *Faric*[2] was a decision on an Act (the Waterworks Clauses Act, 1847) which applied to England as well as Scotland. It is a binding authority on all the Courts at the present time. To sum up—there is a series of cases shewing what "minerals" means in its unrestricted sense; then there is a series shewing that for a time no difference was made between contractual and statutable cases; then *Glasgow Corporation* v. *Faric*[2] shewed this to be wrong and established a limitation. The defendants fail to shew that the present case differs from that case.

Cur. adv. vult.

BUCKLEY, J.—The decision in this case affects interests of far-reaching importance. It involves or may involve the determination, as between the railway companies of

(4) 51 L. J. Ch. 778; 20 Ch. D. 552.
(5) 51 L. J. Ch. 305; 19 Ch. D. 559.
(6) 51 L. J. Ch. 570; 22 Ch. D. 25.
(7) 55 L. J. Ch. 745; 33 Ch. D. 632.
(8) 58 L. J. Q.B. 573; 22 Q.B. D. 555.
(9) 41 L. J. Ch. 761; L. R. 7 Ch. 699.
(10) 62 L. J. Ch. 483; [1893] 1 Ch. 427.
(11) 68 L. J. Ch. 559; [1899] 2 Ch. 190.

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this country and the landowners from whom they purchased the soil on which their lines are laid, of the question whether the clays which in many cases constitute, or more or less closely underlie, the soil have passed to the companies by the conveyance of the land, or are, by virtue of section 77 of the Railways Clauses Act, 1845,[1] excepted. If they are excepted the landowner is entitled to get them, even by surface workings and destruction of the surface, unless the company, upon notice given, elect to purchase. In substance, therefore, the question is whether the value of these clays, or many of these clays (and it must be many millions sterling), belongs to the companies or to the vendors of the lands to them. Section 77 of the Act of 1845 [1] excepts from conveyances of lands made under a statutory purchase "mines of coal, ironstone, slate, or other minerals." The question I have to determine is whether the clay in the present case is a "mineral." If it be, then an open working of that "mineral" from the surface, according to the usual manner of working in the district, is a "mine of a mineral" —*Midland Railway* v. *Robinson*.[3]

A purchaser of the surface is by the common law entitled to support from the subjacent and adjacent strata. But, in cases falling within the *fasciculus* of clauses of the Act of 1845, commencing with section 77, the statute has created a specific law, and by that alone are the rights of the purchasing company and the owner of the "minerals" regulated—*Great Western Railway* v. *Bennett* [1867].[12] It was decided in that case "that the common-law principle which would have prevented an owner who had sold his surface land to a railway company from defeating his grant by withdrawing support from the surface land so used, did not apply to a state of things created by the statute in which the statute itself creates the distinction between the surface-owner and the mine-owner, and gives power to the mine-owner to work his minerals unless the railway company purchases or gives compensation to the mine-owner for leaving his mines unworked," *per* Lord Halsbury, L.C., in the recent case of *Glasgow Corporation* v. *Farie*.[2] In *Hext* v. *Gill*[9] Lord Justice Mellish stated the result of the authorities to be that "a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." Notwithstanding what was said in the House of Lords in *Glasgow Corporation* v. *Farie*,[2] to which I shall presently more particularly refer, it must be taken as concluded before me by *Jersey (Earl)* v. *Neath Union*[8] that *Hext* v. *Gill*[9] has not been overruled and, where applicable, is as binding on me as before *Glasgow Corporation* v. *Farie*[2] was decided. The real question for my decision, I apprehend, is whether to the transaction with which I have to deal the rule in *Hext* v. *Gill*[9] is applicable or not. The task before me is limited, I think, to ascertaining the exact facts of the case with which I have to deal, and then endeavouring, not so much to construe section 77 of the Act for myself, as to understand and state the true effect of the many decisions upon that section. They are not all of them easy to reconcile, and the more so in that they include differences of opinion upon cardinal points as between the learned Lords and the learned Judges of Appeal who have taken part in their decision.

I am unable to accede to an argument of the plaintiffs that the fact that the deed of 1852 speaks of "mines" in connection with coal assists me at all in determining whether in this transaction clay is a "mineral" or not. The fact that the word "mines" in the language of the deed includes coal does not shew that it excludes clay. Neither can I accede to an argument of theirs that, for the purpose of ascertaining what were the parcels as described in the deed, I can have regard to the fact that a large sum per acre (even allowing for compensation for certain matters) was evidently paid. For the purpose of this decision I must regard the conveyance as being nothing but a conveyance of six acres of land (being land such as proved by the evidence) made under the statute, with all the consequences which ensue from a

(12) 36 L. J. Q.B. 133; L. R. 2 H.L. 27.

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conveyance of that kind by the operation of section 77. The whole question is whether this clay is a "mineral," and as such was by virtue of section 77 excepted from the conveyance—whether, in fact, it now belongs to the defendants, or whether it passed by the conveyance and now belongs to the plaintiffs.

After carefully considering all the authorities, I have come to the conclusion that the proposition which lies at the root of the true solution of the question before me is that, to a case dependent as this is upon the operation of the statute, different considerations apply from those which arise where the relations between the parties exist by contract or grant. The difference lies in the fact that, where by grant land passes from A to B, reserving the minerals to A, A cannot so work the reserved minerals as to let down the surface, for that would be to destroy that which he has granted. In such case, therefore, there is no reason for withholding from the word "minerals" the widest possible meaning, because, however wide the meaning may be, the rights of B are not affected, seeing that A cannot work the reserved thing so as to injure B. But in a case under this statute that proposition is not true, for A can work the excepted thing so as to injure B, and the whole basis of *Glasgow Corporation* v. *Farie*,[2] in arriving at the decision at which the House of Lords there arrived (without overruling—as the Court of Appeal has distinctly said their Lordships did not overrule—the case of *Hext* v. *Gill*[9]), seems to me to lie in that proposition. I find that this difference in the considerations applicable to the two cases has been repeatedly pointed out in the House of Lords. Thus in *Great Western Railway* v. *Bennett*,[12] which may be said to be the foundation of all this branch of the law, Lord Westbury, after reading section 77, says: "In the face of these words there is no room for the ordinary implication which applies to a common grant, namely, that it extends by implication to all that, though not named, which is necessary for the support or enjoyment of the thing granted." Lord Watson, in *Glasgow Corporation* v. *Farie*,[2] speaking of *Menzies* v. *Breadalbane* (*Earl*) [1822],[13] which was a case of contract, says: "Irrespective of other considerations which differentiate that case from the present, there is little analogy between a reservation of minerals coupled with an obligation to support the surface, and a reservation not only of the minerals, but of the right to work them without giving support." In the same case Lord Herschell, after pointing to similar considerations, says: "In this respect the case differs from an ordinary reservation in a deed unaffected by statutory provisions." Lord Herschell again, in *Midland Railway* v. *Robinson*,[3] says: "I doubt whether much assistance is to be obtained from the cases in which a construction has been put upon that word" (mines) "in instruments embodying merely agreements between the parties to them, unaffected by any statutory enactment. In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining undisturbed. And if this be true of minerals lying deep below the surface, it would be obviously out of the question to permit it to be disturbed by winning minerals which can only be wrought by surface operations. But in the case of mines reserved under section 77 of the Railways Clauses Act the case is different. It is clear that the mines reserved, if not purchased by the company, may be so worked as to interfere with the surface, the only limitation being that the working must be according to the usual manner of working such mines in the district where the same are situate."

It will occur to every one that an argument might be advanced to the contrary of this of the following nature. In more than one of the cases the reasoning is adopted by the Judges that the word "mines" in section 77 may very properly have attributed to it the widest possible meaning, because the railway companies are not necessarily injured, seeing that they can protect themselves by purchasing—see, for example, *Midland Railway*

(13) 1 Shaw App. 225; 4 R. R. (Sc.) 60.

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v. *Haunchwood Brick and Tile Co.*[4] and *Midland Railway* v. *Robinson.*[3] A similar argument might be employed to shew that "minerals" might, without injury to the railway companies, receive the widest possible meaning for the like reason. But, though I have looked diligently to see whether any of the learned Lords who have dealt with this matter have accepted this argument, I cannot find that they have. On the contrary, from the passages which I have quoted, I am satisfied that the decisions include this as a proposition upon which I am entitled and bound to act, and which I think explains *Glasgow Corporation* v. *Farie*[2] consistently with all the other cases—namely, that you are not to apply to a case where there is no right to support under the Act the considerations which you are to apply where there is a right to support because the rights lie in contract.

The authority upon which the plaintiffs mainly rely, and which, in my judgment, governs the present case, is the decision of the House of Lords in *Glasgow Corporation* v. *Farie.*[2] The defendants argued that the facts stated in the report from the pleadings, and the fact that the purchasers there were a waterworks company, to whom from the nature of the case the clayey nature of the soil would be of importance for the purpose of retaining water, were circumstances which swayed the judgment of the House. I cannot accede to that argument. I cannot in the judgments find a trace that any of their Lordships proceeded upon anything arising from those facts, or from the fact that the appellants' works were waterworks. No evidence was led, and Lord Watson pointed out that the statements in the pleadings were unfortunately conflicting. The case was one of conveyance, it is true, but of conveyance by reference to the statute, and the learned Lords dealt with it entirely as a case under the statute. Thus, Lord Halsbury says that the question is "whether clay is included in the reservation of mines and minerals under he Waterworks Clauses Act, 1847." Lord Herschell says the issue depends entirely upon the construction to be put upon the statute in relation to the circumstances before the House, and Lord Macnaghten says that the question must depend for its solution "on an examination of the sections in the Waterworks Act which bear on the subject, with the aid of such light as may be derived from parallel passages in the Railway Acts." The defendants also urged that Lord Halsbury strictly limited his opinion to the case then before the House, and left himself wholly free if the question should arise with respect to any other statute or with respect to any grant not controlled by the statute relevant in that case. But I cannot accede to the argument that by that observation the decision was, even so far as Lord Halsbury was concerned, confined to Scotland or to the Waterworks Clauses Act, 1847. Lord Halsbury dealt with it as a case depending on certain language in a statute, and identical language is found in this statute. Lord Watson said that the question would have been precisely the same if the purchaser had been a railway company and the statute an English statute. Lord Herschell pointed attention to other statutes which contained the same words, and said that it was not to be supposed that the Legislature intended the same enactments in various statutes to have different meanings, and Lord Macnaghten called attention to the fact that the words of the Railways Clauses Act, 1845, are in this respect identical. The question which the House determined was, in my judgment, this—that under the statute which was relevant there, and which is in identical words with the statute in this case, cases such as *Hext* v *Gill*,[9] dealing with grants, are not of much assistance, and that, while the rule in *Hext* v. *Gill*[9] is no doubt good law in circumstances to which it applies, the question under an Act such as this involves other considerations. I am fortified in my view of the effect of the several decisions upon this vexed point by reading *Jersey* (*Earl*) v. *Neath Union.*[8] The judgments in that case shew, as I think, that the true principle to apply is that, accepting *Hext* v. *Gill*[9] as good law, and assuming that a "mineral" *prima facie* includes anything lying in the land which has a value of its own as being capable of being used independently of the land, yet that rule must bend, as Lord

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Justice Bowen said, or be modified, as Lord Justice Fry said, by the circumstances of the case, and that what I must look to is whether in the nature of this transaction, and having regard to all the circumstances of this case, the word "minerals" does in the case before me include the clay in question. I must look to this, as Lord Justice Fry says, that "in the construction of a statutory enactment intended to regulate the relative rights of a body of persons purchasing an interest in land for the purpose of constructing works, and the previous owner, it is reasonable to anticipate that the purchasers would acquire such an interest in the surface as would enable the works to be constructed and maintained by the purchasers." I wish it were open to me to adopt that which Lord Justice James in *Hext* v. *Gill*[9] said that he, but for the authorities, would have thought was the right way to ascertain the meaning, and which Lord Halsbury in *Glasgow Corporation* v. *Farie*[2] would evidently have desired to adopt, and to say that the meaning of the word is a mere question of fact, to be determined like any other question of fact; but I do not feel that the authorities leave me at liberty to do this. It seems to me that I must ascertain the meaning upon the footing that the term may, as in *Hext* v. *Gill*[9] and *Midland Railway* v. *Haunchwood Brick and Tile Co.*,[4] include clay, but not that it must include clay, and that the question whether it does or does not is to be determined by ascertaining the true nature of the transaction and the object of the contracting parties. This, I think, is the fair result of *Glasgow Corporation* v. *Farie*[2] and *Jersey (Earl)* v. *Neath Union*.[8] Mines and minerals, as Lord Watson says in the *Glasgow Case*,[2] are not definite terms; they are susceptible of limitation or expansion according to the intention with which they are used.

In this state of things I do not derive much assistance from that which was said by Sir George Jessel in *Errington* v. *Metropolitan District Railway*,[5] or by Mr. Justice Fry in *Loosemore* v. *Tiverton Railway*,[6] or from *Midland Railway* v. *Miles*,[7] where I find that the company did not argue that clay was not a "mineral," nor, as Lord Watson said in *Glasgow Corporation* v. *Farie*,[2] even from *Hext* v. *Gill*.[9] As regards *Midland Railway* v. *Haunchwood Brick and Tile Co.*,[4] I may say that the decision, as I read the case, was not really one that clay was a "mineral," although that was involved in the decision, but was that surface workings of clay (assuming clay to be a "mineral") were "mines" of that "mineral." *Ruabon Brick Co.* v. *Great Western Railway*[10] is but an application of *Midland Railway* v. *Robinson*[3] to its own particular facts.

It remains to solve the question, therefore, upon the facts of this particular case. Now the facts here, concisely stated, seem to me to be that this clay is the soil. The six inches or so of decomposed vegetable matter on the surface is not in this place the soil any more than in a room the carpet can be said to be the floor. The plaintiffs' witnesses (who all say the same thing) say that these clays are in this district the land, and the figures which the defendants' witnesses give in stating the different strata of the ground lead irresistibly to the same conclusion. It is impossible to read the speeches in *Glasgow Corporation* v. *Farie*[2] without seeing that it may well be, consistently with that decision, that the same clay may within that decision be a "mineral" in one district and not in another. Thus Lord Watson, after suggesting that it may be possible that there may be some strata which would pass to the compulsory purchaser if they lay on the surface, but be reserved if they occurred some depth below it, goes on to say that the expression "the land," being that which the company purchases, cannot be restricted to vegetable mould or to cultivated clay, but that it naturally includes and must be held to include the upper soil, including the sub-soil, whether it be clay, sand, or gravel. And Lord Macnaghten points to similar considerations as affording an answer to the question of what it is that the company have bought. Where the clay is what Lord Halsbury calls the stratum on which the house is built, or constitutes "the land," as Lord Watson describes it, it is not, I think, a mineral within the Act as the Act has been construed by

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the decisions. It is a thing which has a value of its own, but not a thing which has a value of its own apart from the soil in which it is found, for the simple reason that it is itself the soil.

At the commencement of this judgment I stated that in my view I could not for the purpose of construing the description of the parcels in the deed of 1852 regard the fact that the company paid so many hundred pounds per acre, but I think I can regard it as a factor to enable me to answer, in connection with all the other facts, the question as to what was the nature of this transaction. Is it possible in this transaction that the railway company should have bought and paid such a sum for the mere right of an easement over the surface (for that is practically what it is), with a right of support so long as the clay is not worked and a right of pre-emption of the soil—that is, the clay—when it is worked; and how could you (to apply Lord Macnaghten's words) value this land at Swan Farm at so much per acre when by the hypothesis you are to separate the land for the purpose of valuation from the ordinary constituents of which it is in fact composed, and which are in substance the whole of the land itself?

I am very conscious of the difficulty of the case, but I have arrived at the conclusion, for the reasons that I have stated, that the plaintiffs are right. I think that in this transaction, and having regard to the nature of this land, the clay was not a "mineral" reserved by force of section 77 of the Railways Clauses Act, 1845, and that the plaintiffs are entitled to an injunction and the costs of the action.

Solicitors—R. R. Nelson, for plaintiffs; Needham, Tyer & Barrow, agents for E. Caddick, West Bromwich, for defendants.

[*Reported by Arthur Lawrence, Esq., Barrister-at-Law.*

FARWELL, J. 1901. July 30.

DODSON v. DOWNEY.

Partnership — Purchase of Share — Vendor's Right to Indemnity—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 31.

A contract to purchase a share in a partnership implies a contract by the purchaser to indemnify the vendor against the liabilities of the partnership, although the contract is silent on the point and although the purchaser is, under the Partnership Act, 1890, *s.* 31, *not entitled to become a partner.*

The plaintiff in this action was a partner with two other persons in an engineering business. In the month of June, 1900, he had arranged to retire and to leave his share of capital in the business for three years.

The defendant, who was fully aware of this arrangement, wrote to the plaintiff proposing to buy his share, and after some preliminary correspondence, on September 19, 1900, wrote to the plaintiff's agents making a definite offer of 175*l.* for his share. The plaintiff was then in New Zealand. His agents obtained his instructions, and on November 10, 1900, wrote a letter to the defendant in which they accepted his offer, and added "The arrangement had, we think, better be carried out by a partnership deed providing for Mr. Dodson's retirement, and for your joining the firm and taking over his position and indemnifying him against all liability and claims in connection with the business."

It was afterwards found that the continuing partners were not willing to accept the defendant as a partner. The defendant repudiated the contract, and the plaintiff brought this action for specific performance.

The business had ceased to be carried on before the hearing; there were no profits and considerable liabilities.

The action was tried on the pleadings and correspondence without further evidence. The only question argued which calls for a report was whether the plaintiff was entitled to the indemnity asked for in his agents' letter.

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DODSON *v.* DOWNEY.

Upjohn, K.C., and *R. B. Yardley*, for the plaintiff.—There is no contract that the defendant was to be made a partner. He gets what he contracted for—that is, the rights of an assignee under section 31 of the Partnership Act, 1890.[1] The purchaser of a share in a partnership takes it subject to the partnership liabilities—*Kelly* v. *Hutton* [1868][2] and *Whetham* v. *Davey* [1885][3]; and, as in the case of any other purchaser, an agreement to indemnify the vendor against these liabilities is implied in the contract—*Waring* v. *Ward* [1802][4] and *Bridgman* v. *Daw* [1891].[5]

Beale, K.C., and *S. R. Earle*, for the defendant.—The claim for an indemnity introduces a new term not contained in the offer. There is therefore no contract. *Waring* v. *Ward*[4] and *Bridgman* v. *Daw*[5] were cases of the purchase of an equity of redemption; they do not apply to the purchase of a share in a partnership. If the purchaser became a partner he would have complete control over the share and a voice as to incurring liabilities. He might then be bound to indemnify the vendor. But under the Partnership Act he does not buy the liabilities, but only a share of the profits. Otherwise he would be a partner without any right of control.

[FARWELL, J.—He does not become liable to the other partners; but is he not bound to indemnify his vendor who is a trustee for him?—*Rose* v. *Watson* [1864].[6]]

There is no decision that he is so bound. In *Lysaght* v. *Edwards* [1876],[7] where Sir George Jessel went very fully into the position of vendors as trustees, there is no suggestion of any right to an indemnity.

FARWELL, J.—The purchaser's last objection depends on the question, what is the position of a purchaser of a share in a partnership business? Assuming, as stated in the pleadings and correspondence, that the vendor had severed his connection with the business and had made an arrangement for leaving his money dormant for three years, he still had rights as a partner, or a late partner, including the right to have his capital repaid subject to the arrangement he had entered into. And those rights the purchaser bought.

I cannot follow the purchaser's argument on section 31 of the Partnership Act, 1890. It appears to me that the section is intended to protect the vendor's partners, and to declare that a partner may sell or mortgage his share in a partnership provided that he does not interfere with his partners' rights. They are not bound to accept or acknowledge the purchase at all; but the vendor, as between himself and his partners, may sell everything he has to sell. The purchaser of a share in such a business differs in no way that I can see from the purchaser of any other property. As from the date of the contract he becomes the owner of the property subject only to the liability to pay the purchase-money, and the vendor becomes a trustee with certain qualifications. The law seems to me to be correctly stated in *Dart's Vendors and Purchasers* (6th ed.), p. 283: "The vendor is not a mere dormant trustee; he is a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest, if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsists, but subject to the

(1) Partnership Act, 1890, s. 31: (1) "An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners. (2) In the case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

(2) 37 L. J. Ch. 917; L. R. 3 Ch. 703.

(3) 30 Ch. D. 574.

(4) 7 Ves. 332.

(5) 40 W. R. 253.

(6) 33 L. J. Ch. 385; 10 H.L. C. 672.

(7) 45 L. J. Ch. 554; 2 Ch. D. 499.

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paramount right of the vendor to protect his own interest as vendor of the property. When the title has been accepted and the purchase money paid, this paramount right of the vendor ceases, and the trusteeship subsists without any qualification, but as from the date of the contract the relationship is throughout that of trustee and *cestui que trust*." It appears to me to follow from that statement that the purchaser as *cestui que trust* is personally bound to indemnify the vendor as trustee from the liabilities of the trust property. He buys the share, and he steps into the position of the vendor.

The purchaser contends that he takes all the benefits and not the liabilities. Supposing a man buys a share in a partnership, and it goes on for six years, during which the vendor remains as a nominal partner, and that the first four years are successful, and the purchaser takes all the profits, but at the end of that time there are two disastrous years, in which the liabilities exceed the assets: the purchaser contends that the vendor must in that case bear the loss. That proposition appears to me absolutely untenable. Applying the principle which seems to me to be correctly stated in the passage I have read from *Dart*, as soon as the relation of trustee and *cestui que trust* is established all the incidents follow, including the vendor's right to a personal indemnity.

The result is that I make a decree for specific performance, and the purchaser must pay the costs of the action. By analogy to the case of *Bridgman* v. *Daw*,[5] the assignment will contain an express covenant by the purchaser to indemnify the vendor against the liabilities of the business.

Solicitors—Alexander Neale, agent for Bennett & Marsh, Worthing, for plaintiff; Edward Betteley, for defendant.

[*Reported by J. R. Brooke, Esq., Barrister-at-Law.*

KEKEWICH, J. 1901. Aug. 1.

WOOD, *In re*; WOOD *v.* WOOD.

Will—Construction—Illegitimate Children—Gift to Children by Name—Gift to Next-of-Kin of Children—Intestacy.

A testator gave legacies to his seven children, naming them, and directed his trustees to hold his residuary estate in trust in equal shares for such of his seven children as should be then living and have attained or attain the age of twenty-one years; daughters' shares to be retained upon trust to pay the income to her for life, and after her death upon trust for her children, as therein mentioned, and if there should be no such child, then in trust for the persons who at the death of such daughter would have become entitled to such share under the statutes for the distribution of the personal estates of intestates in case she had died possessed thereof without having been married. An illegitimate married daughter of the testator survived him, and died without ever having had a child:—Held, *that her interest in the residue did not devolve upon the persons who would have been her next-of-kin at the time of her death had she been legitimate, but to her legal personal representative as if the same had been absolutely bequeathed to her.*

Standley's Estate, *In re* (L. R. 5 Eq. 303), *followed.*

Deakin, *In re*; Starkey *v.* Eyres (63 L. J. Ch. 779; [1894] 3 Ch. 565), *not followed.*

Summons.

By his will dated May 12, 1883, the testator, after making a specific bequest to his widow, bequeathed to each of his seven children by name pecuniary legacies, and directed his trustees to stand possessed of his residuary estate upon trust to pay the income thereof to his wife for life, and after her death in trust in equal shares for such of his seven children thereinbefore named as should be then living and should have attained or should attain the age of twenty-one years. And he directed his trustees to retain any daughter's share upon trust to pay the income of each such daughter's legacy and share to her during her life for her sepa-

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rate use during any coverture, and from and after her death upon trust for her children as therein mentioned; and "if there shall be no such child then in trust for the persons who at the death of such daughter would have become entitled to such share under the statutes for the distribution of the personal estates of intestates in case she had died possessed thereof without having been married, such persons taking as tenants in common in the shares in which they would have taken under such statutes."

The testator died on December 10, 1883, and his will was duly proved on January 19, 1884.

Shortly after the death of the testator it was discovered that his three eldest children were illegitimate. The widow died on December 11, 1893, leaving five out of her seven children surviving her.

The testator's daughter R., one of his three illegitimate children, died on January 23, 1901, without issue.

This summons was taken out by the youngest child of the testator for the determination of the question whether the legacy, bequest, and share of residue of R. under the will of the testator devolved upon her death without issue—first, upon the persons who would have been her next-of-kin at the time of her death in case she and the other persons described in the will as the testator's children had all been legitimate; or secondly, passed to her legal personal representative as if the same had been absolutely bequeathed to her; or thirdly, became divisible amongst the persons entitled in right of the testator's widow and legitimate children as if he had died intestate in relation thereto.

Warrington, K.C., and *Lyttelton Chubb*, for the plaintiff.—If a testator speaks of his son T. who is legitimate and his daughter R. who is illegitimate, and further on treats them as brother and sister, he must mean them to take equally in common with the others who are mentioned—*Deakin, In re; Starkey* v. *Eyres* [1894].[1] This is a stronger case than that, because in it there were no words in the will to assist in the construction. In *Hill* v. *Crook* [1873][2] the House of Lords laid it down that there must be clear evidence of an intention in the will itself to establish the inclusion of illegitimate children with legitimate in the use of the word "children," and here there is such an intention. As Lord Cairns said in that case, "there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children." *Standley's Estate, In re* [1868],[3] is a decision to the contrary; but Stirling, J., in *Deakin, In re*,[1] refused to follow it, and said he was unable to distinguish it. It was decided before *Hill* v. *Crook*,[2] and was inconsistent with the principles there laid down. This case is in substance the same as those which have already been before the Court, and therefore the distribution must be to natural kindred, as if they had been legitimate.

[They also cited *Horner, In re; Eagleton* v. *Horner* [1887],[4] and *Haseldine, In re; Grange* v. *Sturdy* [1886][5]

P. O. Lawrence, K.C., and *A. F. Peterson*, for the legal personal representative, and

Renshaw, K.C., and *F. Thompson*, for parties entitled on an intestacy, were not called upon.

KEKEWICH, J.—I think that I should best perform my duty by rejecting the plaintiff's contention. No one can doubt that the severe rules which obtained in the younger days of some of us, and which were handed down from the time of Lord Eldon, have been modified benevolently in later years. *Hill* v. *Crook*[2] is an example of that, and the more recent case of *Haseldine, In re; Grange* v. *Sturdy*,[5] which has been mentioned, was a strong case of extracting from the language used by the testator an intention to include illegitimate children under phrases and terms which otherwise would be strictly

(1) 63 L. J. Ch. 779; [1894] 3 Ch. 565.
(2) 42 L. J. Ch. 702; L. R. 6 H.L. 265.
(3) L. R. 5 Eq. 303.
(4) 57 L. J. Ch. 211; 37 Ch. D. 695.
(5) 31 Ch. D. 511.

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construed as children in the ordinary sense *ex justis nuptiis procreati*. The other case to which I have been referred is that of *Deakin, In re*,[1] and I have myself not hesitated to adopt the same line of reasoning in the case of *Parker, In re; Parker* v. *Osborne* [1897],[6] which I think stands alone as including in a gift by a testator to a class of his wife's nephews and nieces an illegitimate nephew of the wife. Here I am asked to go further, and say that the testator's reputed children are to be regarded as legitimate for the purpose of benefiting those who are not in law their next-of-kin, but who would have been under the Statutes of Distribution their next-of-kin if the children had been legitimate. That is another step in favour of the benevolent view of letting in illegitimate children where the Court sees that that is the testator's intention. That is a distinct step, and I think it is a step which ought not to be taken by a Judge of first instance, but ought to be taken, if at all, by the Court of Appeal or the House of Lords. Counsel for the plaintiff was unable to cite any case in which this has been done, and the very point came before Vice-Chancellor Wood in *Standley's Estate, In re*,[3] and he declined to extend the law in the way proposed. There the gift was to the son's "next-of-kin under the statute for the distribution of intestates' estates, in case he had died unmarried and intestate," and the result was that only those who were next-of-kin in blood could take, if any one was to take at all. Vice-Chancellor Wood, who I need hardly say is a very high authority, declined to give effect to the gift. He said: "The only cases in which effect has been given to a limitation in favour of illegitimate children (who, in the eye of the law, are no children at all), are cases where it can be distinctly ascertained that the testator pointed out these children as *personæ designatæ*, although he did not name them. For example, where a testator speaks of 'the children of my deceased brother,' and the brother never was married; in that case there could be none but illegitimate children; but as he speaks of the children as living, it is the same thing as if he had written the names of each of them in the will."

I do not understand that to be in the least degree touched by *Hill* v. *Crook*[2] and the other cases to which I have referred. Some of these cases have gone very far; still in order to give to illegitimate children anything under the term "children" one must ascertain from the language of the testator's will, construed, no doubt, by the light of surrounding circumstances, that he must have intended to include them in the will under that description. The Vice-Chancellor declines to go further and say that the next-of-kin, although the children themselves might have taken, should be let in. He says, "What the testator has attempted to do is this,"—apparently he gives him credit for having intended it—"to declare that his children, though illegitimate, shall be regarded as if they were legitimate; and then, to say that under the description 'next of kin' shall be let in all the persons who would have been their next of kin had they been legitimate. I apprehend that is an attempt which the law will not permit to succeed." So here the testator was entitled to treat his illegitimate children as legitimate, but then he wishes to include as next-of-kin all persons related by blood to these children. I recognise that that was the testator's wish, but I cannot give effect to it because, in the language of the Vice-Chancellor, "I apprehend that that is an attempt which the law will not permit to succeed."

I am a little puzzled by the observations of Mr. Justice Stirling in *Deakin, In re*,[1] because I cannot suppose that he would have attempted to overrule a decision of Vice-Chancellor Wood. He might have examined the case and might have pointed out how it was distinguishable from the case before him; or he might have said that it was practically overruled by other authorities and ought not to be followed. If he had said that, it is quite possible that I might have felt bound to follow him; but he says this: "The case of *Standley's Estate, In re*,[3] decided by Lord Hatherley when Vice-Chancellor, was relied upon as an authority adverse to the conclusion at which I have arrived.

(6) 66 L. J. Ch. 509; [1897] 2 Ch. 208.

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WOOD, IN RE.

I must confess myself unable effectually to distinguish it; but it was decided before *Crook* v. *Hill*.[2] The reasoning on which the decision was based appears to me to be inconsistent with the principles there laid down, and, notwithstanding the weight justly due to any decision of Lord Hatherley, I am unable to follow it, having regard to the more recent authorities, which are binding on me." Now the learned Judge had not before him the case of an attempt such as the Vice-Chancellor described to bring in as next-of-kin those who were not in the eye of the law next-of-kin, and in that respect the two cases were not the same. I can quite understand Mr. Justice Stirling saying that the line of reasoning adopted by the Vice-Chancellor was inconsistent with the other cases, but I cannot read his judgment as saying that the attempt which was made before the Vice-Chancellor has ever been successfully made. Vice-Chancellor Wood has held that the law will not permit that attempt to be made, and finding a decision by the Vice-Chancellor upon the very point I think that I am bound to follow it.

[Following *Hancock, In re; Watson* v. *Watson* [1900],[7] it was admitted that the testator did not die intestate as to the daughter's share, and therefore a declaration was made that the property passed to her legal personal representative as if it had been bequeathed to her absolutely, the second alternative in the summons being the correct interpretation of the will.]

Solicitors — Indermaur, Clark & Parker, for plaintiff; Field, Roscoe & Co., for defendant.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

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(7) *Ante*, p. 114; [1901] 1 Ch. 482.

BUCKLEY, J. 1901. Aug. 5.

BARNARD CASTLE URBAN COUNCIL *v.* WILSON.

Local Government — Water Supply — School — Charity — Swimming Bath — "Domestic purposes" — "Trade, manufacture, or business"—Waterworks Clauses Act, 1847 (10 *Vict. c.* 17), *ss.* 35 *and* 53—*Waterworks Clauses Act*, 1863 (26 *& 27 Vict. c.* 93), *s.* 12—*Public Health Act*, 1875 (38 *& 39 Vict. c.* 55), *ss.* 51, 56, *and* 57.

A school carried on under a scheme established by the Charity Commissioners, although for certain purposes a business, is nevertheless entitled to a supply of water for a swimming bath as for "domestic purposes" within section 12 *of the Waterworks Clauses Act*, 1863, *and not as for a "trade, manufacture, or business."*

Trial of action.

The plaintiffs were the urban sanitary authority authorised under the Public Health Act, 1875, and the Acts incorporated therewith, to provide water to the urban district of Barnard Castle, in the county of Durham. The defendants were the governors of the North-Eastern County School at Barnard Castle, and within the district. The school was carried on under a scheme established by the Charity Commissioners, which provided that the funds not thereby required or directed to be otherwise applied or disposed of should be transferred to the Official Trustees of Charitable Funds in trust for the foundation in augmentation of its endowment.

In 1896 the defendants constructed on their premises a swimming bath with a cubical capacity of 35,000 gallons. A fee of 3*s.* 6*d.* a term was charged for the use of the bath to every boarder.

The plaintiffs had supplied water for this bath under a special agreement until March, 1899, when they gave notice to the defendants that for the future the charge for the water would be sixpence per 1,000 gallons, the usual price for water supplied in the district for trade purposes. The defendants refused to pay this charge, and thereupon the plaintiffs brought the present action, claiming a

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declaration that the defendants were not entitled to demand and receive from the plaintiffs a supply of water for the swimming bath as for "domestic purposes" within the meaning of the Waterworks Clauses Acts, 1847 and 1863, as incorporated by the Public Health Act, 1875, and that the plaintiffs were entitled to the payment from the defendants for the bath at the rate of sixpence per 1,000 gallons, and that the plaintiffs were entitled to cut off the water until payment was made, and an injunction to restrain the defendants from taking the water except for purposes other than domestic purposes within the meaning of the Acts.

By section 56 of the Public Health Act, 1875, where a local authority supply water to any premises they may charge in respect of such supply a water rate to be assessed on the net annual value of the premises ascertained in the manner prescribed by the Act, or they may enter into agreements for supplying water on such terms as may be agreed on between them and the parties receiving the supply. By section 57 the Waterworks Clauses Act, 1863, is incorporated. By section 65 the local authority are authorised to supply water for public baths or washhouses or for trading or manufacturing purposes on such terms and conditions as may be agreed on between the local authority and the persons desirous of being so supplied.

S. G. Lushington, for the plaintiffs.—The school carried on by the defendants is a business—*Wauton* v. *Coppard* [1898] [1] and *Doe d. Bish* v. *Keeling* [1813] [2]; and that notwithstanding it is a charity—*Rolls* v. *Miller* [1884] [3] and *German* v. *Chapman* [1877].[4] That being so, section 12 of the Waterworks Clauses Act, 1863, which is incorporated by section 57 of the Public Health Act, 1875, draws a distinction between water supplied for "domestic purposes" and water supplied for the purposes of any "trade, manufacture, or business." This swimming bath was part of the business of the school. The water supplied for it was therefore supplied for the purposes of a "trade, manufacture, or business," within that section, and the plaintiffs are not affected by the regulations as to a domestic supply.

[He also referred to *Bushy* v. *Chesterfield Waterworks Co.* [1858] [5]; Waterworks Clauses Act, 1847, ss. 35, 47, and 53; and Public Health Act, 1875, ss. 51, 56, 57, 58, and 65.]

R. Cunningham Glen, for the defendants.—Assuming that the school is a business, the business must be one in the nature of a trade in order to bring it within section 12 of the Act of 1863—*Liskeard Union* v. *Liskeard Waterworks Co.* [1881].[6] It must be carried on as a commercial undertaking—*Smith* v. *Anderson* [1880],[7] and that cannot be said of this school.

[He also referred to *Weaver* v. *Cardiff Corporation* [1883].[8]]

S. G. Lushington replied.

BUCKLEY, J.—The plaintiffs in this action are the Barnard Castle Urban District Council, who, under the Public Health Act, 1875, are authorised to supply water to that district, and the defendants represent the governors of the North-Eastern County School at Barnard Castle, who in 1896 erected a swimming bath. The boys are some 350 in number, and the bath consumes about 35,000 gallons a fortnight. The whole question between the parties is whether the supply of water to that bath is a supply for "domestic purposes" or for a "trade, manufacture, or business." It appears to me that the undertaking of a school of 350 boys is within certain authorities and for certain purposes a business. I find that Lord Ellenborough in *Doe d. Bish* v. *Keeling* [2] held that an assignment of a lease to a schoolmaster was a breach of a covenant "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises or any part thereof any trade or business whatsoever, &c., without the licence of the lessor,"

(1) 68 L. J. Ch. 8; [1899] 1 Ch. 92.
(2) 1 M. & S. 95.
(3) 53 L. J. Ch. 682; 27 Ch. D. 71.
(4) 47 L. J. Ch. 250; 7 Ch. D. 271.
(5) 27 L. J. M.C. 174; E. B. & E. 176.
(6) 7 Q.B. D. 505.
(7) 50 L. J. Ch. 39; 15 Ch. D. 247.
(8) 48 L. T. 906.

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&c.; and, to take the recent case of *Rolls* v. *Miller*,[3] the Court of Appeal there held that a charitable institution called a "home for working girls," where the inmates were provided with board and lodging, whether any payment was taken or not, was a business, and came within the restrictions of a covenant not to use, exercise, or carry on upon the premises any trade or business of any description whatsoever. This case is not, in my opinion, varied by the fact that the school is not carried on for profit, and that the receipts from the boys are applied to the augmentation of the foundation.

For certain purposes I think this school is a business; but I have to decide whether, within section 12 of the Waterworks Clauses Act, 1863, which contrasts a supply for "domestic purposes" with a supply for a "trade, manufacture, or business," this is a supply for domestic purposes or for the purposes of the business. The only sections to which I need refer or which have any bearing on the matter in the Public Health Act, 1875, are sections 56 and 65. The effect of section 56 is that where a local authority supplies water it may charge a water rate, to be assessed on the net annual value of the premises in the manner pointed out, or it may enter into an agreement as to the terms on which water is to be supplied, the effect of which is that it may make an assessment as of right in default of an agreement which may be made if the parties please. Section 65 enables the local authority to supply water for public baths or washhouses on the terms of an agreement, or to construct works to supply water for public baths or washhouses, and this is the only section which expressly applies to baths. I have therefore to deal with a series of enactments in which there is no provision about baths, except one which refers to public baths. In this state of things counsel for the plaintiffs does not contest that a supply of water to an ordinary bathroom in a private residence would not be a supply for the purpose of a trade, manufacture, or business. There is authority for that in the case of *Weaver* v. *Cardiff Corporation*,[5] in which it was held that when a special Act required a company to supply water for domestic purposes, not including a supply for baths, washhouses, or public purposes, a fixed bath connected with the water service and used by a private resident was not within the exception. Beyond that, counsel for the plaintiffs does not contest the proposition that if the owner of a private residence constructed a swimming bath on his premises for his own use the water supplied to that bath would be supplied for "domestic purposes." But he says that this is a different case because the school is a business, and the supply of water for this swimming bath is a supply for the purposes of that business. The business, if it be one, is that of receiving the boys, feeding them, teaching them, and housing them during the school term; and if the plaintiffs' proposition is true, the supply of water for the use of the boys for washing their hands or cooking their meals would be a supply for the purposes of that business. It seems to me that this is an extravagant proposition, and I ask myself whether I ought to draw a distinction between water supplied for ordinary domestic purposes and water supplied for this swimming bath. I think it is impossible to say that this swimming bath is a business as distinguished from the other purposes for which the school is carried on. If the governors had a gymnasium, could it be said that they carried on business as gymnasium proprietors? If they taught carpentering, could it be said that they carried on business as carpenters? I answer, Certainly not. Their business is the whole business of the school, and the swimming bath is only a part of that whole. The true answer is, that in section 12 of the Waterworks Clauses Act, 1863, you have to read the words "trade, manufacture, or business" in contrast with "domestic purposes"; and directly you find that the water is supplied for domestic purposes, even though it is supplied for the domestic purposes of the business of keeping a school, it is a supply for domestic purposes, and not for a business. The nearest case to this is *Liskeard Union* v. *Liskeard Waterworks Co.*[6] That was a case about a workhouse, and it was argued that the maintenance of a workhouse was

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a public, not a private purpose, and that water supplied for it was not supplied for domestic purposes. Lord Coleridge uses these words: "No doubt this is true, but in the prosecution of that which is a public purpose there may be domestic uses, and this is one." And he gives us an instance that "Every large family is partly made up of persons quite unconnected by ties of blood or marriage, and the number of those so connected may bear a very small proportion to the whole number of persons collected together, as, for instance, in the case of a school, where a number of persons of different families are collected from different places, but under one head, and one roof, and are for all practical purposes one family." It seems to me that that is the real way to treat this case. All these boys constitute for the purpose of this question one family, one establishment; and the supply of water to them is as much a supply for domestic purposes as the supply to the masters or any other members of the family; and if it is conceded, as it is, that in a private residence there is no distinction between water supplied to swimming baths and water supplied for ordinary washing purposes, it follows that the water supplied to this bath is supplied for domestic purposes, and the plaintiffs must fail. The action must therefore be dismissed.

Solicitors—Doyle, Devonshire & Woodhouse, agents for J. Ingram Dawson, Barnard Castle, for plaintiffs; Huntingdon & Leaf, agents for A. T. Piper, Barnard Castle, for defendants.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

BUCKLEY, J.
1901.
April 18, 19, 20, 22, 23.

METROPOLITAN ELECTRIC SUPPLY CO. *v.* GINDER.

Contract—Electric Light—Contract to Take Whole of Electric Energy from Specified Company—Absence of Negative Stipulation—Breach of Contract—Injunction—"Undue preference"—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *ss.* 19 *and* 20 — *Metropolitan Electric Supply Co.* (*Mid-London*) *Lighting Order*, 1889, *ss.* 46 *and* 52—*Electric Lighting Orders Confirmation* (*No.* 5) *Act*, 1889 (52 & 53 *Vict. ch. clxxxi*).

In 1898 *the defendant signed a request to the plaintiff company for a supply of electric energy. The request was made subject, among other terms and conditions, to the following:* (1) "*The consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period of not less than five years*"; (2) *the charge was fixed at* 4½*d. per Board of Trade unit. On the margin it was noted that in the event of the company's standard rate being reduced below the price therein quoted the defendant was to have the benefit of such reduction. In* 1901 *the defendant gave the plaintiff company notice to disconnect. The company had entered into similar contracts with other consumers for different terms of years, and in the case of one consumer at a different rate of payment.*

In an action by the company for an injunction to restrain the defendant from taking any electric energy from any person other than the company,—Held, *first, that the contract implied a contract by the defendant not to take energy from any one except the company, which in a case of this kind—a trade contract for supply and not for personal services—could be enforced by injunction.*

Held, *secondly, that the contract was not void under sections* 19 *and* 20 *of the Electric Lighting Act*, 1882, *on the ground that undue preference had been given by the company to other consumers; that the relevant words of section* 19 *were* "*under similar circumstances to a corresponding supply*," *and that the section left a latitude*

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to the company to make bargains with its customers, where the circumstances differed or the supply did not correspond, for different terms, and that on the facts of the case no undue preference was shewn.

Held, *thirdly, that the injunction asked ought therefore to be granted.*

Trial of action with witnesses.

The Metropolitan Electric Supply Co., Lim., the plaintiff in the action, obtained in 1889 a provisional order under the Electric Lighting Acts, 1882 and 1888, which was duly confirmed by the Electric Lighting Orders Confirmation (No. 5) Act, 1889, authorising it to supply electric energy in the Mid-London district, which included the Holborn district.

The defendant, Thomas Ginder, was a publican carrying on business at the Red Lion public-house, No. 72 High Holborn. On November 16, 1898, he signed what was called in the proceedings a contract, but which in point of fact was a request, delivered to the plaintiffs under the statutory rights conferred by the Act of Parliament, requesting a supply of energy to his premises. This request was made subject, among other terms and conditions, to the following: (1) "The consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period of not less than 5 years." (2) "The charge for electric energy to be 4½*d.* per Board of Trade unit." On the margin it was noted that in the event of the plaintiff company's standard rate being reduced below the price therein quoted the defendant was to have the benefit of such reduction.

The result of the request was that, the plaintiff company being by statute compellable to supply directly the request was made, there arose a right in the defendant to have a supply, and accordingly a supply was given him by the plaintiff company.

On February 25, 1901, the defendant wrote to the plaintiff company stating that as he was dissatisfied with its light he had instructed another company to fix up its light and was now using it, and requesting the plaintiff company to remove its meter. Thereupon the defendant abandoned the plaintiff company and took his supply from another company.

On March 16, 1901, the plaintiff company issued the writ in the present action asking for an injunction to restrain the defendant from taking the whole or any part of his electric energy from any person other than the plaintiff company.

On March 18 the plaintiff company gave notice of motion for an injunction. The motion was not heard out, but the hearing of the action was accelerated, and the action now came on for trial without pleadings upon the issues raised in the affidavits filed on the motion.

It appeared from the evidence that the plaintiff company had entered into contracts with other consumers for the supply of electric energy for different terms of years. The following instances were proved:

1. Case of the Rugby Tavern.—In March, 1898, the plaintiff company entered into a contract with one Schultz, the then tenant, for a term of five years at 4½*d.* per unit; in March, 1900, a contract with one Hatchman, who had then become the tenant, for two years at 4½*d.* per unit; and on February 14, 1901, a contract with Schultz for two years at 4½*d.* per unit.

2. Case of the Old Thatched House.—On June 6, 1899, the plaintiff company entered into a contract with the tenant for three years at 4½*d.* per unit.

3. Case of the Vienna Café, the proprietor of which was one Gates.—In 1895 Gates paid 7¼*d.* per unit, but no term of years was fixed. On October 6, 1899, he entered into a contract for one year to pay 4½*d.* per unit; and on October 8, 1900, he entered into a contract for two years at 4*d.* per unit.

One of the defences relied upon by the defendant was that the plaintiff company itself had failed to perform its obligations, and had not given proper light; but the Court found as a fact that the light supplied by the plaintiff company to the defendant was reasonably such as he was entitled to receive.

Astbury, K.C., and *C. H. Sargant*, for the plaintiff company.—The request signed by the defendant amounts to a negative

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contract by him not to take electric energy from any one else for a period of five years. By taking energy from another company the defendant has broken his contract, and the plaintiff company is entitled to the injunction it asks.

Swinfen Eady, K.C., and *Stewart-Smith*, for the defendant.—First, the contract is affirmative in its terms, and does not contain any negative stipulation restraining the defendant from taking his energy from any other company. In such a case the Court will refuse to grant an injunction on the footing that a negative stipulation is to be implied—*Whitwood Chemical Co.* v. *Hardman* [1891][1] and *Montague* v. *Flockton* [1873].[2]

The contract here is analogous to a contract for the sale of goods, in which case the Court will not decree specific performance by way of injunction—*Donnell* v. *Bennett* [1883][3] and *Fothergill* v. *Rowland* [1873].[4]

[BUCKLEY, J., referred to *Catt* v. *Tourle* [1869].[5]]

That was a case of purchase of land, and the purchaser, having purchased with notice of a covenant, was held, under the doctrine of *Tulk* v. *Moxhay* [1848],[6] to be bound by it. The case is therefore distinguishable from the present.

[BUCKLEY, J., referred to *Doherty* v. *Allman* [1878].[7]]

That was not a case of a contract for the sale of goods. Assuming that the plaintiff company has suffered any injury by reason of the defendant's conduct, damages would afford an adequate remedy. But what injury has the plaintiff company suffered? The defendant was not under any obligation to take any supply from the plaintiff company. The plaintiff company cannot therefore claim damages for his not having done so.

Secondly, under the Electric Lighting Act, 1882, the plaintiff company had no power to impose, as a condition of supplying the defendant, that he should agree to take a supply for a term of five years. There was no consideration for such an agreement. It was a mere *nudum pactum*. The contract is therefore invalid to that extent.

Thirdly, under sections 19 and 20 of the Act of 1882 [8] the plaintiff company is prohibited, in making contracts for a supply of electricity, from shewing any undue preference to any company or person. This it has done in the instances that have been proved in evidence by granting in some cases a supply at the same price per unit as it is granted to the defendant, but for shorter terms, and in the case of Gates by granting a supply for a shorter term and a lower price. An agreement for a longer term of years than other consumers is not such a consideration as to justify a lower rate of charge—*Diphwys Casson Slate Co.* v. *Festiniog Railway* [1874][9] and *Holland* v. *Festiniog Railway* [1876].[10]

Astbury, K.C., in reply.—As to the right of the plaintiff company to an injunction, we rely upon the observations of Lord Selborne in *Wolverhampton and Walsall Railway* v. *London and North-Western Railway* [1873].[11] This is not a case in which damages would afford an adequate satisfaction of the breach of contract. It was contended that the case was analogous to that of a contract for the sale of goods, but here there is no contract for the sale of any specific

(1) 60 L. J. Ch. 428; [1891] 2 Ch. 416.
(2) 42 L. J. Ch. 677; L. R. 16 Eq. 189.
(3) 52 L. J. Ch. 414; 22 Ch. D. 835.
(4) 43 L. J. Ch. 252; L. R. 17 Eq. 132.
(5) 38 L. J. Ch. 665; L. R. 4 Ch. 654.
(6) 18 L. J. Ch. 83; 2 Ph. 774.
(7) 3 App. Cas. 709.

(8) The Electric Lighting Act, 1882, s. 19: "Where a supply of electricity is provided in any part of an area for private purposes, then except in so far as is otherwise provided by the terms of the license, order, or special Act authorising such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply."

Section 20: "The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference to any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity, as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the license, order, or special Act authorising them to supply electricity."

(9) 2 Nev. & Mac. 73.
(10) 2 Nev. & Mac. 278.
(11) 43 L. J. Ch. 131, 133; L. R. 16 Eq. 433, 440.

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chattels which could be purchased elsewhere.

Whitwood Chemical Co. v. *Hardman*[1] was the case of a contract for personal services, and is distinguishable on that ground.

[On this point he also referred to the *dictum* of Jessel, M.R., in *Printing and Numerical Registering Co.* v. *Sampson* [1875].[12]]

The objection that the plaintiff company has no power to impose as a condition of supplying the defendant that he should agree to take a supply for a fixed term is entirely covered by the plaintiff company's (Mid-London) Lighting Order, 1889, s. 46,[13] which requires that an owner requiring a supply of energy shall "enter into a written contract with the undertakers (if required by them so to do) to continue to receive and pay for a supply of energy for a period of at least 2 years"; and section 52,[13] which empowers the undertakers to make any agreement with the consumer as to the price to be charged for energy.

Then as to undue preference, the words "under similar circumstances to a corresponding supply," in section 19 of the Electric Lighting Act, 1882,[8] give the plaintiff company a latitude to make bargains with its customers where the circumstances differ or the supply does not correspond for different terms. In the present case no undue preference has been proved.

Diphwys Casson Slate Co. v. *Festiniog Railway*[9] and *Holland* v. *Festiniog Railway*[10] were decisions upon the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2, and do not apply.

[He also referred to *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Railway* [1885].[14]]

BUCKLEY, J., stated the facts, and continued: One of the first defences which is raised is this: it is said that the language of the contract here is affirmative and not negative, and that the Court is asked to grant an injunction upon the footing that there is a negative covenant, and in point of fact there is none such. Now in answering that question it appears to me that my first duty is to read and construe the contract, and for the purpose of arriving at the true construction of the contract I must disregard what would be the legal consequences of my construing it the one way or the other way. I must first find out what it means, and when I have found out what it means then I must apply proper legal principles to the contract as construed. Now there is a

(12) 44 L. J. Ch. 705; L. R. 19 Eq. 462, 465.

(13) Metropolitan Electric Supply Co. (Mid-London) Lighting Order, 1889, s. 46: "The undertakers shall, upon being required to do so by the owner or occupier of premises situate within 50 yards from any distributing main of the undertakers in which they are, for the time being, required to maintain or are maintaining a supply for the purposes of general supply to private consumers under this Order or any regulations and conditions, subject to which they are authorised to supply energy under this Order, give and continue to give a supply of energy for such premises in accordance with the provisions of this Order, and of all such regulations and conditions as aforesaid, and they shall furnish and lay any electric lines that may be necessary for the purpose of supplying the maximum power with which any such owner or occupier may be entitled to be supplied under this Order subject to the conditions following; (that is to say) . . . Every owner or occupier of premises requiring a supply of energy shall . . . Enter into a written contract with the undertakers (if required by them so to do) to continue to receive and pay for a supply of energy for a period of at least 2 years of such an amount that the payment to be made for the same, at the rate of charge for the time being charged by the undertakers for a supply of energy to ordinary consumers within the area of supply, shall not be less than 20*l.* per centum per annum on the outlay incurred by the undertakers in providing any electric lines required under this section to be provided by them for the purpose of such supply, and give to the undertakers (if required by them so to do) security for the payment to them of all moneys which may from time to time become due to them by such owner or occupier in respect of any electric lines to be furnished by the undertakers, and in respect of energy to be supplied by them . . ."

Section 52: "Subject to the provisions of this Order and of the principal Act, and to the right of the consumer to require that he shall be charged according to some one or other of the methods above mentioned in cases where he is entitled to require a supply, the undertakers may make any agreement with a consumer as to the price to be charged for energy, and the mode in which such charges are to be ascertained, and may charge accordingly."

(14) 55 L. J. Q.B. 181; 11 App. Cas. 97.

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passage in the judgment of Lord Selborne in *Wolverhampton and Walsall Railway* v. *London and North-Western Railway*[11] which I desire to read on this part of the case. Referring to *Lumley* v. *Wagner* [1852],[15] Lord Selborne said: "With regard to the case of *Lumley* v. *Wagner*,[15] to which reference was made, really when it comes to be examined it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance: the technical distinction being made that if you find the word 'not' in an agreement—'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it. I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression."

Now, the cases since that have gone to shew that what Lord Selborne says would be the true principle, if it should eventually be adopted by this Court, has really now been adopted by this Court. The language here is this: The consumer agrees to take the whole of the electric energy required for his premises from the plaintiff company. The company was bound to supply under the statute if asked. The consumer asks. The result was, of course, that there was a right in the consumer to be supplied. The only question for bargain, then, was price, and that was fixed at 4½*d.* per unit. What were the parties really contracting about in those words? They were contracting not affirmatively for the supply of something, but negatively that the defendant would not take from somebody else. There is no affirmative contract here to take at all. The defendant does not agree that he will take any energy from the plaintiff company. He says he will take the whole of the electric energy required. It is competent to him to burn gas if he likes, and to require none. The only thing he was contracting about was that if he took electric energy he would take it from the plaintiff company. It seems to me that the whole essence of that contract is that which is not expressed in words, I agree, but which by implication is really the only thing existing—a contract that he will not take from somebody else. He agrees to take the whole from A, which necessarily implies that he will not take from B. As a matter of construction therefore—not by express words, but by necessary implication—I think that there is here an agreement not to take from others. Now, in that state of things, how do the authorities stand which have been referred to? In the first place, it is said that in the recent case of *Whitwood Chemical Co.* v. *Hardman*,[1] in which an injunction was refused, the language of the contract was, "A will give the whole of his time to the company's business," which implies that he will not give any to anybody else, and that the language here—namely, "A will take the whole of his supply—the whole required," is exactly similar. But when you read the judgments in that case, it appears to me that the Lords Justices founded them entirely on this: that what they were dealing with was a contract of personal service which, of course, this Court will never specifically enforce, and what they point out is that, by implication, the parties were not thinking of contracting about excluding the manager from acting for another—that was not in their contemplation. What was in their contemplation was that they should enjoy A's whole time, that he should give them his service without reservation, but that they did not contemplate the negative stipulation that he should not serve

(15) 21 L. J. Ch. 898; 1 De G. M. & G. 604.

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others; and it being a contract of personal service it is quite plain, I think, that the Court of Appeal were not prepared to extend the doctrine of *Lumley* v. *Wagner*[15] as to contracts of personal service beyond the case where there exists, as there did in *Lumley* v. *Wagner*,[15] express negative words. But, on the other hand, I find in *Catt* v. *Tourle*,[5] a case equally on all-fours with the present as regards the expression, but not a case of personal service; the words of the covenant were that the plaintiff "should have the exclusive right of supplying all ale," and he asked for an injunction to restrain a person from supplying the ale himself or getting it from another person, and succeeded. Now the observation which has been made on *Catt* v. *Tourle*[5] is this: that it was a case dependent upon the doctrine of *Tulk* v. *Moxhay*,[6] because the defendant in the action was a person who bought the land with notice of the covenant in question, and was therefore bound by it. It does not appear to me that the observation has any pertinence. It is quite true, but it is immaterial to the case.

By the application of the doctrine of *Tulk* v. *Moxhay*,[6] the defendant became bound by a covenant which he had not entered into because he had notice of it. Then the question was, What was the covenant by which he had become bound for that purpose? The Court of Appeal were of the opinion that under those words, "the exclusive right of supplying," they were entitled to imply the negative words, and that there was a right to an injunction. *Fothergill* v. *Rowland*[4] was an action brought by a person who had become entitled to be the purchaser of all the coals raised in a colliery His vendor was going to sell the colliery to somebody else, and he would not have got the coals. He was simply the purchaser of goods which were going to be delivered to somebody else; he could get the same goods, or goods just as good and as suitable for his purpose, elsewhere, and it was held that his remedy was only in damages. In *Donnell* v. *Bennett*[3] Mr. Justice Fry granted an injunction in a case of a contract for the sale of chattels because there existed negative words. After reading or referring to the passage in Lord Selborne's judgment to which I have referred, Mr. Justice Fry said: "The Court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract whether it contain or does not contain a negative stipulation." Now I think this is such a contract, because it appears to me that the contract for this present purpose is not one for the supply by the plaintiff company to the defendant of electricity. He is not bound to take any. The contract really is a contract the whole of which is in substance the negative part of it, that he will take the whole from them, and will not take it from anybody else. I therefore think that the fact that the contract is affirmative and not negative in form is no ground for refusing an injunction.

Then the next point arises upon two sections of the Electric Lighting Act, 1882.[8] It was argued that this contract was invalid so far as it created rights as between the plaintiff company and the defendant for a term of years. I think that point is entirely answered by the language of sections 46 and 52 of the Metropolitan Electric Supply Co. (Mid-London) Lighting Order, 1889[13] [His Lordship read the sections, and continued:] So that it appears to me that, subject to complying with the other provisions of the Act and the Order, there is express statutory authority given to require a contract from the consumer to continue to receive a supply for a period of at least two years. The contract here is less than that. It does not require the consumer to take any at all, but the contract is that he shall not during a period take from other people. If the order allows him not to be compelled to take from the plaintiff company, a contract which requires him not to take from others is less and not greater than that, and is therefore, I think, legitimate

Then the next point is this: that under sections 19 and 20 of the Electric Lighting Act, 1882,[8] stating them shortly, undue preference must not be given to any particular consumer, and it is said that here there were contracts

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with other consumers which were different in their terms. The instances which are given are three. [His Lordship referred to the three instances above set forth, and continued:] Now it is said that there were thus contracts with other customers either for different terms of years, or, as regards Gates, at a different rate of payment, and that that is not justified by the Act. Under section 19 every person within such an area as this is entitled to a supply on the same terms on which any other person in the area "is entitled under similar circumstances to a corresponding supply." Now that last expression a person "is entitled" means, I think, is entitled by arrangements made between him and the company. It appears to me that the relevant words in section 19 are "under similar circumstances to a corresponding supply." There is left latitude to the company to make bargains with its customers, where circumstances differ, or the supply does not correspond, for different terms. How far they may go is a question of degree. The fact is that Gates is a very large consumer. His bill is stated to be some ten times that of the defendants. Moreover, he is a consumer who burns largely upon the day load as distinguished from the night load, a circumstance which is, to these companies, of great importance. They are bound to keep their plant running in the day as well as in the night, to some extent at least, because some consumers want currents during the day, and to get a consumer who draws on the day load is of use to them, because they are getting some return for running their plant during hours which would otherwise be unproductive. May they take that into consideration? I answer certainly they may. The circumstances are not similar where the one consumer is on the day load and the other is on the night load.

Then what does a "corresponding supply" mean? Does it mean that the undertakers are necessarily to treat the small consumer upon equally advantageous terms as the large consumer? The cost to them may be very different; greater uniformity of demand, easier and less expensive collection of the amount, are circumstances to which regard must be had. It appears to me, therefore, that that defence cannot be maintained. Then, in section 20 of the Electric Lighting Act, 1882,[8] there is direct statutory authority which is supplemented by sections 46 and 52 of the plaintiff company's Mid-London Order of 1889,[12] authorising the plaintiff company to make charges within the statutory limit, which is 8*d.* per unit, subject, of course, to section 19 as to similar circumstances and corresponding supply, and subject to this that they must not unduly prefer. I fail to find in the facts of this case that there has been any undue preference. Mr. Page, who is the person principally concerned in these contracts, told me, as I should expect, that he takes the circumstances of each case into consideration, and the price which has to be charged is fixed accordingly.

It seems to me that this is a contract which it was competent for the plaintiff company to make, and that it is entitled to succeed in the action. I must, therefore, grant an injunction to restrain the defendant during the residue of the term of five years which is mentioned in the contract of November 16, 1898, from taking the electric energy required for his premises from any person other than the plaintiff company, with liberty to the defendant, if at any time the plaintiff company is not prepared to supply the energy which he wants or if it supplies an energy such as not to be an efficient supply—such as it is bound to give by statute—to apply to be relieved from the operation of the injunction, and I order him to pay the costs of the action.

Solicitors—Barlow & Barlow, for plaintiff company; Sidney Morse, for defendant.

[*Reported by W. Ivimey Cook, Esq., Barrister-at-Law.*

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KEKEWICH, J. 1901. Aug. 2.

ALSTON, *In re*; ALSTON *v.* HOUSTON.

Settlement—Trust Fund—Tenant for Life — Remaindermen — Mortgage — Arrears of Interest—Sale—Deficient Security —Interest and Capital—Apportionment.

Trust funds vested in the trustees of a marriage settlement included a mortgage of leasehold property. The mortgage interest fell much into arrear, and finally the security was sold at a considerable loss:— Held, *that the amount recovered must be apportioned between capital and income, represented by the remaindermen and the tenant for life, in proportion to the amounts due at the date when it was recovered in respect of arrears of interest and in respect of principal; as between successive tenants for life, the amount attributed to interest being apportioned in proportion to the arrears due to them respectively.*

So held, *following* Moore, In re (54 L. J. Ch. 432), *and* Lyon *v.* Mitchell (34 L. J. N.C. 135; W. N. (1899), 27).

By a settlement dated August 16, 1882, executed on the marriage of Rowland Crewe Alston with Mary Elizabeth Johnson, the share and interest of M. E. Johnson under the will of her grandfather, Robert Johnson, in his residuary real and personal estate were settled upon trust to pay the income to her for her life, and after her death upon trust to pay the income to R. C. Alston for his life, and after the death of the survivor of them upon trust for the children of the marriage as therein mentioned. The trustees had power to retain any investments, or with the consent of M. E. Johnson during her life to sell and reinvest.

On July 28, 1896, the marriage between R. C. Alston and M. E. Alston was dissolved by a decree absolute obtained on the petition of R. C. Alston, and on the same day the life interest of the wife under the settlement was extinguished, an order being made that the settlement should be read in all respects as if M. E. Alston had died in the lifetime of R. C. Alston.

There was issue of the marriage three children, all of whom were infants. In 1896 the said M. E. Alston married her present husband, one Houston.

The trust funds under the settlement included a sum of 3,257*l.* 14*s.* 1*d.*, secured by a mortgage of leasehold premises by deed of March 31, 1886, carrying interest at 4 per cent. This mortgage was ultimately assigned to the present trustees of the settlement. The payments of interest having been very irregular, and there being considerable arrears, in June, 1896, the trustees went into possession of the mortgaged property and collected the rents; and in October, 1900, the property was sold for 1,825*l.*, out of which the costs of the sale and other charges had to be deducted. It was estimated that the net amount to come to the trustees would not exceed 1,742*l.* 2*s.* 6*d.*

The total net interest which ought to have been paid between April 1, 1887, and October 15, 1900, was 1,711*l.* 17*s.* 6*d.*, and the amount actually received by the trustees during the same period was 1,030*l.* 12*s.* 6*d.* (including the rents), so that the arrears of interest amounted to 681*l.* 5*s.*

This summons was taken out by the trustees of the settlement as plaintiffs, the defendants being M. E. Houston, R. C. Alston, and his infant children, for the determination of the question how the amount realised by the sale of the mortgaged property ought to be apportioned between the successive tenants for life and the remaindermen, so that the loss might be apportioned amongst them fairly.

Popham, for the trustees.

Warrington, K.C., and *Leigh Clare*, for M. E. Houston.—There are two sets of authorities laying down conflicting principles of apportionment. Kay, J., in *Foster, In re; Lloyd* v. *Carr* [1890],[1] said that the capital moneys produced by the sale and all the moneys received by the tenant for life must be added together. The total must be divided between the tenant for life and the remaindermen in the proportion of the amounts which they ought to have received if the security had been sufficient, the tenant for life giving credit for what he had actually received.

(1) 60 L. J. Ch. 175; 45 Ch. D. 629.

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This was followed by Farwell, J., in *Bird, In re; Evans, In re; Dodd* v. *Evans* [1901].[2] The other authority is *Moore, In re; Moore* v. *Johnson* [1885],[3] decided by Pearson, J., and followed by North, J., in *Lyon* v. *Mitchell* [1899].[4] The principle there was to take the capital amount and the amount due for arrears of interest to the tenant for life, and apportion the sum recovered—in other words, apportion between the losses—and we ask the Court to adopt that principle. In *Moore, In re*,[3] the point was not argued: it was assumed that that was the right principle to adopt. In *Bird, In re*,[2] the facts were different, as the loss had occurred through a breach of trust, and therefore the learned Judge said the parties must be put in the same position as if the breach of trust had not occurred. Again, in *Barker, In re; Barker* v. *Barker* [1897],[5] Stirling, J., followed *Moore, In re*,[3] and intimated his opinion that the apportionment in *Foster, In re*,[1] was intended to be confined to the case of a mortgagee in possession.

J. D. Davenport, for R. C. Alston and the infant defendants.—James, V.C., in *Cox* v. *Cox* [1869],[6] said the true principle was that neither the tenant for life nor the remainderman was to gain an advantage over the other; neither was to suffer more damage in proportion to his estate and interest than the other suffered. *Moore, In re*,[3] is not a satisfactory report, and it is doubtful whether it has ever been followed. *Foster, In re*,[1] has been followed by Stirling, J., in the case of a mortgagee in possession, and by Farwell, J. That case did not require the tenant for life to refund, but only to account for what he had received; and this is the true principle of *Cox* v. *Cox*.[6]

Warrington, K.C., replied.

KEKEWICH, J.—I must abandon the attempt which I had contemplated to discriminate between the conflicting authorities. In reference to that subject, I agree with what has been said by Mr. Justice Farwell in *Bird, In re*.[2] It may be, but I do not say that it is, that each of these cases is right under the special circumstances prevailing. I would rather not refer to the two cases in the *Weekly Notes*, and I don't think we can find anything useful in them, except that Mr. Justice North did not follow *Foster, In re*,[1] but apparently adopted the same method of apportionment as that adopted by Mr. Justice Pearson in *Moore, In re*.[3] I must endeavour to find some principle from the cases which is not inconsistent with them, and which may be applied to the facts of the present case.

I have before me the case of *Turner* v. *Newport* [1846].[7] That was the case of a bond given by will as part of the residue of the testator's estate. No principal or interest had been paid, and nothing had been recovered for some years. At length something was recovered, and Lord Cottenham said: "At length a sum is realised; and then, when the question arises what part of it is, as between the parties, to be considered as principal, the tenant for life is told, that, because the gross sum recovered is less than the amount of the original debt, she is to have nothing. Such a proposition is contrary to the plainest principles of justice, particularly when it is considered that the Court itself has restrained her from getting in the debt sooner, in the hope that more might be ultimately recovered. But the other proposition is equally untenable—that she is entitled to the whole of what has been recovered in respect of interest since the testatrix's death." He solved the question, or put it in the way of solution, by referring it back to the Taxing Master to find out the value of the bond at the date of the death of the testatrix, and to calculate interest, there being an intimation that the sum calculated as interest was to be paid to the tenant for life. That would not work here because the facts are different, but a principle may be deduced from it. A sum has been realised which is not sufficient to pay the principal and interest in full. The result is that it must be ascertained

(2) *Ante*, p. 514; [1901] 1 Ch. 916.
(3) 54 L. J. Ch. 432.
(4) 34 L. J. N.C. 135; W. N. (1899), 27.
(5) 32 L. J. N.C. 569; W. N. (1897), 154.
(6) 38 L. J. Ch. 569; L. R. 8 Eq. 343.
(7) 2 Ph. 14.

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in some way what is a fair division between those who are entitled to interest, but have not received it in full, and those who are entitled to the principal, but will not receive it in full.

It seems to me that the simplest and most logical way to deal with it is to apportion the amount in hand between the two estates which are beneficially interested in that amount, the estate of the tenant for life, or successive tenants for life, as in this case, on the one hand, and the estate of the remaindermen on the other. The real question is what is due to each at the time of realisation. If a tenant for life has received money, he must give credit for the amount, but the point is what is due at the date when the money is recovered; in other words, what is due in respect of arrears when the division takes place? That view, as I understand it, agrees with the decision of Mr. Justice Pearson in *Moore, In re.*[3] If that is so, I am happy in following it. It does depart from the decision of Mr. Justice Kay in *Foster, In re,*[1] but the explanation of that decision may be that it is one only to be applied to the peculiar circumstances of the case; and in *Barker, In re,*[5] Mr. Justice Stirling appears to have intimated an opinion that the apportionment in *Foster, In re,*[1] was intended to be confined to the case of a mortgagee in possession. That distinction does not altogether commend itself to my mind.

In the present case the amount which has been recovered must be apportioned between capital and income in proportion to the amounts due at the date when it was recovered in respect of arrears of interest and in respect of principal. As between the successive tenants for life, the amount attributed to interest will be apportioned in proportion to the arrears due to them respectively.

Solicitors—Newman, Paynter & Co; Lydall & Sons; Cunliffes & Davenport.

[*Reported by W. S. Goddard, Esq., Barrister-at-Law.*

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such trust was enforceable by the Attorney-General as a charitable trust for the benefit of the public, even though the public thereby acquired rights which the testator never intended them to have, and to the detriment of the owner for the time being. *Pitt-Rivers, In re; Scott* v. *Pitt-Rivers*, 257.

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Nature of Share in Limited Company.]—A share in a company is not to be regarded as a sum of money settled subject to certain conditions contained in the articles of association; but is to be regarded as an interest in the company, measured, it is true, for the purposes both of liability and interest, by a certain sum of money, but impressed also from its inception with the various rights and liabilities contained in the contract entered into by means of the articles of association by all the shareholders *inter se*, in accordance with section 16 of the Companies Act, 1862. *Ib.*

Rule against Perpetuity—Personal Contract.] —The rule against perpetuity has no application in the case of personal contracts. *Ib.*

Memorandum of Association — Alteration — Association Formed for Purpose not of Gain—Licence of the Board of Trade — Sanction of Board of Trade to Proposed Alteration.]—Where an association incorporated with the licence of the Board of Trade under section 23 of the Companies Act, 1867, as an association formed for purposes not of gain, without the word "limited," desires to alter its memorandum of association, the proper course is first to submit the proposed alterations to the Board of Trade, and if the Board approves and authorises them then to apply to the Court under the Companies (Memorandum of Association) Act, 1890, for its sanction. *St. Hilda's Incorporated College, Cheltenham, In re*, 266.

Memorandum of Association — Alteration — Sanction of Court—Verbal Alterations.]—The power given to the Court by the Companies (Memorandum of Association) Act, 1890, to sanction alterations in the memorandum of association of a company does not apply to mere verbal alterations in the language of the original memorandum of association. *Consett Iron Co., In re*, 198.

Underwriting Commission—Option to Take Shares—Premium—"Offer to the public."]—An agreement by a company to remunerate underwriters by an option to call for an allotment of shares is prohibited by section 8, subsection 2 of the Companies Act, 1900, notwithstanding that the issue price fixed by the option exceeds the nominal amount of the shares. *Burrows* v. *Matabele Gold Reefs and Estates Co.*, (C.A.) 434.

Per FARWELL, J.—An offer of additional shares to existing shareholders is not an "offer to the public" within section 8, sub-section 1. *Ib.*

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II. PROMOTERS AND DIRECTORS.

Director—Fiduciary Character—Partner or Shareholder in Concern Contracting with Company—Profit Acquired—Articles of Association.]—Articles of association of a company provided that the rules therein contained as to the vacation of the office of a director if he was concerned in the profits of any contract with the company without setting forth in writing the nature of his interest should be subject to the exception that "no director shall vacate his office by reason of his being a member of any . . . company, or partnership which has entered into contracts with, or done any work for, the company; or by reason of his being interested, either in his individual capacity or as a member of any company . . . or partnership, in any adventure or undertaking in which the company may also have an interest," with a provision in respect of voting which prevented his vote being counted in such a case:—*Held*, that, having regard to the above article, a director was not liable to account for profits arising out of contracts with another company or partnership in which he was a shareholder or partner to the knowledge of the company. Decision of LORD HATHERLEY, L.C., in *Imperial Mercantile Credit Association* v. *Coleman* (40 L. J. Ch. 262; L. R. 6 Ch. 558), followed. *Costa Rica Railway* v. *Forwood*, (C.A.) 385.

Managing Director—Agreement for Service—Time of Commencement—Statute of Frauds—Article Empowering Directors to Contract with Themselves on Behalf of Company.]—A memorandum in writing of an agreement by a company to employ a managing director for a term of five years is not sufficient within the Statute of Frauds unless it shews the date at which the service is to begin. *Alexander's Timber Co., In re*, 767.

Semble, it should also contain some definition of the nature of the service. *Ib.*

Where articles of association purport to give directors very wide powers to enter into contracts with themselves on behalf of the company "having regard to the interests of the Company," directors who seek to maintain a contract with themselves made under such a power must bring evidence that in making it they had regard to the interest of the company. *Ib.*

Misfeasance—Payment of Dividend out of Capital—Reliance of Director on Officers of Company—Extent of Director's Responsibilities.]—The director of a company is bound to give his attention to the matters brought before him at meetings of the board, and to exercise his judgment as a man of business upon them. In the absence of ground for suspicion he is entitled to rely upon the judgment, information, and advice of the officials of the company, and is not bound to examine entries in the company's books, but is entitled to rely on the examination of those whose special duty it is to attend to such details. *Dovey* v. *Cory*, (H.L.) 753.

It is not the function of any tribunal to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs, but to deal with each particular case on its own facts and circumstances. *Ib.*

A director who attends meetings, makes enquiries, is assured by the officials that provision has been made for bad debts and believes such assurances, and examines such matters as are brought before him in the ordinary course of business, cannot be made liable in the liquidation of the company in respect of losses incurred by improper credits to directors and customers or the payment of dividends out of capital. *Ib.*

Semble, a company is not at liberty to write off to capital losses incurred in previous years, or in any subsequent year, and, if the receipts for that year exceed the outgoings, to pay dividends out of such excess without making up the capital account, such a procedure being inconsistent with the provisions of the Companies Act, 1877. *Ib.*

Promoter—Winding-up—Sale—Secret Profit—Commencement of Fiduciary Relation—Liability to Account—Misfeasance Summons.]—A vendor who sells property to a company towards which he stands in a fiduciary relation at the time of the sale is not liable to account in the winding-up of the company for any undisclosed profit made by him on the transaction, unless either, first, his conduct has been tainted with fraud; or secondly, he stood towards the company in a fiduciary relation, not only at the time of the sale, but also at the time of his original acquisition of the property in question. *Lady Forest (Murchison) Gold Mine, In re*, 275.

Olympia, Lim., In re (67 L. J. Ch. 433; [1898] 2 Ch. 153; affirmed *sub nom. Gluckstein* v. *Barnes*, in HOUSE OF LORDS, 69 L. J. Ch. 385; [1900] A.C. 240), discussed and distinguished. *Cape Breton Co., In re* (54 L. J. Ch. 822; 29 Ch. D. 795), *Ladywell Mining Co.* v. *Brookes* (56 L. J. Ch. 684; 35 Ch. D. 400), and *dicta* of LORD CAIRNS in *New Sombrero Phosphate Co.* v. *Erlanger* (48 L. J. Ch. 73, 84; 3 App. Cas. 1218, 1234, 1235) followed. *Ib.*

The mere suppression by the vendor of the amount of profit that is being made by him on the sale to the company does not by itself amount to fraud within the meaning of the above proposition. *Ib.*

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Where a syndicate is formed for the acquisition and working of a gold mine absolutely and entirely for their own benefit, and without, at the time, any present intention of promoting or selling to any other company, the mere fact that they contemplate the bare possibility of the promotion by them of and sale to another and larger company, in the event of their needing further capital, or being able to sell at a greatly enhanced price, does not place them in any fiduciary relation at the time of their own formation to any such company which they may happen subsequently to promote. *Ib.*

Power of Reduced Directorate—Quorum of Directors—Assignment by Debtor to Director with Knowledge of Defect.]—Where articles of association provide that the number of directors of a company shall not be less than three, and that the directors may act notwithstanding any vacancy, and the directors contract a loan upon security when their number has been reduced to two, the act of the two directors will be binding on the company, notwithstanding their reduction below the number fixed by the articles as necessary to form a quorum. *Scottish Petroleum Co., In re* (23 Ch. D. 413), followed. *Bank of Syria, In re; Owen and Ashworth's Claim; Whitworth's Claim*, (C.A.) 82.

One of the two directors who takes an assignment from an outside creditor of a debt contracted by the company under the above-mentioned circumstances will be entitled to stand in the position of the creditor and will not be debarred from claiming against the company because he was a party to the contracting of the loan when the directorate was below its proper number. *Ib.*

Vacation of Office—"Absent himself."]—Although there is a difference between the act of "absenting oneself," which is purely voluntary, and the fact of "being absent," which is voluntary or involuntary, as the case may be, yet the fact that a person is absent under some strong compulsion, which does not amount to physical necessity, does not necessarily negative the voluntary aspect of his act, or shew that he has not "absented himself." Where, accordingly, the director of a company, though not actually physically prevented by present ill-health from attending the meetings of his fellow directors, was yet induced to stop away from them because his remaining at that season in England might have been injurious to his health, his absence was treated by the Court as being voluntary, and he was deemed to have "absented himself" within the meaning of a provision in the articles of association. *London and Northern Bank, In re; McConnell's Case*, 251.

Resolution to Forego Fees—Validity.]—It is open to the directors of a company, with regard to remuneration which is not yet fully earned by them, to make, under the form of a resolution passed by them to renounce such remuneration, a new contract with the company, varying in the aggregate the several contracts which the directors have already severally made by accepting office as directors of the company. *Lambert* v. *Northern Railway of Buenos Ayres* (18 W. R. 180) distinguished. *Ib.*

III. CONTRACTS OF.

Contract with Third Person for Intended Company—Privity—Inferred Contract—Adoption—Right of Action.]—On March 3, 1897, the plaintiffs agreed with A to grant to him, or to an intended company (the defendants), an exclusive licence to use certain patents, in consideration of payments to be made of a proportion of its profits by the company when formed. On March 5, 1897, A agreed to sell to B, on behalf of the proposed company, this agreement and exclusive licence, together with others, for 120,000*l.* The company was incorporated on March 8, 1897, and, a month later, adopted the agreement of March 5, 1897. By their balance-sheet of October, 1899, which shewed large profits, the defendants claimed to write off 3,000*l.* as depreciation and towards the ultimate extinction of the cost of the licences and contracts. In an action by the plaintiffs to test the validity of this claim,—*Held* (following the decision in *Northumberland Avenue Hotel Co, In re* (33 Ch. D. 16), and distinguishing *Howard* v. *Patent Ivory Manufacturing Co.* (57 L. J. Ch. 878; 38 Ch. D. 156)), that there being no direct privity of contract between the plaintiffs and defendants, and no contract which could be inferred or considered as having been adopted by the conduct of the defendants, the plaintiffs had no right of action against them. *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, 128.

IV. DEBENTURES.

Debenture-Holder's Action—Solicitor—Costs—Taxation—Joint and Several Retainer—Company and Trustees for Debenture-holders Represented by Same Solicitor—Full Set of Costs.]—In a debenture-holders' action where the same solicitor appeared for the defendant company and for two sets of trustees for debenture-holders, and where the funds were insufficient to pay the first mortgage debentures in full, a direction was given by the Court to the Taxing Master that, in taxing the costs of the defendants (other than the defendant company), he should allow the trustee defendants a full set of costs, except as regarded any separate costs of the defendant company. *Mortgage Insurance Corporation* v. *Canadian Agricultural Coal and Colonisation Co.*, 684.

Debenture-holder's Action — Insufficient Assets—Costs of Plaintiff—Solicitor-and-Client Costs.]—In an action by a debenture-holder on

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behalf of himself and all other the debenture-holders of a company to enforce their security, where the assets are insufficient for the payment of the debentures in full, the plaintiff is entitled to be allowed costs as between solicitor and client, and not as between party and party only. The principle laid down in *Thomas* v. *Jones* (29 L. J. Ch. 570, 571; 1 Dr. & S. 134, 136) applied. *Queen's Hotel Co., Cardiff. Lim., In re* (69 L. J. Ch. 414; [1900] 1 Ch. 792), distinguished. *New Zealand Midland Railway, In re; Smith* v. *Lubbock*, (C.A.) 595.

Floating Security—Sale of Property and Assets—Dissentient Debenture-holders.] — The power of a company, which has issued debentures expressed to be a charge by way of floating security on the property, undertaking, and assets for the time being, whether present or future, of the company, to deal with its property and assets in the ordinary course of business, extends to a sale thereof, in accordance with its memorandum of association, without making any specific provision for the satisfaction or discharge of the debentures. *Government Stock &c. Investment Co.* v. *Manila Railway* (66 L. J. Ch. 102; [1897] A.C. 81) applied. *Borax Co., In re; Foster* v. *Borax Co.*, (C.A.) 162.

Per VAUGHAN WILLIAMS, L.J. — *Quære*, whether the carrying out of an agreement for sale containing a covenant by the company not to exercise its powers in respect of one of its principal objects as defined by the memorandum of association could not be restrained upon the application either of shareholders or the holders of debentures of the company. *Ib.*

Debenture-Holder's Action—Receiver — Rent and Covenants — Claim by Landlord.]—See RECEIVER.

V. STOCK AND SHARES.

Dividends—"Profits available for dividend"—Reserve Fund—Memorandum and Articles of Association.]—The memorandum of association of a limited company provided that the "profits from time to time available for dividend" should be applicable—first, to the payment of a dividend of 15 per cent. to the ordinary shareholders; and secondly, should be divided between the ordinary shareholders and the holders of founders' shares in specified proportions. The articles adopted Table A, expressly excluding some articles in Table A, but made no express mention of article 74, which enables directors to create a reserve fund:—*Held*, that article 74 of Table A was not excluded by implication, and that the words "profits from time to time available for dividend" in the memorandum meant the net profits after deducting all sums properly appropriated by the directors for other purposes, and that the application of part of the profits to a reserve fund was a proper purpose under article 74. *Fisher* v. *Black and White Publishing Co.*, (C.A.) 175.

Per ROMER, L.J.—Article 74 of Table A was so far modified that the reserve fund could not be used for equalising dividends. *Ib.*

Dividends—Profits—Accretion to Capital—Injunction.] — In 1897 the defendant company purchased the property and assets of another company. Among the property and assets so purchased was a debt of 100,000 dollars secured by promissory notes. This debt and the notes were not specifically mentioned in the agreement for sale. Subsequently new promissory notes were given to the defendant company for 127,000 dollars, being the amount of the old debt and notes and interest accrued in respect thereof. In respect of the new notes the defendant company received 26,258*l.* 16*s.* English currency. It did not appear that the amount of these notes had ever been included in any balance-sheet:—*Held*, that an interlocutory injunction must be granted restraining the defendants from distributing as dividends so much of the amount received as represented the original debt of 100,000 dollars (to which the plaintiffs limited their claim) without having regard to the value of the total capital assets of the defendant company, and the result of the year's trading. *Foster* v. *New Trinidad Lake Asphalt Co.*, 123.

Issue of Fully Paid Shares for Consideration other than Cash—Omission to File Contract—Power of Court to Give Relief—Memorandum in Lieu of Contract.]—The power of the Court to give relief under the Companies Act, 1898, against the omission to file a contract under section 25 of the Companies Act, 1867, in the case of an issue of shares of a company as fully paid for a consideration other than cash has not been taken away by the Companies Act, 1900. *Brutton & Burney, Lim., In re; and Burney's New Cross Brewery, Lim., In re*, (C.A.) 309.

Preference Shares—Preference Stated in Memorandum of Association—Alteration of Holder's Rights.]—Where the memorandum of association of a company contains a statement that the original preference shares therein mentioned shall confer a right to a fixed cumulative preferential dividend, but also contains a power for the company to issue new shares on such special conditions, as to priority or postponement, either for dividends or repayment of principal, as the company may determine, the company has power to issue new preference shares to rank *pari passu* with the original preference shares without altering their memorandum. *Underwood* v. *London Music Hall, Lim.*, 743.

Voluntary Surrender of Partly Paid Shares—Release from Liability—Ultra Vires—Successful Company—Restoration to Register—Equity.]—

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A surrender of partly paid-up shares to a company, although voluntarily made for the benefit of the company, will, if followed by a release of the shareholder's liability for the amount remaining unpaid on the shares, constitute in effect a purchase by the company of those shares at the price of discharging the shareholder from such liability, and consequently will be *ultra vires* of the company, and bad within *Trevor* v. *Whitworth* (57 L. J. Ch. 28; 12 App. Cas. 409). But although such surrender is bad, the Court will not, in the exercise of its discretionary power under section 35 of the Companies Act, 1862, rectify the register by restoring thereto the name of the shareholder in respect of the surrendered shares, and so enable the shareholder after the lapse of seven years to share in the profits of the company, unless he can satisfy the Court that there is an equity in his favour to disturb the existing state of things. *Semble*, since *Trevor* v. *Whitworth* (57 L. J. Ch. 28; 12 App. Cas. 409), *Snell's Case* (L. R. 5 Ch. 22) is no longer law. *Bellerby* v. *Rowland and Marwood's Steamship Co.*, 616.

Equitable Mortgage—Deposit—Foreclosure.] See MORTGAGE.

Mortgage of Shares—Implied Power of Sale.] See MORTGAGE.

VI. MEETINGS OF SHAREHOLDERS.

Special Resolution—Declaration by Chairman "Conclusive evidence."]—The provisions of section 51 of the Companies Act, 1862, that the declaration of the chairman in the case of a special or extraordinary resolution that the resolution has been carried "shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour or against the same," precludes the Court from enquiring into the question whether the requisite proportion of votes was in fact given. *Arnot* v. *United African Land Co.*, (C.A.) 306.

Gold Co., In re (48 L. J. Ch. 281; 11 Ch. D. 701), followed. *Hadleigh Castle Gold-Mining Co., In re* (69 L. J. Ch. 631; [1900] 2 Ch. 419), approved. *Horbury Bridge Coal, Iron, and Waggon Co., In re* (48 L. J. Ch. 341; 11 Ch. D. 109), distinguished. *Ib.*

Voting Power—Forfeited Shares—"Call or other sum due."]—Where the articles of association of a company provide that after forfeiture of shares for non-payment of calls the company shall be entitled to recover the calls from the original holder, and also that no member shall have a vote so long as any calls, or other sums, are due and payable in respect of any share, the calls upon a forfeited share are "sums due in respect thereof," and the purchaser from the company of forfeited shares cannot vote so long as the calls have not been recovered from the former shareholder. *Randt Gold-Mining Co.* v. *Wainwright*, 90.

VII. WINDING-UP.

Committee of Inspection — Constitution — Power of Court to Alter.]—A company having been ordered to be wound up, first meetings of the creditors and contributories were held, at which a liquidator and committee of inspection were appointed, and an order was subsequently made giving effect to such appointments. The debts of the creditors represented at the meeting of creditors amounted to 43,000*l.* Shortly after the meetings a foreign company recovered judgment against the company, and its proof was admitted for 45,000*l.* On an application by the foreign company that the liquidator might be ordered to summon a general meeting of the company for the purpose of ascertaining their wishes as to whether or not a representative of the foreign company should be appointed a member of the committee of inspection, or, in the alternative, that directions might be given for summoning a fresh first meeting of creditors,—*Held*, that the Court had jurisdiction under section 23 of the Companies (Winding-up) Act, 1890, and section 91 of the Companies Act, 1862, to order the liquidator to summon a meeting of the creditors to consider whether one or more members of the committee of inspection should be removed, and some other person or persons appointed in their place, and that such order ought to be made in the present case. *Semble also*, that the Court had jurisdiction to order fresh first meetings of creditors and contributories to be summoned for the purposes of section 6 of the Act of 1890. *Radford & Bright, Lim., In re*, 78.

First Meetings of Creditors and Contributories—Committee of Inspection—Unrepresented Creditors—Power of Court to Re-summon First Meetings.]—The Court has power under section 91 of the Companies Act, 1862, to re-summon first meetings of creditors and contributories to consider whether an additional member shall be added to an already appointed committee of inspection, in order to give representation to substantial creditors who had not yet proved their debts, and were not accordingly able to vote, at the time of the appointment of the already existing committee of inspection. *Radford & Bright, Lim., In re* (*No.* 2), 352.

Contributory—Action by Company for Calls—Discontinuance by Liquidator—Costs of Abandoned Action—Summons by Liquidator to Enforce Calls—Stay of Proceedings.]—A company brought an action against Y. for calls. Before the trial the company went into liquidation. The liquidator put Y. on the list of contributories in respect of the calls, and after notice discontinued the action and took out an originating summons in the winding-up against Y. for

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a balance order. Y. applied for a stay of proceedings until his taxed costs of the discontinued action had been paid:—*Held*, that the stay must be refused, but that the costs should be deducted from any sum recovered by the liquidator on the originating summons. *United Service Association, In re; Young, ex parte*, 15.

Fraudulent Preference—Debentures—Issue to Creditors to Relieve Surety—"Undue or fraudulent preference."]—Section 164 of the Companies Act, 1862, although it uses the words "undue or fraudulent preference," does not extend the operation of section 48 of the Bankruptcy Act, 1883. *Stenotyper, Lim., In re; Hastings* v. *Stenotyper, Lim.*, 94.

H. & Co. were creditors of a joint-stock company for a debt, part of which was secured by an acceptance of the company, upon which R., the chairman of the company, was liable. The company was known by its directors to be, if not absolutely insolvent, at least unable to pay its debts as they became due from its own money. Under these circumstances the company issued debentures to H. & Co. as collateral security for the payment of their debt:—*Held*, that, the main motive of the company in issuing the debentures being to relieve R. from his liability on the acceptance, the debentures were not given with a view of preferring H. & Co., although incidentally they would obtain a benefit by them, and that they were therefore valid. *Mills, In re; Official Receiver, ex parte* (5 Morrell, 55), followed. *Ib.*

Judgment Creditor—Debt Due to Company—Attachment—Garnishee Order Nisi—Secured Creditor—Right of Liquidator.]—Section 45 of the Bankruptcy Act, 1883, is not attracted to the winding-up of companies by section 10 of the Judicature Act, 1875, so as to render receipt by the creditor necessary to effectually complete the attachment of a debt. The attachment of a debt due to a company by the service of a garnishee order *nisi* before the filing of a petition to wind up the company constitutes the garnisher a secured creditor and gives him priority over the liquidator. *National United Investment Corporation, In re*, 461.

Jurisdiction — Creditor — Previous Proceedings—Unregistered Company—Building Society Certified after 1862 and not Registered after 1874—Unauthorised Association—Costs.]—A building society was established in 1868 under the Building Societies Act, 1836, but had never been incorporated under any subsequent Act. In 1900 the society was found to be insolvent, and a petition was presented by two creditors to wind it up, and the present petitioner had knowledge of it, but that petition was subsequently withdrawn. All the undisputed creditors except the present petitioner and three others had accepted a composition of 12*s.* 6*d.* in the pound, and the whole of the assets had been sold by the directors, who had contributed out of their own pockets to provide the composition. A petition was now presented by a creditor to wind up the society. The directors had expressed their willingness to pay him a composition of 12*s.* 6*d.* in the pound on his debt, and had retained sufficient funds in their hands for this purpose:—*Held*, upon the merits, that no order ought to be made upon the petition. *Ilfracombe Permanent Mutual Benefit Building Society, In re*, 66.

Semble, that although in a literal sense the society was, in the words of section 4 of the Companies Act, 1862, "formed in pursuance of some other Act of Parliament"—that is, the repealed Building Societies Act, 1836—the word "formed" in that section means formed and having its existence recognised under the provisions "of some other Act," and therefore that the society, not having been incorporated under the Building Societies Act, 1874, was an illegal society, and consequently the Court had no jurisdiction to make a winding-up order:—*Held*, therefore, that the petition must be dismissed, but that the society, having pleaded its own illegality as a defence, was not entitled to costs. *Ib.*

Liquidator—Application to Remove—Circular to Shareholders—Pending Proceedings—Charges against Liquidator—Contempt of Court.]—Where a summons to remove a liquidator in a voluntary winding-up is taken out on behalf of the applicant and all other shareholders, the Court will not, on the ground of contempt, restrain the applicant from issuing a circular to the shareholders asking their support to the summons, though it contains charges against the liquidator, made *ex parte*, to justify the application. *New Gold Coast Exploration Co., In re*, 355.

Liquidator—Remuneration—Sale to Another Company — Voluntary Liquidation of Vendor Company — Compulsory Liquidation of Purchasing Company—Basis of Remuneration.]—On the sale of a company's assets to another company the purchasing company agreed to pay the costs, charges, and expenses of the voluntary winding-up of the vendor company:—*Held*, that the remuneration of the voluntary liquidator was not governed by the regulation as to the mode of remunerating official liquidators adopted by the Master of the Rolls and sanctioned by the Lord Chancellor (1868); such a case must be considered in regard to its own particular circumstances. It is not a proper mode of remuneration that all letters should be paid for on a uniform scale irrespective of the difficulty involved. *Amalgamated Syndicates, In re*, 726.

Petition for Compulsory Winding-up—Resolution for Voluntary Winding-up Fraudulently Obtained—Contempt of Court—Committal.]—

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It is a contempt of Court, while a petition for a compulsory winding-up is pending, to obtain by improper means the passing of a resolution for a voluntary winding-up, with a view to mislead the Court as to the real views of the shareholders and thereby induce the Court to abstain from making a compulsory order. *Septimus Parsonage & Co., In re*, 706.

Petition by Debenture-Holder—Default in Payment of Interest on Debentures—Waiver of Default—Creditor—Future Debt.]—A debenture stockholder of a company to whom nothing is due for principal or interest has no *locus standi* to present a petition to wind up the company. *Melbourne Brewery and Distillery, Lim., In re*, 198.

In 1895 a company issued debenture stock which was secured by a debenture trust deed. The deed provided that the security should become enforceable (*inter alia*) in the event of default by the company in the payment of interest on the stock for a period of three months after such interest ought to have been paid. In 1896 the company made default in payment of the interest on the debentures. Thereupon a petition was presented by a debenture stockholder to wind up the company, but was withdrawn by him on certain terms which included the payment to him of the interest due on his debentures. A petition was now presented by the same debenture stockholder, who had received payment of all interest due on his debentures, to wind up the company, alleging that the company was only able to pay the interest on the debenture stock by borrowing the amount required; that default had been made in payment of the interest on the debentures; and that the principal of his debenture stock had thereupon become due and was payable to him:—*Held*, that the petitioner, by receiving the interest on his debentures, had waived the default by the company in 1896, and could not now take advantage of it, and that, as no interest was due to him and the debentures were not repayable until 1994, there was no debt presently due to him in respect of which he could petition, and that the petition must therefore be dismissed. *Australian Joint-Stock Bank, In re* (32 L. J. N.C. 264; W. N. (1897) 48), distinguished. *Ib.*

Preferential Payments—Receiver in Possession—Poor Rate—District Rate—Rate for Water Supplied by Meter—Apportionment.]—A poor rate and district and water rates were made respectively on October 15, 1898, and October 4, 1898, and were payable by the defendant company. A receiver was appointed on behalf of debenture-holders on November 9, 1898, who went into possession on the same day; and on December 1, 1898, the company went into voluntary liquidation. The receiver paid the rates in full in January, 1899, and claimed to be recouped by the liquidators of the company out of the assets available for payment of the general creditors:—*Held*, that the poor and district rates were preferential payments within the Preferential Payments in Bankruptcy Act, 1888, and the amending Act of 1897, and that the receiver must be recouped by the liquidators the whole of the amount, and not merely an apportioned part down to the date of his going into possession. But the water being supplied and paid for by meter, the water rate must be apportioned, and only that part of the rate which represented the quantity consumed down to the date of the receiver going into possession was a preferential payment. *Mannesman Tube Co., In re; Von Siemens* v. *Mannesman Tube Co.*, 565.

Surplus Assets—Preferred and Deferred Shareholders—Distribution Inconsistent with Legal Rights—Right of Majority to Bind Minority.]—Where a meeting of shareholders of a company had resolved by a majority upon a mode of distribution of surplus assets between preferred and deferred shareholders different from that to which the parties were legally entitled, the Court refused to draw an inference that the shareholders absent or not represented at the meeting had assented to such mode of distribution. *Somes* v. *Currie* (1 K. & J. 605) and *Beeston Pneumatic Tyre Co., In re* (33 L. J. N C. 188; W. N. (1898) 34), distinguished. *North-West Argentine Railway, In re*, 9.

Voluntary Winding-up—Petition by Creditor—Special Resolution—Invalidity—Resolution not in Accordance with Notice—Reconstruction.]—Notice was given of an extraordinary meeting of shareholders in a company for the purpose of considering and, if thought fit, passing resolutions for a voluntary winding-up, with the appointment of a liquidator at a fixed remuneration, for the purpose of reconstruction in accordance with the terms of a draft agreement. At the meeting the only resolution put was for the voluntary winding-up of the company, with the appointment of a liquidator:—*Held*, on the petition of a creditor for either a compulsory or supervision order, that a compulsory order must be made, on the ground that the resolution put to the meeting was not in accordance with the resolutions of which notice had been given, and therefore no valid resolutions for a voluntary winding-up had ever been passed. *Teede & Bishop, Lim., In re*, 409.

Voluntary Winding-up — Resolution for—Irregularity—Notice of Meeting.]—A resolution for the voluntary winding-up of a company is not valid if passed at an extraordinary general meeting convened by the secretary, acting on his own authority and without the authority of the board of directors, upon the requisition of shareholders of the company under section 13, sub-section 1 of the Companies Act, 1900, within the twenty-one days from the date of the requisition being deposited

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with the company allowed by sub-section 3. The summoning of such a meeting by the secretary on his own authority is a serious matter, and cannot be treated as a mere irregularity in the internal regulations of the affairs of the company. *Haycraft Gold Reduction &c. Co., In re* (69 L. J. Ch. 497; [1900] 2 Ch. 230), followed. *State of Wyoming Syndicate, In re*, 727.

Voluntary Winding-up—Profit on One Year's Trading—Previously Existing Debit on Profit-and-Loss Account—Declaration of Dividend—Application of Profit.]—There is no rule of law that the profit on one year's trading of a company cannot be divided merely because on the profit-and-loss account there is a debit balance in respect of the trading of former years, but it does not follow that such profit is necessarily to be treated as available for dividend. *Crichton's Oil Co., In re*, 639.

Surplus Assets—Arrears of Dividends on Preference Shares—Profits.]—By the memorandum of association of a company incorporated in 1889 the capital was divided into preference and ordinary shares, and it was declared that the preference shares should confer on the holders a right to a fixed accumulative preferential dividend of 5 per cent. per annum on the capital paid up thereon, "subject to the provisions of the company's articles of association." The articles, amongst other things, provided for the payment of the cumulative preference dividend, and that in the event of winding-up the surplus assets should be distributed between the holders of preference and ordinary shares according to the amount paid up thereon; that the directors should have power to set aside out of the profits of the company or otherwise such sums as they should think proper as a reserve fund to meet contingencies, &c., or for such other purposes as they should in their absolute discretion think conducive to the interests of the company; that profits from time to time available for dividends should, subject to the provisions thereinafter contained, be applicable—first, to the payment of the fixed cumulative preferential dividend on the preference shares; and secondly, that the surplus should be applicable to the payment of dividends on the ordinary shares, but that the whole or any part thereof might be carried to reserve or otherwise dealt with; that the company in general meeting might declare a dividend, and that no larger dividend was to be declared than should be recommended by the directors. The whole of the preference and ordinary shares issued were fully paid up. Dividends on the preference shares had been paid up to February, 1896, but no dividend had since been declared. The balance-sheet made up in March, 1899, showed a debit balance on profit-and-loss account of upwards of 4,000*l.* In July, 1900, the company sanctioned an agreement for the sale to a proposed new company of all the vendor company's assets, except any undivided net profits of the business appearing in the balance-sheet for the year ending March 31, 1900, which was to be settled and certified by the auditors of the vendor company on the same basis as the previous balance-sheets. On August 7, 1900, the auditors certified a balance-sheet that shewed a profit of 1,675*l.* on the trading for the year ending March 31, 1900. On the following day the resolution for voluntary winding-up was confirmed. The sale-moneys were insufficient to repay to the shareholders the amount paid up on their shares:—*Held*, that the preference shareholders were not entitled to have the sum of 1,675*l.* applied in payment of the arrears of dividends on their shares; that it was not sufficient for them to shew that the money might have been made available for dividend, but that they ought to have shewn that it had actually been made so available, and that as they had failed to do so the money must be applied in repaying the capital paid up on the preference and ordinary shares. *Odessa Waterworks Co., In re* (32 L. J. N.C. 608; W. N. (1897) 166), discussed. *Ib.*

Fraudulent Preference — Guarantor and Guarantee.]—See BANKRUPTCY.

CONDITION.

Forfeiture Clause—"Become vested in some other person"—Act of Bankruptcy—Adjudication — Title to Dividend — Apportionment.]—Under a will by which a life interest in a fund is made forfeitable if the tenant for life "should do or omit to do or should suffer to be done any act whereby the income if payable to himself would become vested in some other person," the forfeiture, for the purpose of apportioning the income in the event of the bankruptcy of the tenant for life, takes effect from the date of the act of bankruptcy and not from the date of the adjudication. *Montefiore* v. *Guedalla*, 180.

Forfeiture Clause—Garnishee Order—Income Accrued Due.]—Inasmuch as a garnishee order made against trustees attaches only to trust funds already accrued due in their hands, which have thus, in a sense, been already actually "received" by their *cestui que trust*, the making of such an order cannot be the cause of a forfeiture under a provision in a will to the effect that the interest of the *cestui que trust* is to be forfeited on the occurrence of any event whereby he shall be deprived of his "right to receive" the trust funds. *Greenwood, In re; Sutcliffe* v. *Gledhill*, 326.

—**Repugnancy.**]—*Semble*, a provision for the forfeiture, on the happening of some event, of trust funds which had already accrued due to the *cestui que trust*, but had not yet been actually

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paid to him and were still in the hands of his trustees, would be void on the ground of repugnancy. *Ib.*

Bates v. *Bates* (19 L. J. N.C. 67; W. N. (1884) 129) not followed. *Sutton, Cardon & Co.* v. *Goodrich* (80 L. T. 765) and *Sampson, In re; Sampson* v. *Sampson* (65 L. J. Ch. 406; [1896] 1 Ch. 630), followed. *Ib.*

Condition Subsequent.]—See WILL.

CONFLICT OF LAWS.

See INTERNATIONAL LAW.

CONTEMPT OF COURT.

See ATTACHMENT; COMPANY (Winding-up).

CONTRACT.

Alternative Written Offer to Let Property or Sell Part—Acceptance of Offer to Let—Statute of Frauds.]—Where, after negotiations for the letting of a certain property, a letter signed by the agent of the owner and containing an alternative offer to let the property on conditions named therein, or to sell part at the price therein stated, is sent to the intending lessee, and in reply thereto he accepts the offer of the property, there is evidence of a concluded contract for letting sufficient to satisfy the Statute of Frauds. *Dictum* of LORD CAIRNS, L.C., in *Hussey* v. *Payne* (48 L. J. Ch. 846, 849; 4 App. Cas. 311, 317), followed. *Lever* v. *Koffler*, 395.

Assignment—Vendor and Purchaser—Money Paid by Purchaser to Assignee—Rescission—Failure of Consideration—Money Had and Received.]—Payments made by a purchaser, on account of moneys payable to the vendor under the contract, to a third person who is assignee of or interested in the vendor's contract can, on total failure of the consideration, be recovered by the purchaser in an action for money had and received to his use from such third person, though he was not a party to the contract. *Aberaman Ironworks* v. *Wickens* (L. R. 4 Ch. 101) distinguished and explained. *Fleming* v. *Loe*, 805.

Restraint of Trade—Public Policy—Validity.]—An agreement made by a trader with a purchaser of his commodities not to sell them below certain prices set out in the agreement, and that if he sells them again to the trade he will procure a similar signed agreement from every retailer that he supplies, is valid, and cannot be impeached as being in restraint of trade or against public policy. *Elliman* v. *Carrington*, 577.

Statutory Confirmation—Vagueness—Remoteness.]—Where an agreement between parties is confirmed by Act of Parliament, every clause in it has statutory validity, and no objection can be taken to any provision in it on the ground that it is void for remoteness or uncertainty. *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, (C.A.) 468.

Contract to Give "First refusal" of Land—Outside Purchaser—Satisfaction of Contract—Definite Offer at Proposed Purchase-price—Interest in Land—Breach of Original Contract—Injunction.]—An agreement by an owner of land to give to another person the "first refusal" of the land in certain events either means that he must on the happening of the events give the other person the opportunity of refusing a fair and reasonable offer, or that he must give the other person the opportunity of refusing the land at a price acceptable to the owner offered by some third person. The owner does not, on either view, comply with the condition if he offers the land to the first person at a price higher than he would accept from other would-be buyers in the event of the refusal of the first person to buy at that price. *Ib.*

The defendants agreed with the plaintiffs that in the event of certain lands belonging to the defendants ceasing to be used as a racecourse, or being proposed to be used for dock purposes, the defendants would give to the plaintiffs the "first refusal" of the lands:—*Held*, that this agreement did not create an interest in land; but that the plaintiffs not having had a first refusal, it could be enforced against third persons proposed alienees of the land, the action being to restrain a breach of a contract threatened to be carried out in pursuance of a subsequent contract by the defendant with a third person having full knowledge of the first contract. Principle of *Lumley* v. *Wagner* (21 L. J. Ch. 898; 1 De G. M. & G. 604) applied. *Ib.*

Electric Light—Contract to Take Whole of Electric Energy from Specified Company—Absence of Negative Stipulation—Breach of Contract—Injunction—"Undue preference."]—In 1898 the defendant signed a request to the plaintiff company for a supply of electric energy. The request was made subject, among other terms and conditions, to the following: (1) "The consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period of not less than five years"; (2) the charge was fixed at 4½*d.* per Board of Trade unit. On the margin it was noted that in the event of the company's standard rate being reduced below the price therein quoted the defendant was to have the benefit of such reduction. In 1901 the defendant gave the plaintiff company notice to disconnect. The company had entered into similar contracts with other consumers for different terms of years, and in the case of one

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consumer at a different rate of payment. In an action by the company for an injunction to restrain the defendant from taking any electric energy from any person other than the company,—*Held*, first, that the contract implied a contract by the defendant not to take energy from any one except the company, which in a case of this kind—a trade contract for supply and not for personal services—could be enforced by injunction. *Held*, secondly, that the contract was not void under sections 19 and 20 of the Electric Lighting Act, 1882, on the ground that undue preference had been given by the company to other consumers; that the relevant words of section 19 were "under similar circumstances to a corresponding supply," and that the section left a latitude to the company to make bargains with its customers, where the circumstances differed or the supply did not correspond, for different terms, and that on the facts of the case no undue preference was shewn. *Held*, thirdly, that the injunction asked ought therefore to be granted. *Metropolitan Electric Supply Co.* v. *Ginder*, 862.

Implied — Administration — Debt to Tradesman — Claim for Interest — Course of Dealing — Evidence of Agreement.]—In the administration of the estate of a deceased debtor a contract to pay interest on a tradesman's bill may be implied from the acts of the debtor in his lifetime, as, for instance, where bills had been sent in from time to time shewing that interest was being charged, and the debtor had never objected to the charge and had from time to time made payments on account generally. Decision of COZENS-HARDY, J., who followed *Lloyd Edwards, In re*; *Williams* v. *Trench* (61 L. J. Ch. 22), reversed. *Anglesey* (*Marquis*), *In re*; *Wilmot* v. *Gardiner*, (C.A.) 810.

Company—Contract with Third Person—Intended Company—Adoption.]—See COMPANY (Contracts of).

Tied House—Personal Contract.]—See LANDLORD AND TENANT.

COPYRIGHT.

Infringement—Agreement to Print for Another for Profit—Partnership—Diary for Shippers—Printer of Infringing Part Employed by Other Party—"Cause to be printed"—Agent.] —Lloyd's agreed with G. to print and publish in their own name a diary for merchant shippers in consideration of certain payments and commission on profits. G. obtained certain lists of merchant shippers which were an infringement of the plaintiffs' copyright. By agreement with Lloyd's, and to save time in publication, G. employed another printer, who was paid by him to print the pirated portion, and Lloyd's, without any knowledge of the piracy, included the infringing portion in the diary, which bore on the title-page the words "Printed at Lloyd's, Royal Exchange, London": —*Held*, that there was no partnership between Lloyd's and G., and that the printer of the pirated portion of the diary was not Lloyd's agent, and consequently that Lloyd's had not "caused to be printed" the diary within section 15 of the Copyright Act, 1842. Principle of *Russell* v. *Briant* (19 L. J. C.P. 33; 8 C. B. 836) and *Lyon* v. *Knowles* (32 L. J. Q.B. 71; 3 B. & S. 566) applied. *Kelly's Directories, Lim.* v. *Gavin*, 237.

—Penalty — Aggregate Sum — Minimum for Each Offence.] — In an action to recover penalties for several infringements of copyright under the Fine Arts Copyright Act, 1862, s. 6, the Court can award a sum of money which in relation to each of the several offences may represent only a fractional part of the lowest coin in the realm as the penalty for each offence, and is not bound to award such a sum as will represent a farthing at the least in respect of each offence. *Ellis* v. *Marshall & Son* (64 L. J. Q.B. 757), *Baschet* v. *London Illustrated Standard Co.* (69 L. J. Ch. 35; [1900] 1 Ch. 73), and *Nicholls* v. *Parker* (17 Times L. R. 482) overruled on this point; and the decision of the majority of the Court in *Green* v. *Irish Independent Co.* ([1899] 1 Ir. R. 386) dissented from. *Hildesheimer* v. *Faulkner*, (C.A.) 800.

Each infringing copy constitutes a separate offence under section 6. *Beal, Ex parte* (37 L. J. Q.B. 161; L. R. 3 Q.B. 387), approved. *Ib.*

— Publisher and Author — Encyclopædia — Injunction.]—A. agreed with the publishers of an Encyclopædia that he would act as editor at a fixed fee, for which he was also to write 7,000 words of special articles, and such unsigned articles as were required. The publishers were to bear all the cost of the work. There was no express provision as to the proprietorship of the copyright in the articles. A. employed C., at the request of the publishers, to write certain other articles for the Encyclopædia at a fixed sum per thousand words. All the articles were written, and A. and C. were registered as proprietors of the copyright in those which they had respectively written. In an action by A. and C. to restrain the publishers of the Encyclopædia from publishing the articles in question in another work without their consent,—*Held*, that there were no special circumstances in the nature of the publication or the terms of the employment of A. and C. from which the Court could infer that the copyright in the articles was to belong to the proprietors of the Encyclopædia, within section 18 of the Copyright Act, 1842, and an injunction must therefore be granted. *Aflalo* v. *Lawrence & Bullen, Lim.*, 797.

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CORPORATION.

Contract between Commissioners and a Company—Commissioner Shareholder in Company—"Interested or concerned in any contract"—Avoidance of Contract.]—The City of London Sewers Act, 1848, vested in the Commissioners of Sewers the powers of cleansing, lighting, and paving within the City, and provided (section 33) that it should be lawful for the Commissioners to contract with any persons for the execution of any works by the Act authorised to be done by the Commissioners, or for furnishing materials or labour, or for any other matters or things necessary for enabling them to carry the purposes of the Act into effect. The sections immediately following contained provisions as to contracts by the Commissioners, and section 42 provided that no person being a Commissioner or an Alderman or Common Councilman of the City should be directly or indirectly interested or concerned in any contract entered into by the Commissioners for the execution of any works by the Act authorised to be done, or for furnishing materials or labour, or for any other matter or thing whatsoever, upon pain that every such contract should be null and void. Section 116 empowered the Commissioners to enter into contracts with gas companies or other persons for lighting the City, but that was the first place in which contracts for lighting were expressly mentioned. The City of London Sewers Act, 1851, which continued and amended the Act of 1848, provided (section 53) that no Commissioner who was a shareholder in, or surveyor, solicitor, or agent for any gas, water, or paving company, or any undertaking, the contracting with or carrying out of which should be discussed at any meeting of the Commissioners, should be eligible to sit or vote as a Commissioner while such subject was under discussion:—*Held*, on the construction of the Acts, that section 42 of the Act of 1848 applied to every possible contract that the Commissioners could enter into by virtue of the Act, and consequently to lighting contracts; and that section 53 of the Act of 1851 was intended to extend still further the disabilities of the Commissioners, not to relax them. *City of London Electric Lighting Co.* v. *London Corporation*, (C.A.) 334.

Held, also, that a Commissioner, Alderman, or Common Councilman who was a shareholder in a company contracting with the Commissioners was "interested" in the contract within section 42 of the Act of 1848, and the fact that he was so interested made the contract void; but if no such person was a shareholder in the company at the date of the contract, the fact that the contract was afterwards assigned to a company in which such persons were shareholders, the rights of the Commissioners under the contract being maintained intact, did not make it void. *Ib.*

COSTS.

Action against Two Defendants—One Ordered to Pay Plaintiffs' Costs—No Order against Other—Liability to Pay Costs of Plaintiffs' Unsuccessful Claim against Other Defendant.]—Where, in an action against two defendants, no order being made against one, the other is ordered to pay the plaintiffs' costs, such costs include the plaintiffs' costs of their unsuccessful claim against the co-defendant. *Kelly's Directories* v. *Gavin and Lloyd's* (*No.* 2), 786.

Higher Scale—Special Grounds.]—The fact that a case of difficulty and importance has been conducted with extreme ability and diligence on the part of the solicitors does not constitute a special ground for allowing costs on the higher scale within Order LXV. rule 9. *Williamson* v. *North Staffordshire Railway* (55 L. J. Ch. 938; 32 Ch. D. 399) followed. *Davies Brothers* v. *Davies* (56 L. J. Ch. 481), *Leeuw, In re; Rein* v. *Wrathall* (93 L. T. J. 333), and *Marriott* v. *Cobbett* (38 S. J. 620) not followed. *Rivington* v. *Garden*, 282.

Taxation—Order to Tax Costs including Remuneration of Receiver—Costs to be Set Off and Balance Certified—Power to make Separate Certificate as to Costs only.]—An order was made that the Taxing Master should tax the costs of the plaintiffs of the action, including the costs and remuneration of certain receivers, and should tax the costs of the defendants of certain motions, and deduct those costs of the defendants from the plaintiffs' costs and certify the balance, and the defendants were ordered to pay to the plaintiffs the balance so to be certified. The Master certified that he had taxed the plaintiffs' costs, but had not included the costs and remuneration of the receivers, and had taxed the defendants' costs and deducted the amount from the amount of the plaintiffs' costs, and he certified the balance due to the plaintiffs in respect of their costs, not including the costs and remuneration of the receivers, which, when ascertained, he proposed thereafter to certify in addition to the said balance:—*Held*, that the Taxing Master had no power under the order for taxation to tax the plaintiffs' costs of the action and the costs and remuneration of the receivers separately. *Silkstone and Haigh Moor Coal Co.* v. *Edey*, (C.A.) 774.

Per Byrne, J.—A Taxing Master has in a proper case power to make a separate certificate, but he cannot do so without special directions under a judgment directing a particular balance to be certified and paid. *Ib.*

—Party and Party—Leading Counsel—Special Fee—Disallowance.]—In a proceeding in the Chancery Division, a special fee of fifty guineas in addition to an ordinary fee upon the brief, paid to a leading counsel practising within the Bar but not usually in that Court where

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the proceeding takes place, cannot under ordinary circumstances be allowed on a taxation of costs between party and party. *Parson, In re; Parson* v. *Parson*, 563.

Semble, such a fee cannot be allowed under any circumstances. *Ib.*

—Solicitor—Lessor and Lessee—Mining Lease—Negotiations—Scale Fee.]—A lessor who has paid his solicitor's bill of costs in relation to the lease can recover what he has paid from the lessee except charges for matters antecedent to the instructions for the lease, such as fees paid to a mining expert in the case of a mining lease. *Gray, In re*, 133.

—Third-Party Order.]—A third-party order for taxation does not alter the nature or enlarge the scope of the liability upon the existence of which the order is based. Where such an order has been made for the taxation of a lessor's bill of costs, at the instance of a lessee, the Court is bound to look at the nature of the items in the bill and to consider whether, apart from the order, the applicant is bound to pay them. The lessee does not by obtaining the order render himself liable to pay the whole bill. *Negus, In re* (64 L. J. Ch. 79; [1895] 1 Ch. 73), applied. *Ib.*

Debenture-holder's Action.]—See COMPANY (Debentures).

Lien—Taxation.]—See SOLICITOR.

Shorthand Note of Judgment.]—See APPEAL.

Solicitor-Mortgagee.]—See MORTGAGE.

Validity of Patent — Certificate.] — See PATENT.

CROWN.

Bona Vacantia—Will—Real Estate—Conversion—Settled Land Act, 1882.]—A testator who was possessed of freeholds devised all his property to his wife for life and appointed trustees and executors, but made no further disposition. The trustees of the will were appointed trustees for the purposes of the Settled Land Act, and the widow sold portions of the land and paid the purchase-money to the trustees. On the death of the widow, there being no heir-at-law or next-of-kin of the testator,—*Held*, that the proceeds of sale did not belong to the trustees beneficially, but went to the Crown as *bona vacantia*. *Bond, In re; Panes* v. *Att.-Gen.*, 12.

Prerogative—Information "ex relatione"—Selection of Division in High Court—Transfer.]—The Court has jurisdiction to order the transfer of an action *ex relatione* from the Chancery Division to the Queen's Bench Division, where, according to the usual practice of the Attorney-General, the choice of the division in which the action was originally brought was left entirely to the relator and co-plaintiff. The co-plaintiff in such a case cannot assert the prerogative of the Crown to choose its own tribunal. *Att.-Gen.* v. *Wilson*, (C.A.) 234.

Charter—Validity—Excess of Prerogative.]—See RIVER.

CUSTOM.

Tenure of Ancient Demesne—Customary Freehold—Fine on Alienation.]—The freehold of land held by the tenure of ancient demesne is in the tenant and not in the lord of the manor. A custom for the lord of a manor of ancient demesne to receive a fine arbitrary upon the purchase of lands within the manor is bad, whether limited to purchases by "strangers" (that is, persons not already tenants of the manor) or not, as being contrary to the statute Quia Emptores and other statutes. *Merttens* v. *Hill*, 489.

—Title to Manor—Possession—Presumption of Lost Grant.]—*Semble*, where a manor has existed in the hands of the Crown, and the Crown has granted some of the lands of the manor to a subject by a grant which did not pass the manor, but the successors in title of the grantee have held manorial courts and kept court rolls continuously, and shew a long modern paper title to the manor, a grant of the manor itself from the Crown will be presumed. *Ib.*

Recital in Inclosure Act—Evidence.]—Recitals in an Inclosure Act are not conclusive evidence against persons claiming through original allottees under the Act, but may be rebutted by other evidence. *Ib.*

DEBTORS ACT.—See ATTACHMENT.

DIRECTORS.—See COMPANY.

DISTRESS.—See LANDLORD AND TENANT.

EASEMENT.

Artificial Watercourse—Temporary Purpose—Right of Dominant Tenement to Compel Continuous Flow—Right to Enjoy de Facto Flow.]—In considering whether the right to the enjoyment of an artificial watercourse on land of the vendor has passed, in the absence of express reference, to the purchaser of land adjoining the artificial watercourse under section 6 of the Conveyancing and Law of Property Act, 1881, it is not sufficient to

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point to the relative position of the property sold and of the watercourse, and to claim that the enjoyment of the watercourse is obvious. It is necessary to consider whether, having regard to all the circumstances of the case, the enjoyment is one which could ever be erected into a right on the basis of prescription or of a lost or presumed grant. *Burrows* v. *Lang*, 607.

In considering the question of a presumed grant it is necessary completely to review the whole of the surrounding circumstances—*e.g.* the purposes for which the artificial watercourse was originally made, the burden of its maintenance, and similar considerations; and on the question of prescription it is material to discover whether the watercourse was constructed for a temporary purpose. A right to enjoy such water in an artificial watercourse—and such water only—as the owner of the watercourse chooses to allow to flow down the watercourse, is *precario*, and, as such, incapable of constituting a legal easement. *Ib.*

"Temporary."] — "Temporary," as a legal term, does not mean merely that a thing happens to last in fact, or is intended to last, for only a few years. It means that a thing may, within the reasonable contemplation of the parties, be expected to come to an end some day, sooner or later, and that it is not of the nature of a grant in fee-simple. *Ib.*

Light—Implied Grant—Derogation—Lease—Building Land.]—In the absence of special facts the doctrine that a grantor cannot derogate from his own grant must be applied without limit or restriction to a claim for access of light by the lessee of a house from the owner of building land, as against a subsequent grantee of adjoining land from the same owner. *Pollard* v. *Gare*, 404.

Where such a lease contains no express grant of lights, the general words of section 6 of the Conveyancing Act, 1881, will be read into it. *Broomfield* v. *Williams* (66 L. J. Ch. 305; [1897] 1 Ch. 602) applied and followed. *Ib.*

Prescription—Private Road—User—Herbage—Inclosure Award—Presumption of Grant.]—Where a local authority has for fifty years let the herbage of a private road, without any restriction as to grazing, the Court will presume a lost grant of a right co-extensive with the usage. It makes no difference that the herbage was given to the predecessors of the local authority by an inclosure award, with the restriction that it was to be grazed by sheep only, or that the usage purported to be in exercise of the right given by the award. *Neaverson* v. *Peterborough Rural Council*, 35.

Private Right of Way—Servient and Dominant Tenement—Unity of Possession—Yearly Tenant.]—Unity of possession by a yearly tenant of the alleged dominant and servient tenements for the twenty years, or for twenty-three out of the forty years, immediately preceding an action in which a claim to a private right of way is sought to be established, is fatal to such a claim under section 4 of the Prescription Act, 1832. *Onley* v. *Gardiner* (8 L. J. Ex. 102; 4 M. & W. 496) and *Bathkhill* v. *Reed* (25 L. J. C.P. 290; 18 C. B. 696) followed. *Damper* v. *Bassett*, 657.

Right of Support—Acquisition by Prescription—Enjoyment—Nature of Enjoyment.]—In order to establish a right to an easement by long enjoyment, the enjoyment must be of such a nature that the servient owner's attention ought reasonably to have been drawn to the existence of the easement. It is not enough that something has been visible from which an expert might have inferred the existence of the easement. The word "*clam*," as applied to the enjoyment by which an easement may be acquired, does not mean surreptitiously or fraudulently, but only in such a manner as could not reasonably be expected to attract the notice of the servient owner. *Union Lighterage Co.* v. *London Graving Dock Co.*, 558.

Right of Way — Parol Licence — Claiming Right — Uninterrupted Enjoyment for Forty Years—Annual Payment.]—The plaintiff and her predecessors in title had from time immemorial made constant, uninterrupted, and open use of a way over the defendants' yard, that being the only means of access for horses and carts to the plaintiff's premises from the high road. The use of the way was essential for the business carried on upon the plaintiff's premises. The owners for the time being of the plaintiff's premises had also used during the same period the water from a pump on the defendants' premises. Since 1855 they had made an annual payment of fifteen shillings to the owners of the defendants' premises. They had also by arrangement contributed something to the repair of the pump. The defendants, while admitting the plaintiff's right of access to the pump, denied her right of way over their premises. There was no evidence of the origin of the payment of fifteen shillings, nor was there anything to shew that the user of the way was due to any agreement by deed or in writing, or on what terms the enjoyment of the right of road and other easement had begun. There was only one receipt for a payment of fifteen shillings produced, given on January 24, 1899, after the dispute had arisen, which was expressed to be for right of way to September, 1898:—*Held* (*dissentiente* RIGBY, L.J.), that the *prima facie* inference to be drawn from the annual payment of fifteen shillings was that the enjoyment of the way was not of right, but each payment was for the use of the way by

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permission during the preceding year, although such permission was not expressly demanded and given in each year, and the plaintiff had not discharged the onus thus thrown upon her of shewing that the user was of right; and that no lost grant could be presumed. *Gardner* v. *Hodgson's Kingston Brewery Co.*, (C.A.) 504.

Plasterers Co. v. *Parish Clerks Co.* (20 L. J. Ex. 362; 6 Ex. 630) and *Bewley* v. *Atkinson* (49 L. J. Ch. 153; 13 Ch. D. 283) distinguished by VAUGHAN WILLIAMS, L.J. *Ib.*

Held, by RIGBY, L.J., that the user of the way had in fact been as of right in the sense that it was such as a person rightfully entitled would have had, and the mere unexplained payment of the fifteen shillings, which began before the commencement of the period of forty years, was not an interruption—the principle of *Plasterers Co.* v. *Parish Clerks Co.* (*supra*) being applicable to cases within section 2 of the Prescription Act, 1832. *Ib.*

ECCLESIASTICAL LAW.

Endowment—Investment in Land—Sale by Incumbent—How far Binding on Successor.]—By a private Act of Parliament an endowment consisting of personalty was vested in an incumbent, and liable to be laid out in the purchase of lands, ground-rents, or other hereditaments in fee-simple to be conveyed to and settled upon and to the use of the rector for the time being for and towards the maintenance of such rector. An incumbent (I.), who had no knowledge of the source from which the endowment came, but merely had a general idea (to use his own expression) that it was "church property," invested it in his own name in the purchase of freehold ground-rents, which were conveyed to him, his heirs and assigns, with a declaration in bar of dower. I. sold a portion of these ground-rents, and upon his resignation conveyed the unsold portion to his successor (H.) in fee-simple by deed which contained uses in bar of dower. Neither conveyance satisfied the provisions of the Charitable Uses Act, 1735 (9 Geo. 2. c. 36), with respect to attestation and enrolment. H. sold part of the ground-rents conveyed to him to the defendant. I. joined in the conveyance to the defendant. H. subsequently applied the proceeds of sale to his own use. In an action by the present incumbent, who was H.'s successor,—*Held*, first, that the defendant's title was not invalidated by 13 Eliz. c. 10; and secondly, that, assuming I. or H. to be trustee of the ground-rents, the present incumbent could not impeach the sale. *Power* v. *Banks*, 700.

ELECTION.—See HUSBAND AND WIFE.

ESTATE.

Estate Tail—Strict Settlement of Realty—Residuary Personalty—"Subject to be invested in the purchase of lands" after the Death of a Certain Person—Disentailing Deed Executed in His Lifetime—Validity.]—The words "money subject to be invested in the purchase of lands to be settled" in section 71 of the Fines and Recoveries Act, 1833 (which section enables a tenant in tail to acquire the absolute interest in such money), when read in conjunction with the interpretation clause (section 1) of the same Act, mean money subject either presently or at any future time to be laid out in the purchase of lands. Where, therefore, by will lands were settled in strict settlement and the testator's residuary personalty was given to trustees upon trust to pay the income thereof to a certain person for his life, and after his death to convert the same and invest the proceeds in the purchase of lands to be settled to the same uses as the settled realty, a disentailing deed executed in the lifetime of such person by the tenant in tail in remainder of the settled realty with the consent of the tenant for life thereof, is effectual to bar the estate tail of the tenant in tail in the residuary personalty. *Fordham* v. *Fordham* (34 Beav. 59) approved and followed. *Harvey, In re*; *Harvey* v. *Harvey*, 694.

Tenant for Life — Apportionment — Reversionary Fund—Marriage Settlement—Rule in Howe v. Dartmouth (Earl).]—The rule in *Howe* v. *Dartmouth* (*Earl*) (7 Ves. 137), and the corollary established in *Chesterfield's* (*Earl*) *Trusts, In re* (52 L. J. Ch. 958; 24 Ch. D. 643), respecting the apportionment between tenant for life and those absolutely entitled in remainder of a reversionary fund which falls into possession, has no application where the fund is subject to the trusts of a marriage settlement. *Van Straubenzee, In re*; *Boustead* v. *Cooper*, 825.

—Alternative Gift — Barring Entail.]—See WILL.

Equitable Estate—Merger.]—See MERGER.

Legal Estate—Priority.]—See MORTGAGE.

Tenure of Ancient Demesne.]—See CUSTOM.

Words of Limitation.]—See VENDOR AND PURCHASER.

ESTATE DUTY.—See REVENUE.

EVIDENCE.

Presumption—Woman Past Child-Bearing—Widow Aged Fifty-six Years and Three Months.]—The Court treated as past child-bearing a widow aged fifty-six years and three months

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who had been married for twenty-four years and had immediately after the marriage had one child. *White, In re; White* v. *Edmond*, 300.

The cases of presumption against child-bearing in the case of a spinster are equally applicable to the case of a widow who has had a child. *Ib.*

Croxton v. *May* (9 Ch. D. 388) and *Hocking, In re; Michell* v. *Loe* (67 L. J. Ch. 662; [1898] 2 Ch. 567), distinguished. *Ib.*

Ownership of Bed of River.]—See FISHERY.

Passing off Goods—View by Judge.]—See PRACTICE.

Recitals in Enclosure Act.]—See CUSTOM.

EXECUTOR AND ADMINISTRATOR.

Administration—Grant to Attorney—Duty to Distribute Assets.]—Where letters of administration have been granted to the attorney of the person entitled, who is abroad, the attorney is administrator for all purposes, and is not justified in paying over assets to his principal for distribution until such principal has himself taken out administration. *Rendell, In re; Wood* v. *Rendell*, 265.

—Partnership Property—Sale for Shares in Company to be Formed—Sanction of Court.]—The Court has no jurisdiction to sanction the sale of a testator's business for shares or debentures in a company to be formed to take it over. *Crawshay, In re; Dennis* v. *Crawshay* (60 L. T. 357), followed. *West of England Bank* v. *Murch* (52 L. J. Ch. 784; 23 Ch. D. 138) distinguished. *Morrison, In re; Morrison* v. *Morrison*, 399. (But see *New's Settlement, In re*, (C.A.) 710.)

—Insolvent Estate—Voluntary Creditor—Judicature Act, 1875, s. 10.]—In the administration of an insolvent estate in the Chancery Division the Bankruptcy Rules by virtue of the Judicature Act, 1875, s. 10, apply as to the equality of provable debts, and therefore voluntary creditors rank *pari passu* with creditors for value. *Smith* v. *Morgan* (49 L. J. C.P. 410; 5 C.P. D. 337) and *Maggi, In re* (51 L. J. Ch. 560; 20 Ch. D. 545), so far as they conflict with this rule, overruled. *Whitaker, In re; Whitaker* v. *Palmer*, (C.A.) 6.

—Insufficient Personalty for Debts, &c.—Specific Bequest—Secret Trust.]—Where residuary personalty has been given by will, and a specific part of it is bound in the hands of the residuary legatee by a secret memorandum of trust not executed as a will, the property comprised in the memorandum does not pass by way of specific bequest but *dehors* the will, and must therefore bear its proportion of the debts of the testator rateably with the other residue. *Maddock, In re; Llewelyn* v. *Washington*, 660.

Right of Retainer—Grant to Agent—Retainer for Principal's Debt.]—A person to whom a grant of administration has been made as nominee of a creditor of an intestate, where the grant is not expressed to be for the use of his principal, cannot retain for the debt due to his principal. *Richards, In re; Lawson* v. *Harvey*, 699.

—Executor Equitable Tenant for Life.]—An executor, who is a tenant for life and *cestui que trust*, is not entitled to retain a sum due from the testator's estate for interest, where there are trustees competent to sue for the *corpus* of the sum. *Dunning, In re; Hatherley* v. *Dunning* (54 L. J. Ch. 900), followed. *Loomes* v. *Stotherd* (1 L. J. (O.S.) Ch. 220; 1 Sim. & S. 458) examined and explained. *Hayward, In re; Tweedie* v. *Hayward*, 155.

—Creditor's Administration Action—Payment out of Court.]—An executor's or administrator's right of retainer is only applicable to a fund which he has actually or constructively got into his possession. Money paid into Court on his application does not come constructively into his possession. *Pulman* v. *Meadows*, 97.

It is not usually the practice of the Court to pay out funds in Court to the legal personal representative of a creditor, but to direct an enquiry as to who are the persons beneficially entitled thereto. *Ib.*

—Creditor Administrator—Administration Bond—"Not unduly preferring."]—Under an administration bond entered into by a creditor administrator with a condition that he "do well and truly administer according to law (that is to say) do pay all and singular the debts which he (the deceased) did owe at his decease in a due course of administration rateably and proportionably and according to the priority acquired by law and not unduly preferring his own debt or the debts of any other of the creditors of the said deceased by reason of his being an administrator . . ." the administrator is not precluded from exercising his right of retainer in respect of debts due to himself from the deceased. *Davies* v. *Parry* (68 L. J. Ch. 346; [1899] 1 Ch. 602) approved. *Belham, In re; Richardes* v. *Yates*, (C.A.) 474.

Trust for Sale and Conversion—Shares of Residue—Appropriation of Specific Assets—Chattels Real.]—The principle upon which the rule, that under a will containing a trust for sale and conversion executors and trustees are entitled to appropriate specific assets to answer shares of residue, proceeds is that it must be

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competent for executors and trustees to agree with the beneficiary that they will sell the particular assets to the beneficiary and set off the amount against the money which they would otherwise have to pay to him, and that it is not necessary for them to go through the form of first converting the assets and then handing over to the beneficiary the money which the beneficiary may be desirous of immediately reinvesting in the very assets which have just been sold. The doctrine, therefore, of appropriation is not confined to pure personal estate, but extends to chattels real and also to real estate which is subject to a trust for sale and conversion. *Beverly, In re; Watson* v. *Watson*, 295.

Although section 4, sub-section 1 of the Land Transfer Act, 1897, applies as well to personal as to real estate, it has not taken away from executors and trustees the power of appropriation which existed before the Act, at all events in cases where there is a trust for sale and conversion. *Ib.*

Administration — Debt to Tradesman — Interest.]—See CONTRACT.

FISHERY.

"Several"—Grant—Ownership of Bed of River — Inconsistent Rights — Evidence — Right of Way—Incorporeal Hereditament—Appurtenancy.]—A grant of a fishery and weirs (gurgites) in a river is a grant of the bed over which the fishery extends. *Hanbury* v. *Jenkins*, 730.

A several fishery may be granted without the use of the word "several." *Ib.*

On a claim for a several fishery, evidence that rights of fishing exist in certain portions of the waters to which the claim extends inconsistent with the existence of a several fishery in those portions is admissible on the question whether a several fishery exists in other portions; but proof of the existence of such inconsistent rights does not necessarily negative the existence of a several fishery elsewhere. *Ib.*

Acts by riparian occupiers, such as placing stakes and wattles on the soil of a river to prevent erosion by flood, taking gravel deposited by flood, and making pens in the stream to prevent cattle from straying, though *prima facie* acts of ownership, but referable to an absence of objection on the part of another person claiming the bed of the river and reasonably necessary or convenient for the protection and enjoyment of the property of the riparian occupiers, are not inconsistent with the ownership of the bed of the river being in such other person. *Ib.*

Where there is no incongruity in the union of two incorporeal things, one—*e.g.* a right of way—may be appendant or appurtenant to the other—*e.g.* a several fishery. *Ib.*

FIXTURES.

Tapestry—Ornamental Purposes—Tenant for Life and Remainderman — Damages for Removal.]—The exception of ornamental fixtures from the rule *Quicquid plantatur solo solo cedit* applies as well between tenant for life and remainderman as between tenant and landlord. *De Falbe, In re; Ward* v. *Taylor*, (C.A.) 286.

Tapestries affixed by means of nails and moulding to the walls of a drawing-room by the tenant for life for the purpose of enjoying them as ornaments are within the exception of ornamental fixtures as between tenant for life and remainderman, and are removable by the tenant for life or by his executors after his death. *D'Eyncourt* v. *Gregory* (36 L. J. Ch. 107; L. R. 3 Eq. 382) and *Norton* v. *Dashwood* (65 L. J. Ch. 737; [1896] 2 Ch. 497) observed on. *Ib.*

The remainderman is not entitled to consequential damages occasioned by the removal of ornamental fixtures, as, for instance, to compensation for the expense of redecoration. *Ib.*

FRAUD.

See UNCONSCIONABLE BARGAIN.

Company — Resolution for Winding-up Fraudulently Obtained.] — See COMPANY (Winding-up).

FRAUDS, STATUTE OF.

See COMPANY (Promoters and Directors); SETTLEMENT.

FRIENDLY SOCIETY.

Life Policy — Non-Assignability — Nominations — Equitable Mortgage by Deposit.]—Policies of life insurance issued by a friendly society constituted under the Friendly Societies Acts, 1875 to 1896, are not assignable otherwise than by nomination according to the provisions of those Acts. *Redman, In re; Warton* v. *Redman*, 669.

The mere deposit of policies to secure a loan, unaccompanied by the nomination of the lender or his nominee, will not create a valid charge on the policy-moneys. *Caddick* v. *Highton* (68 L. J. Q.B. 281) followed. *Ib.*

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HIGHWAY.—See WAY.

HUSBAND AND WIFE.

Married Woman—Election—Restraint on Anticipation—Subsequent Discoverture—Gift by Will—Compensation.]—The doctrine of election does not apply in the case of a married woman to whom an interest with a restraint on anticipation attached thereto is given by the same instrument as that which gives rise to a question of election, even though at the time when the question of election arises the married woman has become discovert. *Hamilton* v. *Hamilton* (61 L. J. Ch. 220; [1892] 1 Ch. 396) distinguished. *Haynes* v. *Foster*, 302.

Power of Appointment—Married Woman Married before 1881—Restraint on Anticipation of Life Interest—Release of Power.]—A married woman married before the Conveyancing and Law of Property Act, 1881, may under section 52 of that Act by deed unacknowledged release a power of appointment over personal property in which she has a life interest subject to a restraint on anticipation. *Chisholm's Settlement, In re; Hemphill's Settlement, In re; Hemphill* v. *Hemphill*, 533.

Restraint on Anticipation—Removal—Benefit of Woman—Increase of Income—Money in Court—Change of Investments—Payment out to Trustees of Settlement.]—A married woman was under a will, in the events which had happened, absolutely entitled to a fund in Court, subject only to a restraint on anticipation during the life of her husband. The fund was standing to a separate account. By the settlement made on her marriage she covenanted to settle after-acquired property. Under the settlement she was restrained from anticipation, and her husband took a life interest in the settled funds after her death. There were no children. The settlement allowed a wider range of investment than the Court allowed for the investment of money under its control. The lady wished to increase her income, and also wished that the fund in Court should pass to the trustees of her settlement under her covenant. She applied to the Court for removal of the restraint on anticipation imposed by the will, and for payment of the fund out of Court to her trustees:—*Held*, that no case of such predominant benefit to the lady had been made out as to warrant the Court in removing the restraint on anticipation, and the application must be refused. *Blundell's Trusts, In re*, (C.A.) 522.

Will—Married Woman—Assent of Husband—Chose in Action—Title of Husband—General Probate of Will of Married Woman.]—Under the old law as it stood before the Married Women's Property Act, 1882, the assent by a husband to his wife's will might be given after her death. It was not necessary that it should be given in her lifetime. *Elliot* v. *North*, 217.

A woman married in 1863 under a settlement made upon her marriage had a power of appointment over certain funds. In 1871 her son by a previous marriage died intestate without issue, and thereupon the married woman became entitled to a reversionary interest in certain personal estate expectant on the determination of the life interest of the son's widow, who was still living. In 1874 the married woman died, having by her will appointed the defendants executors and trustees thereof, and having in exercise of the power reserved to her by the settlement appointed the residue of the settlement funds and all other personal estate which at the time of her decease she had power to appoint or dispose of by will to be equally divided between the defendants. The will did not expressly refer to the reversionary interest. The husband signed a consent to letters of administration with the will annexed being granted to the defendants. The executors of his will brought an action against the defendants to determine whether the plaintiffs or the defendants were entitled to the reversionary interest:—*Held*, that although the husband had consented to the wife's will the reversionary interest did not pass under it to the defendants, and that the effect of the grant of general administration to them was merely to constitute them trustees for the husband and his personal representatives of the reversionary interest. *Squib* v. *Wyn* (1 P. Wms. 378) followed. *Ib.*

INFANT.

Maintenance—Settled Land—Tenant in Tail in Possession—Direction to Accumulate Surplus Income—Items of Expenditure—Upkeep of Mansion-House—Subscriptions to Local Charities.]—Where a testator settles his property on persons for life with remainders over, and provides for infants being maintained during minority, he does not, when he mentions a sum for maintenance and directs an accumulation of the surplus income, without negative words, necessarily exclude an intention that the estate should be kept up and the infants brought up in the way suitable to the position which he has shewn by his will he intended they should ultimately occupy. *Walker, In re; Walker* v. *Duncombe*, 417.

The following items of expenditure were authorised by the Court on the application of the above principle: (*a*) Internal repairs to mansion-house and appurtenances; (*b*) Maintenance of gardens and pleasure-grounds of mansion-house; (*c*) Increased sum for maintenance of infant; (*d*) Tutor, clothing, pocket-money, travelling and incidental expenses of infant; (*e*) Subscriptions to local charities. *Ib.*

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Management of Lands — Appointment of Trustees—Infant Taking by Descent.]—The power given to the Court by section 42 of the Conveyancing and Law of Property Act, 1881, to appoint trustees for the management of an infant's land during minority, on the application of his next friend, extends to the case of an infant taking by descent. *Cowley, In re*, 88.

Necessaries.]—In the case of an infant, who was entitled to an income of between 7*l.* and 8*l.* a week during his minority, such things as (*a*) cartridges; (*b*) champagne; and (*c*) jewellery presented to a lady, to whom the infant was engaged without the consent of his guardian, but who did not become his bride, will not be allowed as "necessaries." *Howlings* v. *Graham*, 568.

INJUNCTION.—See STATUTE.

INTEREST.

Implied Agreement to Pay.]—See CONTRACT.

INTERNATIONAL LAW.

Committee Appointed by Foreign Court—Payment to Foreign Committee—Discretion of Court.]—A committee appointed by a foreign Court of the estate of a lunatic residing within its jurisdiction, but domiciled in England, cannot recover, as of right, personal property of a lunatic situate in England. But the English Court has a discretion, and may exercise the discretion by paying over the property to such a committee without requiring evidence that the whole of such money is needed for the maintenance of the lunatic. *New York Trust and Securities Co.* v. *Keyser & Co.*, 330.

Marriage Settlement — Construction — Movables—Form of Deed—General Power—Appointment — Property.]—A domiciled Englishwoman, on the eve of her marriage with a domiciled Frenchman, executed a settlement of her property. The trustees of the settlement were English, and the trusts were for her appointees by deed or will, and in default of appointment for her separate use absolutely, but the settlement contained no declaration that it should take effect and be construed as an English settlement. The lady (her domicil being then French) exercised the power by a testamentary appointment executed in England according to English law:—*Held*, that the proper inference was that the parties shewed an intention that the settlement should be construed as an English settlement, and that the will was effective according to its tenor to pass the fund, whether regarded as an exercise of the power of appointment, or a disposition of the property to which the testatrix was entitled to her separate use. *Mégret, In re; Tweedie* v. *Maunder*, 451.

JOINT TENANCY.—See MERGER.

LANDLORD AND TENANT.

Covenant Running with the Land—Underlease—Demise by Underlessee — Covenant by Underlessee if Term Extended to Grant New Lease—Personal Covenant—Rule against Perpetuities — Assign of Reversion.] — Where a lessor who was himself an underlessee covenanted with his lessee that if he should obtain from the freeholder any extension of his term he would grant a new lease to his lessee, it was held on the construction of the covenant that it was personal only to the lessor, and was not binding on his assign; that the covenant was not one for renewal strictly so called, and therefore did not run with the land; and that according to the statute 32 Hen. 8. c. 34, s. 2, the covenant was limited to the reversion with which it ran—that is, the reversion which was vested in the covenantor at the time he entered into the covenant. *Brereton* v. *Tuohey* (8 Ir. C. L. R. 190), *Kent* v. *Stoney* (9 Ir. Ch. R. 249), and *Coey* v. *Pascoe* ([1899] 1 Ir. R. 125) followed. *Muller* v. *Trafford*, 72.

Distress for Rent—Patented Chattel—Sale to Purchaser with Notice of Restrictions on User.] —The purchaser of a patented article at a sale of a distress for rent does not acquire the right to use the article, in breach of a contract entered into by the tenant with the patentee restricting the right to use the article, if at the time of purchase he has notice of the contract. *British Mutoscope and Biograph Co.* v. *Homer*, 279.

Forfeiture—Lease to a Company—Condition for Re-entry on Liquidation—Voluntary Winding-up of Solvent Company — Underlessee — Terms of Relief—Rent—Public-house.]—Where an underlessee applies to the Court under section 4 of the Conveyancing Act, 1892, for relief in consequence of the forfeiture of the lease of his immediate lessor by the original lessor, the Court has discretion to vest the property in him for a new term upon such conditions and at such a rent as it shall, having regard to all the circumstances of the case, think just as between the parties, and the lessor must be treated as having not only his original rights as lessor, but, by virtue of the forfeiture, the rights of the lessee also. *Ewart* v. *Fryer*, (C.A.) 138.

A lease of a public-house was granted to a brewery company for thirty years at a rent of 300*l.*, with a proviso for re-entry if the lessees or their assigns, being a company, should enter into liquidation, whether compulsory or volun-

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tary. The company granted an underlease of the premises at a rent of 800*l.*, reducible to 300*l.* if the underlessee bought his beer from them. The company went into voluntary liquidation for the purpose of amalgamation with two other companies. It was solvent at the time. The lessors brought an action to recover possession of the premises on the ground of the forfeiture caused by the voluntary liquidation. The underlessee claimed relief under section 4 of the Conveyancing Act, 1892:—*Held*, on the authority of *Horsey Estate, Lim.* v. *Steiger* (68 L. J. Q.B. 743; [1899] 2 Q.B. 79), that the voluntary liquidation was a cause of forfeiture, that the underlessee was entitled to a new lease of the premises, and there must be an enquiry as to the rent at which the new lease ought to be granted, bearing in mind that the house could no longer be a tied house. *Ib.*

Lease—Surrender by Operation of Law—Possession of Surrendered Lease.]—A lessee, notwithstanding a surrender of his term by operation of law, retains an interest in the lease, and on the granting of a new lease to him by the lessor is entitled to retain the old lease. *Knight* v. *Williams*, 92.

The surrender of an old lease, implied from the acceptance of a new lease, is subject to an implied condition that the new lease is valid. *Ib.*

Licence — Agreement to Let Hoarding — Yearly Tenancy—Notice to Quit.]—An agreement to let A erect a hoarding for a bill-posting and advertising station, and use a wall of a house for the same purpose, at a rental of 10*l.* per annum, payable quarterly, on the usual quarter-days,—*Held*, to constitute a licence and not a tenancy, and that a three months' notice to quit, expiring at the end of a year of the term, was a reasonable and valid notice to determine it. *Wilson* v. *Tavener*, 263.

Market Garden—Glass-Houses—Trade Fixtures — Right of Removal.] — Glass-houses erected for the purpose of his trade by a tenant who is carrying on the business of a market gardener, with the knowledge of his landlord, are trade fixtures, and may be removed by the tenant during the tenancy though attached to the freehold. *Mears* v. *Callender*, 621.

Fruit Trees—Compensation—Landlord's Consent.]—A power in an agreement for an agricultural tenancy for the tenant to turn meadow land into orchard is a consent in writing by the landlord to the planting of fruit trees within section 3 of the Agricultural Holdings (England) Act, 1883, and the tenant is entitled to compensation for trees so planted. *Ib.*

Sporting Rights — Licence — Tenancy from Year to Year—Successive Tenancies for Single Year—Incorporeal Hereditament—Six Months' Notice—Reasonable Notice.]—A lessor purported to lease certain shooting rights for one year from March 25, 1895, by an instrument not under seal. On December 31, 1895, the lessor consented to a future reduction of rent in a letter addressed to the lessee. Subsequently to March 25, 1896, the lessee continued for some years longer in tacit possession of the shooting at the reduced rent, but nothing further was agreed between the parties as to the nature or duration of such tacit possession. On February 26, 1901, the lessor determined the said possession by verbal, and on March 23 by written, notice, as from March 25 then instant:—*Held*, that the possession of the lessee subsequent to March 25, 1896, was not that of a mere licensee. *Lowe* v. *Adams*, 783.

Wood v. *Leadbitter* (14 L. J. Ex. 161; 13 M. & W. 838) questioned, having regard to *Walsh* v. *Lonsdale* (52 L. J. Ch. 2; 21 Ch. D. 9). *Ib.*

Quære, whether such possession was that of a tenant granted successive rights each year for a single year, or that of a tenant from year to year. *Ib.*

Held, however, that the common-law rule as to the necessity of giving six months' notice to determine a tenancy from year to year in a corporeal hereditament does not apply in the case of an incorporeal hereditament such as the one now in question; and assuming that the defendants were entitled to "reasonable notice," that "reasonable notice" had in fact been given in the circumstances. *Ib.*

Tied House—Lessee's Covenant to Buy Beer from Landlord and His Successors in Business and not Elsewhere—Assigns not Mentioned.] A covenant by a tenant of a tied house that he "will at all times during his tenancy purchase from the landlords and their successors in business all beer, ale, porter, &c., whether sold or consumed on or off the demised premises, and that he will not at any time directly or indirectly sell or dispose of on the premises any beer, ale, &c., other than such as shall have been so *bona fide* purchased," is a covenant which will run with the land and be enforceable by the purchasers of the reversion and the landlord's brewery business, although the purchasers have at the time of action brought ceased to carry on such business at the original landlord's brewery. *Manchester Brewery Co.* v. *Coombs*, 814.

Lease Executed by Lessee only—Sale of Landlord's Business—Enforcement of Covenant by Purchaser — Specific Performance — Yearly Tenancy.]—Where an agreement for a yearly tenancy containing such a covenant has been executed by the lessee only, but the lessor or his assigns are in a position to compel the

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acceptance by the tenant of a duly executed lease, either of them can enforce performance of such a covenant, notwithstanding that the agreement is not a lease by deed within 32 Hen. 8. c. 34. *Walsh* v. *Lonsdale* (52 L. J. Ch. 2; 21 Ch. D. 9) and *Swain* v. *Ayres* (57 L. J. Q.B. 428; 21 Q.B. D. 289) followed. *Clayton* v. *Illingworth* (10 Hare, 451) distinguished. *Ib.*

—Assignment of Personal Contract—Notice.]—*Semble*, such a covenant is a personal contract binding on the lessee, and the benefit of it could have been assigned in equity before the Judicature Act, 1875, and the assignees could sue upon it if there had been an absolute assignment thereof to them in writing signed by the assignor, of which express notice in writing had been given to the lessee. *Ib.*

Disclaimer.]—See BANKRUPTCY.

LANDS CLAUSES ACT.

Charity—Real Estate—Official Trustee of Charity Lands—Costs of Re-investment.]—Where the legal estate in lands belonging to a charity, taken by a corporation under the Lands Clauses Act, 1845, is vested in the official trustee of charity lands, he is not bound to receive the purchase-money if tendered. His refusal to receive such purchase-money is not "wilful refusal to receive" within the meaning of section 80, so as to relieve the corporation from the costs of re-investment. *Leeds Grammar School, In re*, 89.

Common Lands—Compensation for Commonable Rights—Apportionment—Action by Commoner to Ascertain Interest—Jurisdiction.]—Common lands were compulsorily taken by a local authority. Meetings of statutory committees of the commoners were held, pursuant to the Lands Clauses Consolidation Act, 1845, and agreements were come to with the local authority as to the compensation to be paid for the extinction of the commonable rights. Under these agreements certain moneys were paid to the committees of commoners of two parishes. By section 15 of the Inclosure Act, 1854, a majority of a committee might apply to the Commissioners to call a meeting of the persons interested in the compensation money to determine whether it should be apportioned; and by section 17 of the same Act the Inclosure Commissioners or any assistant commissioner appointed for the purpose were directed to ascertain, determine, and award the names of the parties entitled to interests in the commonable lands, and the amount or value of their interests therein. The committees were willing to act under these statutory powers, but had not yet done so. An action was brought by a plaintiff, who claimed to be the sole person entitled to commonable rights, for the payment to him of the whole of the compensation money:—*Held*, upon the construction of section 104 of the Lands Clauses Consolidation Act, 1845, and sections 15 and 17 of the Inclosure Act, 1854, that proper machinery was provided to determine who were the parties entitled, and the amount of their interests, and therefore the Court had no jurisdiction to interfere at the present stage. *Richards* v. *De Winton*. *Richards* v. *Evans*, 719.

Notice to Treat—Withdrawal—Fresh Notice in Respect of Same Land.]—Where promoters of an undertaking with compulsory powers of purchase of land have validly and properly withdrawn a notice to treat given by them under the Lands Clauses Consolidation Act, 1845, they can, provided that the time limited for the exercise of their powers has not expired, give a fresh notice to treat in respect of the same land. *Ashton Vale Iron Co.* v. *Bristol Corporation*, (C.A.) 230.

Payment Out to Person Absolutely Entitled—Costs—Brokerage.]—Where an interim investment in stock has been made of moneys paid into Court under the Lands Clauses Act, and a person absolutely entitled petitions for payment out, the company or party who paid the money in must pay the brokerage on sale of the investments. *Magdalen College, Oxford, In re*, 821.

Purchase-money Paid into Court — Interim Investment — Railway Securities — Brokerage Costs—Incidence.]—Where an interim investment of purchase-money paid into Court under the Lands Clauses Act, 1845, is made upon railway securities allowed by Order XXII. rule 17 for the investment of cash under the control of the Court, the promoters of the undertaking are, by virtue of section 80 of the Lands Clauses Act, liable for the costs of the investment, although the terms of the section apply only to the costs of investment "in Government or real securities." *Brown, In re* (59 L. J. Ch. 530), applied. *Gaselee, In re*, 441.

Termor — Adverse Possession — Reversioner Unknown—Payment Out—Dividends.]—In 1810 a freehold house was demised, at a peppercorn rent, for two hundred years to secure an annuity of 100*l.*, payable until the death of the survivor of nine named persons, upon which event the term was to cease. From 1829 to 1895, when the ninth life dropped, and from 1895 to December, 1900, the annuitant or his successors in title, the last of whom was the petitioner, had been in possession of the premises and in receipt of the whole of the net rent, which was never less than 120*l.* per annum, without any claim on the part of the reversioner, who was altogether unknown. In December, 1900, the premises were acquired compulsorily under the Lands Clauses Act, 1845, and the purchase-

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money paid into Court. On petition for payment out under section 79 of that Act,—*Held*, that the petitioner was not at present entitled to immediate payment out to her of the capital money in Court within that section, but that the dividends or income on the investments of the fund might be forthwith paid to her until twelve years from the dropping of the ninth life, or until further order. *Harris, In re; London County Council, ex parte*, 432.

LEGACY.—See WILL.

LICENCE.

See LANDLORD AND TENANT.

LIMITATIONS, STATUTE OF.

Real Property — Possession — "Concealed fraud."]—The "concealed fraud," which under section 26 of the Real Property Limitation Act, 1833, will prevent the running of the Real Property Limitation Acts against a plaintiff claiming real property must, according to the principles which have been always acted upon by Courts of equity, be the fraud of, or in some way imputable to, the person setting up the statutes, or of some one through whom that person claims (RIGBY, L.J., *dissentiente*). *McCallum, In re; McCallum* v. *McCallum*, (C.A.) 206.

Per RIGBY, L.J.—Section 26 did not alter the old doctrine of the Courts of equity, which was that a suit might have been brought at any time in a case of concealed fraud, notwithstanding that the person sued and those through whom he claimed had not been party or privy to the fraud at the time when it was perpetrated. *Ib.*

Per LORD ALVERSTONE, C.J., RIGBY, L.J., and KEKEWICH, J.—The intentional concealment by a mother of a conveyance of property by her to her daughter is a "concealed fraud" against the daughter, whatever the mother's motive for concealment may have been. *Ib.*

Breach of Covenant for Title on Conveyance.]—See VENDOR AND PURCHASER.

Railway—Land Purchased for Undertaking.]—See RAILWAY.

LIQUIDATOR.

See COMPANY (Winding-up).

LOCAL GOVERNMENT.

Local Authority Created by Statute—Powers — County Fund — Purchase of Tramways — Running Omnibuses — Ultra Vires — Locus Standi of Attorney-General.]—A county council constituted under the Local Government Act, 1888, is not in the position of a municipal corporation created by Royal charter, but is the creation of statute, and can only exercise such powers as are conferred upon it by statute. Any power, therefore, the assumption of which cannot be justified by the statutes under which the council acts, must be taken not to exist. *Att.-Gen.* v. *London County Council*, (C.A.) 367.

The London County Council, which was constituted under the Local Government Act, 1888, had power under section 43 of the Tramways Acts, 1870, to purchase compulsorily, and under section 31 of the London Tramways Co. (Lim.) Act, 1896, to purchase by agreement, the undertakings of certain tramways, including any works and property connected therewith. Under section 2 of the London County Tramways Act, 1896, the Council had power to work the tramways, and provide carriages, horses, cars, and fixed and movable plant for that purpose. Under section 21 of the London County Council (Vauxhall Bridge Tramways) Act, 1896, the Council were to cause accounts to be kept of their receipts and expenditure "in connection with tramways," and set off one against the other; and so far as the tramway revenue was insufficient to cover the expenses the deficiency was to be paid as payments for general or special county purposes under the Local Government Act, 1888, and any surplus was to be carried to the county fund. The Council purchased by agreement the whole undertaking of a tramway company. The company at that time were running omnibuses as feeders to their tramways on certain routes. The Council took over the omnibuses with the tramways, and continued to run them, and extended the route of one line. Passengers used the omnibuses who were not going to or coming from the tramways, and a profit was earned from running them:—*Held*, that the omnibus business was a separate and distinct business from the tramway business; and that the London County Council had no power, either express or implied, under the Local Government Act, 1888, or the London County Tramways Act, 1896, or the London Tramways Co. (Lim.) Act, 1896, to carry it on; and the fact that it might be beneficial to them or to the public made no difference. *Ib.*

Held, also, that section 21 of the Vauxhall Bridge Tramways Act, 1896, only applied to receipts and payments in connection with tramways, and would not relieve the Council from making payments in respect of the omnibus business in the first instance out of the county fund under section 68 of the Act of 1888. *Ib.*

Held, also, that the question was properly raised in an action by the Attorney-General at the relation of certain persons who were ratepayers within the county, and by the relators as plaintiffs. *Ib.*

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"Sewer" or "Drain"—Trespass on Neighbour's Land.]—In considering whether a culvert for conveying the drainage from more than one house is a "sewer" or a "drain" within the definition clause (section 4) of the Public Health Act, 1875, the test is whether the houses do in point of fact constitute one building only, or more than one. *Webb* v. *Knight*; *Hedley* v. *Webb*, 663.

Query, whether a sewer carried across a neighbour's land by trespass does or does not vest in the local authority under section 13 of the Public Health Act, 1875. *Semble*, not. *Ib.*

Sewerage System—Entry on Private Land without Notice—Erection of Pumping Station—"Sewer."]—A local authority has no right to carry a sewer under private property without previously giving the notice required by section 16 of the Public Health Act, 1875. A pumping station is not a "sewer" within section 16 of the Act; but it is, within section 27, an apparatus "for distributing or otherwise disposing of sewage," and consequently the land required for such pumping station must be purchased by the local authority. *King's College, Cambridge* v. *Uxbridge Rural Council*, 844.

Sewers—Prescriptive Right of Drainage—Trade Effluents—Pollution.]—Where a local authority have for some years allowed effluents produced in the course of a trade or manufacture to be discharged into their sewers they are not justified under the provisions of the Rivers Pollution Prevention Act, 1876, s. 7, in cutting off the connection made with their sewer merely because the nature of the trade effluent is such that it renders the disposal by irrigation or otherwise of the sewage matter less efficient than it might otherwise be. *Eastwood* v. *Honley Urban Council*, (C.A.) 313.

Water Supply—School—Charity—Swimming Bath—"Domestic purposes"—"Trade, manufacture, or business."]—A school carried on under a scheme established by the Charity Commissioners, although for certain purposes a business, is nevertheless entitled to a supply of water for a swimming bath as for "domestic purposes" within section 12 of the Waterworks Clauses Act, 1863, and not as for a "trade, manufacture, or business." *Barnard Castle Urban Council* v. *Wilson*, 859.

District Rate—Preferential Payment in Bankruptcy.]—See COMPANY (Winding-up).

Drain for Surface-Water and Slops—Discharge into Drain of Solid Sewage.]—See NUISANCE.

LUNATIC.

Jurisdiction of Master—Stock in Joint Names of Lunatic and Another — Lunatic a Retired Trustee — Vesting Order — "Management and administration."]—L. and another person were jointly entitled to certain funds as trustees of a settlement. In 1887, L. retired from the trust, and a new trustee was appointed. The trust property was then transferred to the new trustees, with the exception of a sum of 430*l.* 11*s.* 3*d.* Consols, which was overlooked. L. became a lunatic in 1896. The present trustees of the settlement applied for a vesting order of the 430*l.* 11*s.* 3*d.* Consols:—*Held*, that what was proposed to be done could not properly be described as a matter in the administration or management of the lunatic's estate, and the Master had no jurisdiction to make the order. *Fuller, In re* (69 L. J. Ch. 738; [1900] 2 Ch. 551), distinguished. *Langdale, In re*, (C.A.) 38.

The powers of administration and management conferred on the Masters by sub-section 1 of section 27 of the Lunacy Act, 1891, are not confined to the powers of management and administration contained in the group of sections (116–130) so headed in the Lunacy Act, 1890, but extend to any powers of management and administration properly so called in the Act of 1890. *Diota* in *Browne, In re* (63 L. J. Ch. 729, 732, 733; [1894] 3 Ch. 412, 417, 419), followed. *Ib.*

Pauper — Maintenance — Arrears — Debt — Claim in Administration of Deceased Lunatic's Estate.]—A pauper lunatic who had been maintained by the guardians since November 1, 1889, became entitled on October 14, 1895, to a sum of money as one of the next-of-kin of an uncle. The guardians, in February, 1898, applied in lunacy for the appointment of a receiver of the fund and payment thereout of the cost of the lunatic's maintenance for the then preceding six years. On January 31, 1899, an order was made in lunacy appointing a receiver and directing him to pay to the guardians 95*l.* 14*s.* for the maintenance of the lunatic from October 14, 1895, to February 14, 1899, and to apply the balance for the future maintenance of the lunatic. The lunatic died on June 29, 1899:—*Held*, that the claim of the guardians for the maintenance of the lunatic for the part of the six years prior to October 14, 1895, was a valid legal debt and was not affected by the order in lunacy, and the guardians could enforce their claim against the lunatic's estate now that she was dead. *Taylor, In re*; *Edmonton Union* v. *Deeley*, (C.A.) 332.

Payment of Personal Property to Foreign Committee.]—See INTERNATIONAL LAW.

MANOR.—See CUSTOM.

MARKET.—See STATUTE.

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MERGER.

Equitable Owners — Acquisition of Legal Estate—Commensurate Interests.] — The rule that where an owner of an equitable interest acquires a commensurate legal estate the equitable interest will merge in the legal estate, applies where two persons become entitled to commensurate legal and equitable interests. *Selous, In re; Thomson* v. *Selous*, 402.

Joint Tenancy—Tenancy in Common.]—The difference in value between a tenancy in common and a joint tenancy is so small and of so unsubstantial a character that it will not by itself prevent an equitable interest in common merging in a commensurate legal estate in joint tenancy. *Ib.*

METROPOLIS.

See Corporation; Way.

MORTGAGE.

Amount Recoverable—Covenant for Payment —Joint-Account Clause—Payment to Partner— Implied Agency—Survivorship.]—Payment to one of two joint creditors is a good discharge of a joint debt, but a partner has no implied authority to receive payment of a debt due to his co-partner in his individual capacity. Where therefore a payment was made on account of a mortgage debt to the partner of one of two mortgagees entitled under a deed which contained the usual joint-account clause, the payment was held bad at law and in equity, although the partner mortgagee survived his co-mortgagee. *Matson* v. *Dennis* (4 De G. J. & S. 345) followed. *Powell* v. *Brodhurst*, 587.

The amount recoverable upon a covenant for repayment of the principal moneys secured by a mortgage is not necessarily the only relevant consideration in determining the amount recoverable in foreclosure or redemption proceedings. *Ib.*

Costs — Solicitor-Mortgagee — Foreclosure Judgment in 1893—Profit-Costs—Taxation in 1895.]—Where a foreclosure order has been made prior to the Mortgagees' Legal Costs Act, 1895, finally settling the terms of redemption on payment of principal, interest, and costs, a solicitor-mortgagee will not be entitled to the benefit of section 3 of that Act because the taxation of his costs takes place under an order made after the Act has come into force. *Eyre* v. *Wynn-Mackenzie* (65 L. J. Ch. 194; [1896] 1 Ch. 135) followed. *Day* v. *Kelland*, (C.A.) 3.

Foreclosure—Choses in Action—Shares in Limited Company.]—The deposit of a certificate of shares to secure the repayment of money amounts to an agreement to transfer the shares by way of mortgage, and the depositee is entitled to a decree for foreclosure, and is not restricted to a remedy by sale. *Carter* v. *Wake* (46 L. J. Ch. 841; 4 Ch. D. 605) distinguished. *Harrold* v. *Plenty*, 562.

Priority — Notice to Trustees — Chose in Action—Proceeds of Land held in Trust for Sale—Mortgagor Trustee—Notice through His Knowledge.]—The knowledge of one of several trustees, who is also a beneficiary, of a mortgage, created by himself, of his own share in the proceeds of land held in trust for sale is not, by itself, notice to the trustees. Such a mortgage will be postponed to a subsequent mortgage of which due notice has been given to the trustees. *Browne* v. *Savage* (4 Drew. 635) followed. *Lloyd's Bank* v. *Pearson*, 422.

A reversionary interest in the proceeds of land held in trust for sale, but not yet sold, is a *chose in action* within the principle laid down in *Dearle* v. *Hall* (3 Russ. 1) as to gaining priority by notice to trustees. *Ib.*

—Trust—Fraud of Trustee—Legal Estate— Relation Back—Notice.]—An equitable mortgagee, who has made an advance without notice of a prior equitable title, cannot gain priority by getting in the legal estate if at the time when he so gets it in he has notice that it is held on an express trust in favour of persons who assert a claim to the property. *Taylor* v. *London and County Banking Co; London and County Banking Co.* v. *Nixon*, (C.A.) 477.

A person who on being appointed a trustee of property requires and obtains a transfer of the legal estate in that property from his co-trustee to himself and the co-trustee jointly, becomes a purchaser for value of the property, inasmuch as he gives up a right of action against the co-trustee for the property. *Thorndike* v. *Hunt* (28 L. J. Ch. 417; 3 De G. & J. 563) and *Taylor* v. *Blakelock* (55 L. J. Ch. 97; 32 Ch. D. 560) followed. *Ib.*

Where the relationship between an equitable incumbrancer and the person in possession of the title-deeds to property is not merely that of mortgagee and mortgagor, but is of a fiduciary nature (for example, of *cestui que trust* and trustee, or of client and solicitor), the equitable incumbrancer will not be deprived of his priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the incumbrancer has no ground to suppose any want of good faith on the part of that person. *Shropshire Union Railways and Canal Co.* v. *Reg.* (45 L. J. Q B. 31; L. R. 7 H.L. 496) and *Vernon, Ewens & Co., In re* (56 L. J. Ch. 12; 33 Ch. D. 402), applied. *Ib.*

A purchaser for value without notice is entitled to the priority conferred by the legal title not only where he has actually got it in,

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but also where he has a better right to call for it; for instance, if he procures at the time of his purchase the person in whom the legal title is vested to declare himself a trustee for the purchaser, or even to join as party in a conveyance of the equitable interest. *Ib.*

Shares — Fluctuating Security — Implied Power of Sale after Reasonable Time.]—A mortgagee of shares in a company has an implied general power, in the absence of express agreement, to sell the shares after the lapse of a reasonable time for the repayment of the mortgage-money. *De Verges* v. *Sandeman, Clark & Co.*, 47.

Sale of Part of Security—Preservation of Remainder.]—A mortgagee of shares is justified at any time in selling part of his security in order to make payments necessary for the preservation of the remainder. *Ib.*

Transfer—State of Account between Mortgagor and Mortgagee—Negligence—Contemporaneous Deeds.]—In 1892 the plaintiff, a tenant for life of freehold property which was subject to a mortgage for 1,500*l.*, put her solicitor in funds for the purpose of paying off the mortgage. The solicitor misappropriated the money and concealed the fraud by continuing to pay interest. The plaintiff did not enquire respecting a reconveyance or receipt for the money nor require the delivery of the deeds. The defendant and his co-trustee (who died before action brought) were also clients of the same solicitor, and on October 4, 1895, forwarded to him a cheque, which the solicitor paid into his private account on the following day. On October 4, 1897, the solicitor took a transfer of the mortgage debt and security to himself, drawing on his firm's account for the consideration-money. On the following day, October 5, 1897, he transferred the mortgage debt and security to the defendant and his co-trustee. It did not appear that the defendant and his co-trustee had bargained with the solicitor for any particular investment for the proceeds of their cheque:—*Held*, that the two deeds of October 4 and 5, 1897, could not be regarded as part of one transaction; that the solicitor as mortgagee could not have set up the mortgage against the plaintiff, and the defendant as transferee took subject to the state of account between the solicitor and the plaintiff, and was in no better position. A reconveyance of the property was accordingly directed upon the footing that the defendant was a satisfied mortgagee *Turner* v. *Smith*, 144.

Current Account with Banker—Closing of Account—Power of Sale.]—See BANKER.

Mortgage of Partner's Share—Dissolution—Rights of Mortgagee.]—See PARTNERSHIP.

MORTMAIN.—See CHARITY.

NUISANCE.

Drain for Surface-water and Slops—Discharge into Drain of Solid Sewage—Liability of Occupiers—"Sewer"—Notice to Local Authority.]—A person who commits a nuisance at common law by draining fæcal matter into a sewer of the local authority, through which it passes on to the plaintiff's land, cannot justify himself under the Public Health Act, 1875, s. 21, without shewing that he has fulfilled the requirements imposed on him by that section. *Per* BYRNE, J.—An owner or occupier has no right under section 21 of the Public Health Act, 1875, to pass fæcal matter into a drain used only for the purpose of carrying off rain and slop-water, although it may be a "sewer" of the local authority within the meaning of section 4. *Kinson Pottery Co.* v. *Poole Corporation* (68 L. J. Q.B. 819; [1892] 2 Q.B. 41) followed by BYRNE, J. *Graham* v. *Wroughton*, (C.A.) 673.

Reasonable Use of Property—Noxious Fumes—Injunction.]—A "reasonable" nuisance has no existence in law. If a man so carries on his business as to create a nuisance he is acting unreasonably, and ought to be restrained by injunction. *Reinhardt* v. *Mentasti* (58 L. J. Ch. 787; 42 Ch. D. 685) explained. *Att.-Gen.* v. *Cole*, 148.

PARTIES.—See PRACTICE.

PARTNERSHIP.

Books of Account—Right of Partners to Inspection by an Agent.]—The ordinary right of inspection of partnership books conferred on a partner by articles of partnership, or under the Partnership Act, 1890, s. 24, sub-s. 9, may be exercised by an agent to whom no personal objection can be made, as well as personally. *Bevan* v. *Webb*, (C.A.) 536.

Mortgage of Partner's Share—Dissolution—Purchase of Mortgaged Share by Partner—Rights of Mortgagee—Account.]—Under subsection 2 of section 31 of the Partnership Act, 1890, the assignee of a share in a partnership business is entitled upon a dissolution of the partnership to receive the actual share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and to an account for the purpose of ascertaining that share. Therefore, where partners have knowledge of an assignment of a share, any arrangement between them for a dissolution of the partnership upon the terms of the share of the assigning partner being purchased by the other partner at a price agreed upon between them, would not be binding upon the assignee if made without his consent. *Watts* v. *Driscoll*, (C.A.) 157.

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Purchase of Share—Vendor's Right to Indemnity.]—A contract to purchase a share in a partnership implies a contract by the purchaser to indemnify the vendor against the liabilities of the partnership, although the contract is silent on the point and although the purchaser is, under the Partnership Act, 1890, s. 31, not entitled to become a partner. *Dodson* v. *Downey*, 854.

Authority of Partner.]—See MORTGAGE.

PATENT.

Infringement—Infringing Articles Bought in England—Articles Sent Abroad for Sale There—"Exercise"—"Use"—"Put in practice"—Measure of Damages.]—The defendants purchased in England twenty-seven articles which had been made in infringement of the plaintiffs' patent. They sold seven of them and used another in England. The remaining nineteen they sent to their branch house in France, where the article was not patented, and sold them there to various foreign persons:—*Held*, that there had been an infringement of the plaintiffs' patent in respect of all the twenty-seven articles, and that in estimating the damages the test was what the defendants would have had to pay for the permission to do that which they did wrongfully. *British Motor Syndicate* v. *Taylor*, (C.A.) 21.

Per LORD ALVERSTONE, C.J.—It was not intended in *Minter* v. *Williams* (5 L. J. K.B. 60; 4 Ad. & E. 251) to lay down as a rule of law that the exposure for sale of a patented article by a person not having a licence from the owner of the patent could not be an infringement of the patent. If the decision could bear that construction it ought to be overruled, *Per* VAUGHAN WILLIAMS, L.J.—It was intended in *Minter* v. *Williams* to lay down the above rule, and the case was wrongly decided. *Ib.*

Per VAUGHAN WILLIAMS, L.J.—Mere possession of a patented article need not necessarily constitute a user, but acquisition and possession of such an article for trade purposes constitute a user, whatever the nature of the article may be. *Ib.*

Infringement — Patented Process — Sale in England of Article Manufactured Abroad by Use of Patented Process with Subsequent Use of other Processes.]—The importation and sale in England of a chemical product made abroad by subjecting a body prepared according to a process patented in this country to further chemical treatment so as materially to alter its chemical composition is an infringement of the English patent. *Elmslie* v. *Boursier* (39 L. J. Ch. 328; L. R. 9 Eq. 217) and *Von Heyden* v. *Neustadt* (50 L. J. Ch. 126; 14 Ch. D. 230) followed. *Saccharin Corporation* v. *Anglo-Continental Chemical Works*, 194.

—Costs — Validity of Patent Questioned in Previous Action — Certificate — Solicitor and Client Costs.]—An action commenced, but not determined at the time a certificate in another action is obtained is not a "subsequent action for infringement" within the meaning of section 31 of the Patents, Designs, and Trade Marks Act, 1883, and the plaintiff cannot claim solicitor and client costs on the production of the certificate of the first determined action. *Automatic Weighing-Machine Co.* v. *Combined Weighing-Machine Co.* (6 Rep. Pat. Cas. 475) followed. *Ib.*

Patented Chattel—Distress for Rent.]—See LANDLORD AND TENANT.

PERPETUITY.

See COMPANY (Formation and Constitution); WILL.

Rule against Perpetuity—Personal Contract.]—The rule against perpetuity has no application in the case of personal contracts. *Borland's Trustee* v. *Steel Brothers & Co.*, 51.

POOR LAW.

Pauper Lunatic — Maintenance.] — See LUNATIC.

POWERS.

Appointment—Execution—Document "purporting to be a will."]—By a settlement property was vested in trustees upon trust to pay the income to A. for her life, and after her decease to her husband for his life, and after the death of the survivor of them upon trust for the children of A. as she should by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament, or any codicil or codicils thereto, or "by any writing in the nature of or purporting to be a will or codicil," direct or appoint. A. executed a document which purported to be her last will, but which, inasmuch as it was not signed by her in the presence of the attesting witnesses as her last will and testament, was not admitted to probate:—*Held*, that though the document was not a will according to law, it was one which "purported" to be a will, and, being so, operated as a valid execution of the power of appointment. *Broad, In re; Smith* v. *Draeger*, 601.

General Power — Appointment — Will — Construction—Severance—Income—Specific Gift.]—An appointment, under general powers over two funds, of the sum of 5,000*l.* and the stocks, funds, and securities representing the same and

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"such part of the stocks, funds, shares, and securities comprised in the first schedule as shall with the said sum of 5,000*l.* make up the sum of 9,000*l.*" is a specific gift, and the income during the first year after the testator's death goes to the appointees. *Marten, In re; Shaw* v. *Marten*, 354.

Special Power—Appointment by Will Dated Prior to Will Creating Power—Personalty.]—H. by his will gave "all the residue of the property over which at the time of my death I shall have a disposing power" to trustees upon trust for sale and conversion and investment, and he directed his trustees "to pay the yearly income or produce arising from my trust estate" to his wife during her life or widowhood; and in case she should marry again he directed his trustees "to pay to her out of the income of my trust estate in addition to the provision made for her by marriage settlement an annuity of 50*l.* payable half-yearly instead of the whole of such income." The will contained further trusts for the benefit of his children. H.'s father by his will empowered each child of his by will or codicil to appoint to or in favour of his or her wife or husband the whole or any part of the yearly income of his or her share in the father's residuary estate for life or for any period determinable on or before death, and declared the trusts of a sum of 4,000*l.* by reference to the trusts of the residue. The father's will was dated after that of the son, but the father predeceased the son. The son had no power of appointment in favour of his widow other than that contained in the will of the father:—*Held*, that the case was not within section 24 or section 27 of the Wills Act, 1837, and there was no legal presumption of an intention on the part of the son to exercise the power contained in the father's will; and the son's will could not fairly be construed as disclosing an intention to exercise a non-existent special power, supposing it were possible to exercise such a power by anticipation. *Hayes, In re; Turnbull* v. *Hayes*, (C.A.) 770.

Decision of BYRNE, J. (69 L. J. Ch. 691; [1900] 2 Ch. 332), affirmed. *Ib.*

Quære, whether it is possible as a matter of law to exercise by anticipation a special power which has not been created until after the alleged exercise. *Ib.*

Special Power—Gift of Residue after Payment of Debts, &c.—"Appoint, devise, and bequeath"—Execution of Special Power—Evidence.]—A testatrix, who possessed a special power of appointment in favour of nephews and nieces over a fund of personalty, after giving a number of pecuniary legacies, proceeded to "appoint, devise, and bequeath" all the residue of her real and personal estate to trustees, upon trust to convert the same and out of the proceeds thereof to pay her debts and funeral and testamentary expenses, and to pay and divide the residue of the proceeds equally between certain nephews and nieces:—*Held*, that evidence was admissible to prove that the testatrix possessed at the time of her death no other power of appointment, having reference to the fact that the word "appoint" was found in her will, and that the above disposition was under the circumstances an exercise of the special power of appointment. *Dictum* in *Richardson's Trusts, In re* (17 L. R. Ir. 436), questioned. *Mayhew, In re; Spencer* v. *Cutbush*, 428.

Exercise by Foreigner.] — See INTERNATIONAL LAW.

Jointuring.]—See SETTLEMENT.

Release by Married Woman.]—See HUSBAND AND WIFE.

Sale.]—See TRUST AND TRUSTEE.

PRACTICE.

Appearance—Undertaking by Solicitor in Writing to Appear—Duration of Undertaking—Motion for Attachment.]—Although, under Order VIII. rule 1, a writ of summons is not available for service, unless renewed, for more than a year from the date of its issue, it is not intended by that rule that the writ is not to be in force for any purpose after the lapse of that time. *Kerly, In re*, (C.A.) 189.

The writ in an action was in February, 1899, sent to the defendants' solicitors, and they, with the authority of their clients, indorsed it, "We accept service for the defendants . . . and will enter an appearance in due course." Negotiations for a settlement followed. The defendants' solicitors made an offer. The plaintiff's solicitors replied that they were prepared to stay further proceedings pending further instructions from their client. The defendants' solicitors wrote that their clients' offer remained open for two months. By consent the time for entering appearance was extended to April 30. Nothing further was done in the action until October 24, 1900, when the plaintiff's solicitors wrote definitely declining the defendants' offer, and calling on their solicitors to enter an appearance according to their undertaking. The defendants instructed their solicitors, having regard to the long delay, not to enter an appearance, and they accordingly declined to do so. The plaintiff moved to attach the solicitors:—*Held*, that, looking at all the circumstances of the case, the delay had not been so great as to deprive the plaintiff of the right of having the writ treated as still an effective writ as regards service; and that an appearance to it ought to be entered forthwith. *Ib.*

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Per FARWELL, J.—An undertaking by a solicitor to enter an appearance to a writ of summons remains in force for a period of six years. *Ib.*

A defendant who has authorised his solicitor to enter an appearance for him is not at liberty to withdraw such authority after the solicitor has entered into an undertaking with the plaintiff to enter such appearance. *Ib.*

Fund in Court—Payment Out to Wrong Person—Stop Order—"Default" of Paymaster-General.]—The words "guilty of any default" in section 5 of the Court of Chancery (Funds) Act, 1872, point to some act of misfeasance or carelessness attributable to the Paymaster-General himself or to those under his direction and superintendence. Consequently, where a person entitled to a fund in Court has not obtained a stop order on the fund, and it has been paid out to a wrong person, the Paymaster-General is not guilty of default within the meaning of the section, and the Treasury cannot be called upon to replace the fund in Court out of the Consolidated Fund. *Bath* v. *Bath*, 270.

Interlocutory Relief—Motion for Injunction by Defendant before Counterclaim — Relief Arising from Same Cause of Action—Contract—Mandatory Injunction to Restrain Interference with Occupation of House.]—Where an action is brought by a plaintiff relying on a cause of action—for example, a contract—and the defendant wants relief arising from the same cause of action—not necessarily the same relief—he may by motion in the same action, before counterclaim delivered, obtain interlocutory relief until the trial. *Collison* v. *Warren*, (C.A.) 382.

Where the plaintiff, the proprietor of an hotel, had executed a deed of assignment of all his property to a trustee for the benefit of his creditors, and had been retained as manager by the trustee under a power in that behalf contained in the deed, and subsequently dismissed, the Court, at the instance of the trustee of the deed, the defendant in the action, granted an injunction to restrain the plaintiff until the trial from interfering with or disturbing the trustee in his occupation of the hotel. *Spurgin* v. *White* (2 Giff. 473) followed. *Ib.*

Parties — Plaintiffs — Joinder of Causes of Action—Representative Action—Class—Public Right—Attorney-General.]—Where there is a common interest and a common grievance a representative action is in order if the relief sought is in its nature beneficial to all whom the plaintiffs propose to represent; and the rule is not limited to persons having a beneficial proprietary interest. And if the alleged rights of the class represented are being denied or ignored, it is of no moment whether or not the nominal plaintiffs have been wronged in their individual capacity. The Attorney-General is not a necessary party to such an action. *Bedford* (*Duke*) v. *Ellis*, (H.L.) 102.

Growers of produce alleging statutory rights in a market, claiming a declaration on the construction of the statute, and an injunction and account, held entitled to be joined as co-plaintiffs. *Ib.*

Observations by LORD MACNAGHTEN on *Temperton* v. *Russell* (62 L. J. Q.B. 300; [1893] 1 Q.B. 435). *Ib.*

Summons to Vary Certificate—Decision of Judge in Chambers.]—Upon a summons to vary the certificate of a Master in respect of an item which the Judge in chambers has adjudicated upon, it is open to the Judge before whom the summons comes, in open Court, to reconsider and reverse the previous decision in chambers. *Hewlings* v. *Graham*, 568.

Trial — Passing-off Goods — Probability of Deception—Evidence—View by Judge.]—In an action to restrain the defendant from running omnibuses so got up as to be a colourable imitation of the plaintiffs' omnibuses, the plaintiffs offered no evidence of actual deception or probability of deception; but the Judge, having inspected the omnibuses, and come to the conclusion on their appearance that the defendant's omnibuses were calculated to deceive, granted an injunction:—*Held*, on appeal, that a Judge is not entitled to place his impression derived from a view in the place of such evidence as should be given to support an action of deceit, and that the plaintiffs' case failed for want of evidence. *London General Omnibus Co.* v. *Lavell*, (C.A.) 17.

A view under Order L. rule 4 is not intended to take the place of evidence, but is merely to enable the tribunal to understand the questions raised, and to follow and apply the evidence. *Ib.*

PRESCRIPTION.—See EASEMENT.

PRINCIPAL AND AGENT.

Power of Attorney—Construction—General Power of Borrowing.]—A power of attorney authorising an agent in England to purchase goods in connection with the business carried on by his principal in the colonies, and either for cash or on credit, and "where necessary in connection with any purchases made on my behalf as aforesaid or in connection with my said business" to make, draw, and accept bills of exchange, and to sign the name of the principal to any cheques on the London banking account of the principal, does not confer on the

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agent a general borrowing power. *Montaignac* v. *Shitta* (15 App. Cas. 357) distinguished. *Jacobs* v. *Morris*, 183.

Power of Attorney—Implied Warranty of Authority — Forged Signature — Transfer of Consols—Bank of England—Liability of Stockbrokers—Indemnity.]—Where one of two trustees of stock, standing in their joint names in the books of the Bank of England, has sold it under a power of attorney, to which the signature of his co-trustee was forged, and the bank has allowed a member of the firm of stockbrokers who applied jointly for and obtained the power to transfer the stock to other persons, the stockbroker who alone acted under the power and signed the transfer will be held liable to indemnify the bank for the loss they sustained by having to replace the stock, upon the ground that he has impliedly warranted his authority to the bank. *Oliver* v. *Bank of England*, 377.

The other partners in the firm of stockbrokers are not proper defendants to an action for indemnity by the bank. *Ib.*

Warranty of Authority—Signature of Contract—Misrepresentation of Fact—Damages.]—In order to enable a plaintiff to maintain an action for damages against a defendant who has purported to sign a contract on behalf of an alleged principal, the plaintiff must prove a representation by the defendant that he was authorised so to sign when in fact he was not authorised, and that such misrepresentation was believed. *Collen* v. *Wright* (27 L. J. Q.B. 215; 8 E. & B. 647) must be considered as having overruled *Smout* v. *Ilbery* (12 L. J. Ex. 357; 10 M. & W. 1). *Halbot* v. *Lens*, 125.

PRINCIPAL AND SURETY.

Right of Surety to Security given by Principal Debtor—Mortgage.]—The right of a surety against the security given to the creditor by the principal debtor arises at the time of his becoming surety, and does not arise merely if, and when, he discharges the obligation of the principal debtor. *Dicta* of PAGE-WOOD, V.C., in *South* v. *Blowham* (34 L. J. Ch. 369; 2 H. & M. 457), considered and explained. *Dixon* v. *Steel*, 794.

RAILWAY.

Compulsory Taking of Land—"Minerals"—Clay.]—Clay is not a "mineral" within the meaning of section 77 of the Railways Clauses Act, 1845, if it is, substantially, "the land" itself. Whether it is or not depends on the circumstances of each particular case. *Great Western Railway* v. *Blades*, 847.

Land was taken by a railway company under statutory powers. The strata were a thin top layer of a few inches only of ordinary surface soil, and merchantable clay, to a depth of several hundred feet, below:—*Held*, that the clay was not a "mineral" excepted out of the conveyance to the railway company under section 77 of the Railways Clauses Act, 1845. *Ib.*

Glasgow Corporation v. *Farie* (58 L. J. P.C. 33; 13 App. Cas. 657) followed. *Ib.*

Land Purchased for Undertaking—Tunnel—Superfluous Land—Discontinuance of Possession—Possession of Surface by Stranger—Telegraph-wires over Tunnel—Title to Surface and Space Above.]—A stranger may by exclusive possession for the statutory period acquire a title to the surface of land situate vertically over a tunnel forming part of a railway company's undertaking, even although not superfluous land, together with so much of what is beneath the surface as is necessary to the enjoyment of such surface, subject to the right of the railway company to the tunnel and to so much of the underlying and superincumbent strata as is necessary for its proper enjoyment as a railway tunnel. *Midland Railway* v. *Wright*, 411.

He may also acquire a title to the space above the surface by the exercise of rights of ownership in such space, such as leasing the right to the railway company to carry their telegraph-wires over the land, where it is not shewn that the occupation of the surface is necessary, although it may be convenient, for the purpose of carrying such wires. *Ib.*

Receiver—Railway not Completed.]—Assuming that there is jurisdiction to appoint a receiver under the Railway Companies Act, 1867, s. 4, before the railway is opened for traffic, the Court will not exercise it in a case where the receiver if appointed would have no duties to perform. *Knott End Railway, In re*, (C.A.) 463.

The Railway Companies Act, 1867, s. 4, discussed by RIGBY, L.J., and VAUGHAN WILLIAMS, L.J., and *Manchester and Milford Railway, In re* (49 L. J. Ch. 365; 14 Ch. D. 645), explained. *Ib.*

RECEIVER.

Debenture-holder's Action—Appointment by Court—Leaseholds Sub-demised to Trustees of Trust Deed—Possession by Receiver—Rent and Covenants—Claim by Landlord to be Paid out of Assets.]—Where, in an action by mortgagees or debenture-holders to enforce their security (including leasehold property mortgaged by sub-demise), a receiver has been appointed who enters into possession of the mortgaged property, the Court will not order the receiver to pay out of the assets in his hands rent or moneys payable in respect of breaches of covenant which neither the mortgagees nor the

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receiver are liable at law or in equity to pay to the head landlord. The mere fact that the head landlord, owing to the appointment of a receiver, cannot re-enter or distrain without first obtaining leave from the Court, is not sufficient to raise such an equity in his favour. *Hand* v. *Blow*, (C.A.) 687.

Railway.]—See RAILWAY.

Remuneration of.]—See COSTS.

REMOTENESS.

See PERPETUITY; WILL.

RENTCHARGE.

Secured by Term—Arrears of Rentcharge—How Enforced—Mortgage or Sale of Term—Sale of Inheritance.]—Where a rentcharge is secured by a term of years the owner of such rentcharge is not entitled to have arrears thereof raised by sale or mortgage of the inheritance; his remedy is confined to having the arrears raised by means of the term. *Hall* v. *Hurt* (2 J. & H. 76) followed. *Blackburne* v. *Hope-Edwardes*, 99.

RESTRAINT OF TRADE.

See CONTRACT.

REVENUE.

Estate Duty—Incidence—General Power of Appointment by Will—Property Passing to Executor "as such."]—A fund appointed by will under a general power passes to the executor "as such" within the meaning of section 9, sub-section (1) of the Finance Act, 1894, and accordingly, in the absence of any direction to the contrary, the estate duty thereon is payable out of the appointor's residuary estate. *Treasure, In re; Wild* v. *Stanham* (69 L. J. Ch. 751; [1900] 2 Ch. 648), on this point considered and not followed. *Moore, In re; Moore* v. *Moore*, 321.

—Will — "Testamentary expenses" — Real Estate.]—The estate duty payable in respect of realty is not a "testamentary expense," and must be borne by the real estate and not by the personalty, notwithstanding that the will contains a bequest of the residue of personal estate "after payment thereout of all my just debts, funeral and testamentary expenses." *Sharman, In re; Wright* v. *Sharman*, 671.

—General Power—Appointment by Will—Incidence of Duty.]—The estate duty on a fund appointed by a will made in execution of a testamentary power of appointment must be borne by the appointed fund, and not by the residue. *Treasure, In re; Wild* v. *Stanham* (69 L. J. Ch. 751; [1900] 2 Ch. 648), followed in preference to *Moore, In re; Moore* v. *Moore* (70 L. J. Ch. 321; [1901] 1 Ch. 691). *Maddock, In re; Llewelyn* v. *Washington*, 660.

—Incidence—General Power of Appointment by Will—Exercise of Power—Property Passing to the Executor "as such"—Legal and Equitable Assets.]—Property appointed under a general power of appointment by will does not pass to the executor "as such" within the Finance Act, 1894, s. 9, sub-s. 1, and consequently estate duty is, in the absence of any direction to the contrary, payable out of the appointed property, and not out of the residuary estate of the appointor. *Power, In re; Stone, In re; Acworth* v. *Stone*, 778.

Treasure, In re; Wild v. *Stanham* (69 L. J. Ch. 751; [1900] 2 Ch. 648), and *Maddock, In re; Llewelyn* v. *Washington* (70 L. J. Ch. 660; [1901] 2 Ch. 372) followed. *Moore, In re; Moore* v. *Moore* (70 L. J. Ch. 321; [1901] 1 Ch. 601), dissented from. *Hoskin's Trusts, In re* (46 L. J. Ch. 817; 6 Ch. D. 281), discussed. *Ib.*

RIVER.

Locks and Sluices—Grant by Crown to Owner of Right to Take Tolls—Franchise—Right of Public to Navigate—Dedication to Public—Reasonable Tolls — Duty of Person Taking Tolls to Keep Locks in Repair—Charters of Crown—Validity—Permissive Act of Parliament—Grant of Tolls by—Practice—Appeal—Varying Order in Matter as to which no Notice of Appeal—Rules of the Supreme Court, 1883, Order LVIII. rule 4.]—In the construction of a royal charter reserving a rent to the Crown, which rent has been paid for a considerable length of time, the Court ought to adopt a construction consistent with the grant falling within the powers of the Crown rather than one which would make the grant in excess of the royal prerogative, and to assume, unless there is clear evidence to the contrary, that the state of things at the date of the charter was such as to make the grant of it within the powers of the Crown. *Att.-Gen.* v. *Simpson*, (C.A.) 828.

By a charter in 1638 King Charles I granted to the predecessor in title of the defendant and his heirs in perpetuity, in consideration (*inter alia*) of a rent to the Crown, the exclusive right of conveying goods in boats over part of the river Ouse by means of the navigation rendered possible by locks and sluices which had been made by that predecessor and his predecessors, and the profits arising therefrom:—*Held*, by VAUGHAN WILLIAMS, L.J., that by 1638 the Ouse in the part in question had become a navigable river by the public availing themselves of the increased facilities

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of navigation, and the acquiescence therein of riparian owners and others having power to dedicate to the public, and that this dedication was accepted by the Crown by the charter. *Held*, by STIRLING, L.J., that the defendant's predecessor, in applying for and putting in use the charter, had given the public the right to resort to the locks and sluices for the purpose of passing from section to section of the river. *Held*, by the COURT, that the charter was valid, and the public had the right to use the part of the river in question on payment of the tolls, and the defendant receiving the tolls was bound to keep the locks in repair and to provide attendants and appliances necessary to enable them to be used. The tolls to be taken for these duties must be reasonable tolls, and might vary in amount with the value of money. *Allnutt* v. *Inglis* (12 East, 527, 538) and *Lawrence* v. *Hitch* (37 L. J. Q.B. 209; L. R. 3 Q.B. 521) applied by STIRLING, L.J. *Ib.*

An Act of Parliament (6 Geo. 1. c. 29) empowered a predecessor of the defendant to improve the navigation of the Ouse, and for that purpose to repair, rebuild, and maintain a certain stanch and other works, and provided that "forasmuch as the making maintaining and repairing the said stanch" and other works would "necessarily be a great charge and expense" to the predecessor, it should be lawful for him, his heirs and assigns, "from and after" doing the works to take certain tolls for goods carried by boats up and down that part of the river:—*Held*, that the grantee could not collect the tolls unless he maintained the stanch and other works in such repair as to keep the river navigable. *Ib.*

In 1628 Charles 1 granted to the predecessor of the defendant a charter, part of the term of which was contemporaneous with a former charter and part contemporaneous with the term of the charter of 1638, and thereby he granted to the predecessor certain exclusive rights of navigation in the Ouse and the right to take tolls in respect thereof. The charter had never been put in force:—*Held*, by STIRLING, L.J., that if the acceptance of the later charter did not effect a surrender of the former by operation of law, the Court could, if necessary, presume a lost surrender. *Held*, also, by STIRLING, L.J., that, this charter never having been put in use, there was no dedication to the public under it. *Ib.*

The defendant appealed against the whole of the order of Court below except one declaration. The plaintiffs gave no notice of appeal:—*Held*, that, the Court had power, under Order LVIII. rule 4, to vary the order of the Court below by substituting a different declaration in the place of that in respect of which there was no appeal. *Ib.*

RULES OF COURT.

Order VIII., rule 1, 189.

—— XVI., rules 1, 9, 102.

—— L., rule 4, 17.

—— LVIII., rule 4, 828.

—— LXV., rule 9, 282.

SETTLED LAND.

Application of Capital Moneys—Commission Payable to Estate Agent for Procuring Leases.]—The commission payable to an estate agent for letting parts of a settled estate on building leases is a charge or expense incidental to the exercise of some of the powers of the Settled Land Act, 1882, and is payable out of capital moneys arising under the Act. *Maryon-Wilson's Settled Estates, In re*, 500.

Application of Capital Money—Improvements—Additions to and Alterations in Buildings—"Dry rot"—Re-flooring.]—By section 13, sub-section (ii.) of the Settled Land Act, 1890, improvements authorised by the Settled Land Act, 1882, include "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let":—*Held*, that the words "reasonably necessary or proper" refer to something which, although not absolutely necessary, is a thing which a reasonable and prudent owner of a house would, if he were absolute owner, do to enable the house to be let. *Held* also, that the section contemplates not necessarily an intention to let immediately, but a present intention to let either at the present or a future time, as distinguished from an intention to occupy. *Stanford, In re; Stanford* v. *Roberts*, 203.

Observations of CHITTY, J., in *De Teissier, In re; De Teissier* v. *De Teissier* (62 L. J. Ch. 552; [1893] 1 Ch. 153), as to the necessity of there being a present intention to let before an application under section 13, sub-section (ii.), could properly be made, explained. *Ib.*

On an application by a tenant for life of a building which was let out for offices that capital money might be applied in concreting and re-flooring the basement of the building, which was affected with dry rot, the Court sanctioned the application, notwithstanding that the rooms were all let, on the ground that the proposed concreting and re-flooring was an alteration which was necessary to make the building habitable, and was one which a reasonable and prudent owner would make if he were absolutely entitled to the property. *Ib.*

Lease by Tenant for Life—Power of Leasing—Bona Fide Exercise of Power—Determination of Tenancy for Life.]—A widow, being under the

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Settled Land Acts tenant for life during her widowhood of settled estate, on the eve of her second marriage intended to grant a twenty-one years' lease of the settled estate to her intended husband:—*Held*, that the granting of such lease must be restrained, as not being a *bona fide* exercise of the powers of a tenant for life. *Middlemas* v. *Stevens*, 320.

Sale of Timber by Court — Conversion.]—Where timber growing on settled land has been rightfully felled and sold under an order of the Court it becomes personal estate, and all the consequences of conversion must follow; and there is no equity for re-conversion as between the heir-at-law and the legal personal representative of the tenant in fee in remainder. *Field* v. *Brown* (27 Beav. 90) not followed. *Hartley* v. *Pendarves*, 745.

Street Improvements—Expenses of Sewering and Paving—Charge upon Premises—Discharge of Incumbrance.]—A tenant for life who has been required by an urban authority under section 150 of the Public Health Act, 1875, as owner of premises forming part of the settled land, to pay certain expenses for making up streets fronting, adjoining, or abutting thereon, and has done so with a view of keeping the charge constituted by section 257 of that Act alive for his own benefit, is entitled under section 11 of the Settled Land Act, 1890, to raise the money necessary for discharging such incumbrance and the costs thereof by mortgage of the settled land or any part thereof. *Smith's Settled Estates, In re*, 273.

SETTLEMENT.

Construction—Provision for "all and every the child and children or grandchild" of a Named Person Living at the Death of the Survivor of Husband and Wife—Right of Grandchildren to Take in Competition with Children.]—Under a trust for "all and every the child and children or grandchild" of a named person, where there is no context requiring the word "or" to be read "and," a grandchild (whether his parent be living or dead) cannot take in competition with a child of the named person, if there be one of that class living at the period of distribution. *Coley, In re*; *Gibson* v. *Gibson*, 153.

Covenant to Settle After-Acquired Property—Separate Legacies each below Limited Amount, but together above it—Aggregation—Deduction of Legacy Duty.]—By a marriage settlement the wife covenanted that if at any time during the continuance of the marriage she should "at one and the same time and from one and the same source" become entitled to any real or personal property of the value of 500*l.* and upwards, she would cause the same to be settled. Under two successive codicils to a will of a testatrix the wife became entitled to two legacies, each for the sum of 500*l.*, one payable out of the general estate of the testatrix and the other out of the proceeds of certain lands directed by the testatrix to be sold. The legacies were subject to duty at the rate of 10 per cent., reducing them to 450*l.* each:—*Held*, that the legacies, so far as the beneficial receipt by the legatee was concerned, were reduced to 450*l.* each, and were therefore separately not bound by the covenant, but that the legatee, having become entitled to them "at one and the same time"—namely, the death of the testatrix; and "from one and the same source"—namely, the testatrix—the legacies must be aggregated, and were together bound by the covenant. *Scott-Chad's Settlement, In re*; *Scott-Chad* v. *Pares*, 426.

Marriage—Assignment of Wife's Property and Fortune, "present and expectant or future"—Gift from Husband to Wife — Intention of Parties.]—By the settlement made previously to her marriage the defendant's wife conveyed and assigned to the trustee thereof "all and singular" her "property and fortune whatsoever both present and expectant or future vested or contingent," upon trust, after the solemnisation of the marriage, for herself for life, and after her death upon trusts in favour of the children of the marriage. During the coverture the defendant gave his wife a sum of 280*l.*:—*Held*, adopting the ground of Malins, V.C.'s decision in *Dickinson* v. *Dillwyn* (39 L. J. Ch. 266; L. R. 8 Eq. 546), that the assignment could not have been intended to apply to such a gift from the husband to the wife, and that therefore the sum of 280*l.* was not bound by the settlement. *Coles* v. *Coles*, 324.

Marriage — Rectification — Mistake — Parol Evidence — Appointment — Non-execution of Power—Statute of Frauds.]—The Statute of Frauds is not a valid defence to an action for the rectification of a marriage settlement where there is satisfactory parol evidence of a mistake made in drawing up the settlement, and of an intention to include a fund over which the husband had a power of appointment. Such an action is not one seeking "to charge any person upon any agreement made upon consideration of marriage" within section 4 of the statute. The settlement, being under seal, will, when rectified, operate as a valid exercise of the power of appointment over the fund. *Johnson* v. *Bragge*, 41.

Post-nuptial—Wife's Property—Recital of Ante-nuptial Agreement to Settle—Statute of Frauds — Estoppel — Husband's Trustee in Bankruptcy.]—A parol agreement before marriage to settle the wife's property cannot support a voluntary settlement made after marriage. A recital in such a settlement of the previous agreement is not a sufficient memorandum within section 4 of the Statute of Frauds, though it will bind by estoppel the parties to the settlement and volunteers claiming under them. *Holland, In re*; *Gregg* v. *Holland*, 625.

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The rule that a trustee in bankruptcy stands in the bankrupt's shoes does not apply to cases under settlements which come under section 47 of the Bankruptcy Act, 1883, or the statute of 13 Eliz. c. 5, or to cases of fraud. *Ib.*

A post-nuptial settlement made by a husband in 1873 of his wife's property may be void under 13 Eliz. c. 5, as being in fraud of creditors. *Pearson, In re; Stephens, ex parte* (3 Ch. D. 807), followed. *Ib.*

Power of Jointuring — Construction — Appointment of Jointure on First Marriage — Divorce—Appointment to Second Wife—Public Policy.]—By a re-settlement of family estates a tenant for life was empowered "at any time or times either before or after his marriage with any woman by any deed or deeds . . . . to appoint to any woman whom he may so marry for her life or for any less period any yearly rentcharge or rentcharges by way of jointure," not exceeding in the events which happened the yearly sum of 2,500*l.*, and it was declared that the power of jointuring might be exercised as often as he should marry. The tenant for life under this power appointed a yearly sum of 2,500*l.* to a lady whom he married in 1869. She obtained a divorce from him in 1883, and he married a second wife in 1888, and purported to appoint to her under the same power a yearly sum of 2,500*l.* On the death of the tenant for life the validity of the jointure to the second wife was disputed:—*Held*, that the appointment of the second jointure was authorised by the power in the re-settlement, and that that power was not invalid as being against public policy, notwithstanding that it enabled the tenant for life to appoint a jointure after a dissolution by divorce of his first marriage. *Cartwright* v. *Cartwright* (22 L. J. Ch. 841; 3 De G. M. & G. 982) distinguished. *Marlborough* (*Dowager Duchess*) v. *Marlborough* (*Duke*), (C.A.) 244.

Trust Fund—Tenant for Life—Remaindermen—Mortgage—Arrears of Interest—Sale—Deficient Security—Interest and Capital—Apportionment.]—Trust funds vested in the trustees of a marriage settlement included a mortgage of leasehold property. The mortgage interest fell much into arrear, and finally the security was sold at a considerable loss:—*Held*, that the amount recovered must be apportioned between capital and income, represented by the remaindermen and the tenant for life, in proportion to the amounts due at the date when it was recovered in respect of arrears of interest and in respect of principal; as between successive tenants for life, the amount attributed to interest being apportioned in proportion to the arrears due to them respectively. *So held*, following *Moore, In re* (54 L. J. Ch. 432), and *Lyon* v. *Mitchell* (34 L. J. N.C. 135; W. N. (1899) 27). *Alston, In re; Alston v. Houston*, 869.

Reversionary Interest — Apportionment—Tenant for Life.]—See ESTATE.

SOLICITOR.

Bill of Costs—Taxation by Cestui que Trust—Twelve Months after Payment]—The discretion given to the Court by section 39 of the Solicitors Act, 1843, to order taxation at the instance of a *cestui que trust* of a bill of costs which has been paid by a trustee is limited by the proviso in section 41 that the application must be made within twelve months after payment. *Downes, In re* (13 L. J. Ch. 159; 5 Beav. 425), followed. *Wellborne, In re*, (C.A.) 172.

Costs—Common-law Lien—Infant Clients—Compromise of Action.]—The effect of the sanction of the Court on behalf of infants to a compromise of an action is, as regards their solicitor's lien for the costs of the action, only to place the infants in the same position as parties *sui juris*, and the sanction does not in itself prejudice the lien. *Wright's Trusts, In re; Wright* v. *Sanderson*, (C.A.) 119.

Payment of Money out of Court—Sanction of Compromise by Court on Behalf of Infants.]—In an action brought by infant *cestuis que trust* against trustees in respect of alleged breaches of trust, a compromise was arrived at and sanctioned by the Court on behalf of the infants, and an order was made in pursuance thereof directing certain of the trust funds which had been brought into Court to be paid out to new trustees. The defaulting trustee was ordered to pay to the next friend of the infants their party and party costs, and the difference between those costs and the solicitor and client costs was ordered to be raised by the new trustees out the trust funds and paid to the next friend. There was no mention in the order of the right to costs of the solicitor who had acted for the infants:—*Held*, that there was nothing in the order to interfere with the solicitor's common-law lien for his costs. *Ib.*

Profit-Costs.]—See MORTGAGE.

Taxation—Lessor and Lessee.]—See COSTS.

Undertaking to Enter Appearance.] — See PRACTICE.

SPECIFIC PERFORMANCE.

Tenancy Less than from Year to Year.]—Specific performance of an agreement for a tenancy shorter than a tenancy from year to year will be granted in a proper case. *Clayton* v. *Illingworth* (10 Hare, 451) distinguished. *De Brassac* v. *Martyn* (11 W. R. 1020) approved. *Lever* v. *Koffler*, 395.

Bankruptcy—Disclaimer of Leaseholds.]—See BANKRUPTCY.

Lease—Agreement for.]—See LANDLORD AND TENANT.

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Misdescription—Verbal Rectification—Injustice.]—See VENDOR AND PURCHASER.

STATUTE.

Statutory Remedy — Market — Statutory Regulation—Disturbance—Common Law Action—Injunction.]—Where an ancient market is regulated by an Act of Parliament, an action at law will lie for disturbance of the market, notwithstanding provisions giving a summary remedy before a special tribunal. *Stevens* v. *Chown*, 571.

But the remedy formerly administered by the Court of Chancery by injunction was more extensive than any common law remedy, and may be invoked to prevent an invasion of proprietary rights, whether newly created or merely confirmed by statute, unless the statute expressly or by a necessary implication excludes that remedy, and the Court will not infer this intention from a provision for the purpose of protecting the right. *Ib.*

Contract — Statutory Confirmation.] — See CONTRACT.

TRADE.

Label—Colourable Imitation—Calculated to Deceive—Evidence—Question for the Court.]—Where an action is brought to restrain a colourable imitation of the make-up of goods, it must be proved beyond question that the goods are so got up as to be calculated to deceive. No general rule can be laid down, and each case must be judged by its own circumstances. *Payton* v. *Snelling, Lampard & Co.*, (H.L.) 644.

Whether a customer would be likely to be deceived is not a proper question to put to a witness, for it is for the Court (and not for the witness) to decide, after inspection of the exhibits and paying regard to the evidence, whether a customer would be likely to be deceived by the make-up of goods. It is not sufficient to shew that by a trick or device a retail trader might be able to pass off the goods of one for those of another. *Ib.*

Name—Similarity—Fraud—Form of Injunction—Order to Change Name of Company.]—It appearing that the words "Panhard et Levassor," or "Panhard," in connection with the manufacture and sale of motors and motor-cars designated the goods of the plaintiffs, and that the individual defendants had subscribed the memorandum of association, and had caused the defendant company, in which they were the only shareholders and directors, to be registered with a view to annex the benefit of the trade and name of the plaintiff company, THE COURT granted the following injunctions—first, An injunction to restrain the defendants and their agents or servants from using the names of Panhard and Levassor, or either of them, or any title or description including those names, or either of them, or otherwise colourably resembling the names of the plaintiffs in connection with the manufacture, use or sale of, or other dealing in, motor-cars or parts thereof; secondly, an injunction to restrain the seven defendant signatories from allowing the defendant company to remain registered under its present title, or any such title or description as aforesaid. *Panhard et Levassor (Société Anonyme Anciens Etablissements)* v. *Panhard Levassor Motor Co., Lim.*, 738.

Passing off Goods—Trial—View.]—See PRACTICE.

TRADE MARK.

Double Registration—Time for Disclaimer.]—When a disclaimer is required under the Patents, Designs, and Trade Marks Act, 1883–1888, it must be made in the application for registration, and cannot be made afterwards. *Player & Sons' Trade Mark, In re*, 359.

When a trade mark has been registered with words the exclusive use of which is not claimed, and which are not essential to the trade mark, a second registration of the same mark will not be allowed with different words and other non-essential particulars. *Ib.*

"Invented word" — Misspelling.]—A word such as "Uneeda," which merely consists of a misspelling of three common words put into one, is not "an invented word" within section 64 (*d*) of the Patents, Designs, and Trade Marks Act, 1883, as amended by the Act of 1888. *National Biscuit Co.'s Application, In re*, 318.

"Words having no reference to quality."]—If such a word or phrase suggests that the purchaser of goods will find them comforting or advantageous, it cannot be registered under sub-section (*e*) of that section as "having no reference to the character or quality of the goods." *Ib.*

TRUST AND TRUSTEE.

Appointment of New Trustee—Validity—Trustee Remaining Abroad for More than Twelve Months—Short Visit to England during that Period.]—Where a trustee who went abroad in April, 1899, paid a visit to England in November, 1899, for about a week, during which visit he attended to the trust matters, and his co-trustee in June, 1900, purported to appoint a new trustee in his place under the power contained in section 10 of the Trustee Act, 1893, it was held that the original trustee had not remained "out of the United Kingdom

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for more that twelve months," and that consequently the appointment of the new trustee was invalid. *Walker, In re; Summers* v. *Barrow*, 229.

Appointment of Judicial Trustee—Person not Named in Summons — Jurisdiction.] — On an application to appoint a named person or the official solicitor as judicial trustee, if the Court is not satisfied of the fitness of the named person there is jurisdiction to appoint a third person suggested by the retiring judicial trustee. *Douglas* v. *Bolam*, (C.A.) 1.

Breach of Trust—Loan by Trustee to Himself—Realisation of Security — Loss — Apportionment.]—Where a trustee has sold Consols and invested the proceeds, in breach of trust, upon an improper security, the amount of which when realised is insufficient to replace the capital and pay the arrears of interest, the tenant for life (or his estate) must, upon an apportionment of the sum realised between capital and income, bring into account all sums received by him in respect of income on the improper investment beyond what he would have received as dividend on the Consols. *Bird, In re; Evans, In re; Dodd* v. *Evans*, 514.

Compromise—Distribution of Fund amongst Bondholders—Absent Parties—No Limit of Time Originally Fixed—Application to Limit a Time within which Absent Parties must come in.]—In a bondholders' action to administer a trust fund, the Court in 1894 sanctioned a scheme of compromise binding upon absent parties under Order XVI. rule 9A, whereby a sum of money was appropriated for distribution in respect of 61,383 outstanding bonds when and so soon as the holders thereof should be ascertained, at the rate of 2*l.* 10*s.* per bond. The bonds were issued by a railway company and were to bearer. The holders of all but 1,700 of the outstanding bonds had been ascertained, and had come in under the scheme. After the lapse of six years, the railway company applied for an order limiting a short time within which the holders must come in or be deemed to have elected not to take the benefit of the scheme:—*Held*, by RIGBY, L.J., and STIRLING, L.J. (*dissentiente* VAUGHAN WILLIAMS, L.J.), that it would be wrong to introduce a time limit into the scheme to the disadvantage of the unascertained bondholders, and that no order ought to be made. *Held*, by VAUGHAN WILLIAMS, L.J., that a reasonable time-limit ought to be read into the scheme and a proper order now made on that footing. *Collingham* v. *Sloper*, (C.A.) 361.

Power of Sale—Leasehold Property—Sale in Lots—Assurance—Underleases to Purchasers—Duty of Trustees.]—Trustees, who are assignees of leasehold property held under one lease, cannot, in exercise of an ordinary power of sale, carry out a sale of such property in lots by retaining in themselves the original term and granting underleases for the whole term less one day to the purchasers of the respective lots at apportioned rents, for by adopting such a method of assurance the trustees do not perform their duty and get rid of their liability by privity of estate to the lessor. *Walker and Oakshott's Contract, In re*, 666.

Shares in Company — Reconstruction — Exchange for Shares in New Company—Sanction of Court—Jurisdiction — Compromise.] — As a rule the Court has no jurisdiction to give its sanction to the performance by trustees of acts with reference to the trust estate which are not authorised by the terms of the instrument creating the trust; but where peculiar circumstances have arisen not expressly provided for by the trust instrument, and not anticipated by its author, the Court, in the emergency that has arisen, has jurisdiction, for the benefit of the estate, to sanction acts by the trustees which in ordinary circumstances they would have no power to do. *New's Settlement, In re; Langham* v. *Langham. Leavers, In re; Leavers* v. *Hall. Morley, In re; Fraser* v. *Leavers*, (C.A.) 710.

Shares in a limited company were held by trustees, and circumstances arose which made it desirable in the interests of all the shareholders to reconstitute the company and substitute for its shares shares in a new company to be formed to take over its business. The trustees had no express power to enter into the reconstruction agreement and exchange their shares for those in the new company:—*Held*, that the Court had jurisdiction to allow the trustees to enter into the reconstruction agreement. *Cranshay, In re; Dennis* v. *Cranshay* (60 L. T. 357), and *Morrison, In re; Morrison* v. *Morrison* (70 L. J. Ch. 399; [1901] 1 Ch. 701), distinguished. *Ib.*

Solicitor—Notice—Prior Equitable Interest.] —Where one of two trustees is a solicitor, the lay trustee on a transfer of property to the two will not be affected with notice of a prior equitable interest known to the solicitor trustee by reason of a previous independent transaction, and fraudulently concealed by him, if such prior interest would not have been disclosed if an independent solicitor had been employed on behalf of the trustees and had made reasonable enquiries and inspections. *Taylor* v. *London and County Banking Co.; London and County Banking Co.* v. *Nixon*, (C.A.) 477.

Appropriation of Specific Assets.] — See EXECUTOR AND ADMINISTRATOR.

Attachment—Money in Possession or under Control of Trustee.]—See ATTACHMENT.

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Improper Investment—Power to Realise.]—See VENDOR AND PURCHASER.

Priority—Notice to Trustees.]—See MORTGAGE.

Secret Trust.]—See CHARITY; EXECUTOR AND ADMINISTRATOR.

Unascertained Persons—Representation by Trustee.]—See WILL.

UNCONSCIONABLE BARGAIN.

Expectant Heir—Reversion—Sale at Undervalue—"Unfair dealing."]—The plaintiff, who was thirty years of age, sold 1,000*l.* part of a reversion expectant on the death of his mother, then aged seventy-two, to the defendant for 300*l.*, with a condition that the plaintiff might re-purchase the same for 600*l.* within two months. The market value of the reversion at the time of the sale was about 675*l.* The plaintiff had no independent advice, and there was evidence that the defendant induced the plaintiff to conceal from the trustees of the settlement and their solicitors the fact that he was selling or raising money on his reversion:—*Held*, that, independently of undervalue, there was evidence of unfair dealing which took the case out of the Sales of Reversions Act, 1867; that the plaintiff was in the position of an expectant heir; and that the transaction must be set aside as an unconscionable bargain. *Brenchley* v. *Higgins*, (C.A.) 788.

Aylesford (Earl) v. *Morris* (42 L. J. Ch. 546; L. R. 8 Ch. 484) followed. *Ib.*

Quære, how far undervalue alone may amount to evidence of unfair dealing so as to take a case out of the Sales of Reversions Act, 1867. *Ib.*

VENDOR AND PURCHASER.

Conditions—Power to Rescind—"Notwithstanding intermediate litigation"—Notice to Rescind Pending Proceedings—Costs.]—Conditions of sale which give a vendor power to rescind the contract "if the purchaser shall insist on any requisition or objection which the vendor shall be unable or unwilling to remove or comply with . . . notwithstanding any attempt to remove the same or that there shall have been any intermediate or pending negotiation proceeding or litigation"; and provided that he shall thereupon return to the purchaser his deposit, "but without any interest costs of investigating the title, or other compensation or payment whatsoever," do not protect the vendor from the payment of costs of litigation; and if the vendor allows a summons, under the Vendor and Purchaser Act, 1874, to be proceeded with until the hearing and then gives notice to rescind, he will be ordered to pay the costs. *Spindler and Mear's Contract, In re*, 420.

—Defect in Title—Condition for Compensation for Misdescription.]—A condition of sale for compensation, "if any error or misstatement shall appear to have been made in the particulars of sale or these conditions," does not apply to a defect in title. *Riches, In re* (27 S. J. 313), followed. *Debenham* v. *Sawbridge*, 525.

—Sale by Court—Mistake—Absence of Fraud—Rescission.]—On a sale by the Court a condition provided for compensation for "any error or misstatement" in the particulars or conditions. After conveyance it was discovered that the vendor had had no title to a portion of the property. All parties had acted *bona fide*, with reasonable ground for believing (subject to a possible doubt in the vendor's mind) that the title was a good one:—*Held*, that the purchaser could obtain neither compensation under the condition, nor rescission on the ground of common mistake. *Ib.*

Implied Covenants for Title—Beneficial Owner—Good Right to Convey—Undisclosed Easement—Breach of Covenant.]—Where a breach of a covenant for good right to convey, implied by virtue of a conveyance by the grantor as beneficial owner, is occasioned by the existence of a right of way over the property conveyed, such a breach is not a continuing breach, but occurs and is complete upon the execution of the deed of conveyance in which the covenant is implied. *Turner* v. *Moon*, 822.

—Statute of Limitations.]—From the moment of the delivery of the deed of conveyance the Statute of Limitations in respect of the breach commences to run. *Ib.*

—Measure of Damages.]—The measure of damages for such a breach is the difference between the value of the property as purported to be conveyed and that which the grantor had power to convey. *Spoor* v. *Green* (43 L. J. Ex. 57; L. R. 9 Ex. 99) followed. *Ib.*

Implied Warranty—Easement—Light—Newly Erected Buildings.]—Upon the sale of land with newly erected buildings having windows overlooking an open space, there is no implied warranty that the vendor has not been a party to anything whereby the easement of light over the open space cannot be acquired upon the effluxion of the statutory period from the time when the houses were first erected. *Greenhalgh* v. *Brindley*, 740.

Leaseholds Subject to Onerous and Unusual Covenants—Private Contract—Stipulation that "the vendor's title is accepted by the purchasers"—Duty of Vendor as to Disclosure—Objection to Title—Return of Deposit.]—On a sale of leasehold property, whether by private contract or public auction, it is the duty of the vendor to disclose the existence of onerous and

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unusual covenants contained in the lease under which the property is held, or at least to afford the purchaser an opportunity of inspecting the lease prior to the signing of the contract. Where the vendor has failed in his duty in this respect a stipulation in the contract that "the vendor's title is accepted by the purchasers" will not preclude the purchasers from insisting that a good title has not been shewn and obtaining a return of their deposit, inasmuch as they have a right, when such a condition is inserted, to assume that the vendor has disclosed what it was his duty to disclose, and the condition must be read as precluding objection upon that footing. Principle of *Jenkins* v. *Hiles* (6 Ves. 646) applied. *Hargreaves and Thompson's Contract, In re* (56 L. J. Ch. 199; 32 Ch. D. 454), followed. *Haedicke and Lipski's Contract, In re*, 811.

Misdescription in Particulars—Verbal Rectification by Auctioneer—Statement not Heard by Purchaser — Specific Performance — Compensation—Injustice to Vendor.]—The Court will not enforce specific performance of a contract for sale where, owing to a mistake on the part of the defendant, injustice would be done to him by a decree for that purpose. *Hare and O'More's Contract, In re*, 45.

Accordingly, where in a purchaser's action for specific performance, with compensation for a material misdescription in the particulars of sale, it appeared that the auctioneer had before the biddings commenced drawn attention to and rectified the misdescription, but that the purchaser had not heard his statement, the Court, notwithstanding a condition for compensation in that behalf, dismissed the action and rescinded the contract. *Manser* v. *Back* (6 Hare, 443) applied. *Ib.*

Mortgage—Constructive Notice—Property in Occupation of Weekly Tenants—Enquiry of Tenants—Rents Paid to House Agent—Landlord's Title.]—A tenant's occupation of property sold or mortgaged is notice to the purchaser or mortgagee of all that tenant's rights, but not of his lessor's title or rights. Actual knowledge, however, on the part of the purchaser or mortgagee that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor or mortgagor, is notice of such person's rights. *Hunt* v. *Luck*, 30.

The mere fact that the rents of property let to weekly or yearly tenants are known to be paid to a house agent is not so inconsistent with an apparently good paper title to the property in the vendor or mortgagor as to put the purchaser or mortgagee on enquiry, or fix him with notice of the rights of the person for whom the agent collects the rents. *Bailey* v. *Richardson* (9 Hare, 734) and *Barnhart* v. *Greenshields* (9 Moore P.C. 18) followed. *Mumford* v. *Stohwasser* (43 L. J. Ch. 694; L. R. 18 Eq. 556) not followed. *Ib.*

Mortgage — Payment Off — Reconveyance—Habendum unto and to the Use of Mortgagor "in fee"—No Words of Limitation—Legal Estate for Life.]—Upon payment off by the mortgagor of a mortgage debt created in 1895, the property which had constituted the security for the debt was conveyed by the mortgagees unto the mortgagor "to hold the same unto and to the use of" the mortgagor "in fee freed and discharged" from the mortgage debt secured by, and all claims and demands under, the mortgage deed:—*Held*, that to supply the word "simple" after "fee" from the obvious intention as appearing by other parts of the deed of reconveyance would not be a compliance with the terms of the Conveyancing and Law of Property Act, 1881, s. 51; that in the absence of the words "and his heirs," as words of limitation in the *habendum*, the deed could not operate to pass the legal estate in fee-simple; and that therefore only a legal estate for life passed under the deed to the mortgagor, leaving the legal estate in remainder outstanding in the mortgagees. *Ethell and Mitchell & Butler's Contract, In re*, 498.

Payment of Deposit—Lien—Rescission.]—A purchaser of land, upon payment of a deposit, acquires an equitable lien therefor upon the land, and that lien may be made available against a transferee (not being a purchaser for value without notice) from the vendor, as well where the purchaser puts an end to the contract in exercise of a right thereby reserved to him, as where the vendor (or his transferee) is in default. *Whitbread* v. *Watt*, 515.

Title—Incumbrance—Executors—Conveyance to Testamentary Devisees—Charge for Payment of Moneys which Executors are "liable to pay"—Unknown Liabilities—Statutory Advertisements.]—Where executors have issued statutory advertisements for creditors pursuant to the Law of Property Amendment Act, 1859, and have subsequently conveyed real estate to the testamentary devisees of their testator, with a declaration, in accordance with section 3 of the Land Transfer Act, 1897, that it was "subject to a charge for the payment of any money which the personal representatives of the testator are liable to pay," such a charge will not render the land liable, in the hands of a purchaser from the devisees, for claims against the testator's estate which were unknown to the executors at the date when they so conveyed. *Cary and Lott's Contract, In re*, 653.

There is nothing in the Land Transfer Act, 1897, which creates a right in creditors to follow real assets in the hands of a purchaser. *Ib.*

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Trustee — Improper Investment — Power to Realise.]—In the case of an unauthorised purchase of land by a trustee, a good title can be made by the trustee to a purchaser with notice, provided that all the beneficiaries are not competent and desirous to take the land in specie. *Patten and Edmonton Union, In re* (52 L. J. Ch. 787), followed. *Power* v. *Banks*, 700.

Contract to give First Refusal.]—See CONTRACT.

Leaseholds—Exercise of Power of Sale.]—See TRUST AND TRUSTEE.

Rescission—Assignment of Contract—Money paid by Purchaser to Assignee.]—See CONTRACT.

Specific Performance — Trustee in Bankruptcy.]—See BANKRUPTCY.

WATER.

Water Supply—Rate of Charge—"Domestic purposes."]—See LOCAL GOVERNMENT.

WATERCOURSE.—See EASEMENT.

WAY.

Footbridge—Right of Member of Public to Erect New Bridge — Trespass — Nuisance — Abatement.]—A person who is merely entitled as one of the public to use a highway has no right to enter on the plaintiff's land and construct on it a permanent footbridge because an old footbridge forming part of the highway has been allowed to decay and disappear. Such acts amount to a trespass, and do not fall within the doctrine of abating a nuisance. *Campbell-Davys* v. *Lloyd*, (C.A.) 714.

Metropolis—Statutory Powers—Obstruction—Rights of Adjoining Owners.]—The owner of premises abutting on a highway has, as a private right, a right of access to the highway, and any obstruction which interferes with the exercise by him of that right is an infringement of his private right. His right, however, as regards the user of the highway itself is one which he enjoys in common with the rest of the public, and is not a private right. *Att.-Gen.* v. *Thames Conservators* (1 H. & M. 1), *Lyon* v. *Fishmongers Co.* (46 L. J. Ch. 68; 1 App. Cas. 662), and *Fritz* v. *Hobson* (49 L. J. Ch. 321; 14 Ch. D. 542) followed. The defendants, a public authority, in the exercise of their statutory obligation to light streets, erected a lamp-post on a highway in a place which it was proved was most convenient for the public. The plaintiffs, the owners of premises abutting on the highway, complained that the lamp-post interfered with the carrying on by them of their business: —*Held*, that the plaintiffs had no right to restrain the defendants from exercising their statutory authority to obstruct the highway by the erection of lamp-posts where they thought it necessary. *W. H. Chaplin & Co.* v. *Westminster Borough*, 679.

Grass Space between Hedge and Metalled Road—Margin—Presumption of Dedication to Public.]—There is no irrebutable presumption that a strip of land left between a metalled highway and the fence of the adjoining property has been dedicated to public use as part of the highway. *Belmore (Countess)* v. *Kent County Council*, 501.

The fact that the margin of such a strip adjoining the metalled road has occasionally been walked over by the public is too indefinite a use to form the foundation of a public right or to establish a dedication as part of the highway. *Ib.*

Public Footway—Private Carriage-way along Same Line—Presumption as to Extent of Public Right of Footway.]—Where a public right of footway exists across land, and a certain amount of the surface of land lying along the course of the public footway is devoted to traffic, even if it be private traffic, the presumption is that the owner of the soil must be taken to have dedicated to the public so much of the surface as he has in fact devoted to traffic, even if it be private traffic. The principle laid down in *Grand Surrey Canal Co.* v. *Hall* (9 L. J. C.P. 329; 1 Man. & G. 392, 406) applied. *Att.-Gen.* v. *Esher Linoleum Co.*, 808.

Private Right of Way.]—See EASEMENT.

WILL.

Absolute Gift—Life Estate with General Power of Appointment—Repugnancy.]—A testator by will, after certain devises and bequests, gave the residue of his real and personal estate to his wife absolutely, and appointed her executrix during her life and his two sons executors after her death. By a codicil the testator revoked his will and gave all his property to his wife, so that "she may have full possession of it and entire power and control over it, to deal with it or act with regard to it as she may think proper." In the event, however, of her not surviving him, or dying without having devised or appointed the whole or any part of his property, then his will was to take effect as if the codicil had not been made:—*Held*, that on the true construction of the codicil the wife took a life estate only in the property with a general power of appointment. *Sanford, In re: Sanford* v. *Sanford*, 591.

Accumulation—Keeping on Foot Policy as Security against Depreciation in Value of Leaseholds.]—A direction in a will to apply a

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portion of the rents of the testator's leaseholds in keeping on foot a policy of insurance to secure the replacement at the expiration of the term for which the lease was held of the capital which would be lost by not selling the leaseholds is not an accumulation within the meaning of the Accumulations Act, 1800, and is therefore valid notwithstanding that at the testator's death the unexpired residue of the term may exceed twenty-one years. *Gardiner, In re; Gardiner* v. *Smith*, 407.

—Partial Accumulation of Income of Property —Direction at End of Ten Years to Invest Accumulations in Purchase of Real Estate— "Land."]—The word "land" in the Accumulations Act, 1892, s. 1, when read in conjunction with the Interpretation Act, 1889, s. 3, includes incorporeal as well as corporeal hereditaments. Consequently a direction in a will to accumulate the rents and annual income of a mining property for ten years and at the expiration of that time to invest the accumulations in the purchase of "real estate" is a direction to accumulate "for the purchase of land only" within the Act of 1892, and, there being no minor in existence who, if of full age, would be entitled to receive the rents and income so directed to be accumulated, is void. Supposed *dictum* of CHITTY, J., in *Danson, In re; Bell* v. *Danson* (13 R. 633), discussed and disapproved. *Clutterbuck, In re; Fellowes* v. *Fellowes*, 614.

Ademption.]—The question whether a testamentary gift or appointment is adeemed by the subsequent disposal of the subject of the gift during the lifetime of the testator is in every case a question of the construction of the will. *Dowsett, In re; Dowsett* v. *Mealin*, 149.

Special Power of Appointment—Testamentary Exercise of Power — Subsequent Compulsory Sale of Subject.]—If the gift or appointment be given simply by a description of the subject as it exists at the date of execution of the will, it will be adeemed if the subject be subsequently disposed of during the lifetime of the testator. If, on the contrary, it be given by a description which not only includes the subject of the gift as it then exists, but still includes it in whatever other form it may happen to exist at the date of the testator's death, it is not then adeemed by any subsequent disposal of it, provided that at the testator's death the original subject of the gift is represented by actual gifts which can be identified. *Ib.*

In applying this principle to the testamentary execution of a power of appointment, there is no distinction between general and special powers. *Ib.*

Ademption — Father and Child — Absolute Legacy—Settled Legacy—Subsequent Settlement on Legatee's Marriage.]—A father bequeathed a legacy of 20,000*l.* to his daughter, a spinster—as to 5,000*l.* to her absolutely and as to 15,000*l.* upon trust for her for life with remainder to her children, and in default of children upon trust for her next-of-kin. Subsequently, upon her marriage, he settled a sum of about 7,000*l.* upon trusts in favour of her and her children, with ultimate trusts in default of children, not corresponding with the trusts of the settled legacy:—*Held*, that the marriage settlement fund must be taken in satisfaction *pro tanto* of the settled portion of the legacy, and that the daughter was entitled to the 5,000*l.* absolute legacy without diminution. *Furness, In re; Furness* v. *Stalkartt*, 580.

Bequest for Repair of Tomb—"Longest period allowed by law"—Twenty-one Years from Death of Survivor of all Persons living at Testator's Death—Void Gift—Uncertainty—Perpetuity.]—A testatrix bequeathed a legacy to trustees upon trust for the maintenance and repair of a tomb "for the longest period allowed by law, that is to say until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death":—*Held*, that, whether the bequest was void as a perpetuity or not, it was, at any rate, void for uncertainty. *Moore, In re; Prior* v. *Moore*, 358.

Construction—Annuity for Maintenance of Infant—Cesser.]—A testator directed his trustees to pay an annuity to his wife during widowhood, and to pay to her a further annuity till his daughter should attain twenty-one to be applied by his wife for the maintenance and education of his daughter:—The widow died while the daughter was an infant:—*Held*, that the further annuity had not ceased. *Yates, In re; Yates* v. *Wyatt*, 725.

—Bequest to Illegitimate Children—Expression of Number — Evidence — Admissibility.]—The testator gave a share in his residue to "the three children respectively of Caroline Lewis born prior to her marriage with her present husband." There were four such children (all illegitimate) of Caroline Lewis, born in 1873, 1876, 1878, and 1880. The testator was the father of the three later-born children, and acknowledged the paternity:—*Held*, that the burden of proof was on the child born in 1873 to shew that the testator intended to benefit him. *Held* also, that evidence that the testator knew of the existence of the child born in 1873 was admissible, but that his instructions for his will and declarations of intention to benefit the parties, and former wills, were inadmissible. *Mayo, In re; Chester* v. *Keirl*, 261.

—Bequest to Illegitimate Children—Gift to Children by Name—Gift to Next-of-Kin of Children—Intestacy.]—A testator gave legacies to his seven children, naming them, and directed

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his trustees to hold his residuary estate in trust in equal shares for such of his seven children as should be then living and have attained or attain the age of twenty-one years; daughters' shares to be retained upon trust to pay the income to her for life, and after her death upon trust for her children, as therein mentioned, and if there should be no such child, then in trust for the persons who at the death of such daughter would have become entitled to such share under the statutes for the distribution of the personal estates of intestates in case she had died possessed thereof without having been married. An illegitimate married daughter of the testator survived him, and died without ever having had a child:—*Held*, that her interest in the residue did not devolve upon the persons who would have been her next-of-kin at the time of her death had she been legitimate, but to her legal personal representative as if the same had been absolutely bequeathed to her. *Standley's Estate, In re* (L. R. 5 Eq. 303), followed. *Deakin, In re; Starkey* v. *Eyres* (63 L. J. Ch. 779; [1894] 3 Ch. 565), not followed. *Wood, In re; Wood* v. *Wood*, 856.

— Devise of "real estate"—Leasehold Interest —"Contrary intention."]—A testator who was possessed of the fee-simple in certain freehold property subject to a term of years, and was also possessed of a sub-leasehold interest in the said term of years less by two days than the original term, "gave and devised all his real estate whether in possession, reversion, or remainder" to a certain devisee. He also "gave and bequeathed all his leasehold estate" (except a certain house thereinbefore specifically bequeathed) to his executors. At the date of his will, the fee-simple in remainder and the sub-leasehold interest in the property in question had been enjoyed and dealt with by the testator and his predecessor in title for more than twenty years as a single freehold estate in possession:—*Held*, that although the sub-leasehold interest did not pass under the devise of "real estate" by virtue of section 26 of the Wills Act, 1837, yet that, having regard to the whole of the surrounding circumstances, it passed under the devise on the true construction of the will. *Guyton and Rosenberg's Contract, In re*, 751.

—Eldest or Only Son for Time Being Entitled to Possession or Receipt of Rents and Profits of Estate — Exclusion of — Estate Disentailed — Testator not in Loco Parentis.]—In construing limitations in an instrument excluding from certain benefits an eldest son for the time being entitled to the possession or to the receipt of the rents and profits of certain estates, a different rule is to be applied where the author of the instrument is a parent or person *in loco parentis* making provision for a family from that to be applied where the author does not stand in that relation to the objects of his bounty. *Shuttleworth* v. *Murray*, (C.A.) 453.

Testator, who died in 1875, by his will made in 1855, devised his real estates to the use of his nephew for life, with remainder to all and every the son and sons of the nephew born in the lifetime of the testator, or in due time afterwards ("other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents and profits of certain estates" situate at C., "after the decease" of the nephew "as tenant for life or any greater estate or interest whatsoever"), severally and successively in remainder one after another for their respective lives. In 1869, the eldest son of the nephew, who was tenant in tail of the C. estates in remainder expectant on the death of his father, and was then twenty-one, joined with his father in disentailing the estates. The estates were sold, and the proceeds held on certain trusts, under which the eldest son took some benefit. He subsequently became bankrupt, and his interest in the proceeds was sold. The nephew was dead:—*Held*, that the eldest son was not within the exception, and he was entitled to the first life interest after the death of the nephew in the estates devised by the testator's will. *Collingwood* v. *Stanhope* (38 L. J. Ch. 421; L. R. 4 H.L. 43) distinguished. *Ib.*

—Estate Tail—Limitation "after the determination or in defeasance of such estate tail"—Alternative Gift—Barring Entail.]—A testator devised real estate in trust for A. for life, and directed the trustees after A.'s decease to convey the same to the use of G. in tail male, but, if G. should be then dead, to the use of the person who should then be the first heir male of the body of G. in tail male, with remainder to the use of C. in tail male, with remainder to his own right heirs for ever. By a codicil the testator revoked the devise to G., and devised the estate after the death of A. to R. in tail male, with all the limitations as in his will mentioned:—*Held*, that R. took a vested equitable estate in tail male expectant on the decease of A., and that the limitation to the first heir male of G. or R. was an estate to take effect in a certain event after the determination or in defeasance of R.'s estate tail, and could be barred under section 15 of the Fines and Recoveries Act, 1833. *Cardigan* v. *Curzon-Howe*, 763.

—Present Relief Sought—Case Ripe for Decision —Unascertained Persons — Representation.]—A. and R., having executed a disentailing deed and a deed of appointment of a fund in Court representing proceeds of sale of part of the settled property, petitioned for payment out:—*Held*, that, immediate relief being sought, it was not premature to determine the construction of the will, and that the trustees of the will represented unascertained persons. *Ib.*

—Gift "so long as she remains unmarried."]—A direction in a will to set aside a sum of 200*l.*

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and thereout pay to the testator's widow a sum of 3*l.* monthly "so long as she remains unmarried or until the said sum of 200*l.* becomes exhausted, the said payment of 3*l.* monthly to cease on my said wife marrying again," is an absolute gift of the 200*l.* *Rishton* v. *Cobb* (9 L. J. Ch. 110; 5 Myl. & Cr. 145) followed. *Howard, In re; Taylor* v. *Howard*, 317.

—Equitable Fee-simple — Rule in Shelley's Case.]—Freehold land was devised to trustees in fee-simple upon trust out of the rents and profits to pay certain annuities, and then to pay the residue of the rents and profits to W. D. for his life, and from and immediately after the respective deceases of the annuitants and W. D. upon trust to convey the land together with any accumulations of rent unto the right heirs of W. D. The land was acquired compulsorily by a railway company, and the purchase-money paid into Court. The surviving annuitant had previously released the property from her annuity. On a petition by W. D. for payment out to him,—*Held*, first, that the rule in *Shelley's Case* (1 Co. Rep. 93*b*) applied to the devise, and that under the will W. D. took an equitable estate in fee-simple in the land subject to the annuities; and secondly, that, in the circumstances, W. D. was absolutely and presently entitled to the fund in Court. *Youmans' Will, In re; Great Central Railway, ex parte*, 430.

—Remoteness—Gift Over—Splitting up—Absolute Gift—Cutting down—Void Limitations.] —Testator gave his residuary estate, which consisted of personalty, upon trust for his wife for life, and after her decease upon trust to be divided into five equal portions, "which I allot in the manner following—to S. D. I give two such portions to my brother W. one such portion to my brother C. one such portion and to the son or sons of my late brother S. the remaining one such portion. But it is my will and mind that the two fifth portions allotted to the said S. D. shall remain in trust," and that she should be entitled to take only the interest of the shares bequeathed to her during her life, and after her decease "in trust for the benefit of any child or children born to her . . . upon his or their attaining the age of 25 years if a son or sons, or if a daughter or daughters, upon her or their attaining the age of 21 years, or upon her or their marriage . . . but in default of any such issue then and in that case the two fifths . . . shall go and be divided among the children of my brother C.," to be equally divided between them, payable to sons at twenty-five and to daughters at twenty-one or marriage. S. D. died without ever having had any children:—*Held*, first, that the gift over was not upon the happening of two alternative events so as to be a valid gift in the event which had happened, but was upon the happening of one compound contingency, and might in a possible event have taken effect at a time too remote within the rule against perpetuities, and it was therefore void for remoteness; secondly, that the gift to S. D. was an absolute gift in the first instance, and the settlement by which it was sought to restrict it failing the absolute gift remained, and her shares belonged to her personal representatives. *Hancock, In re; Watson* v. *Watson*, (C.A.) 114.

Evers v. *Challis* (29 L. J. Q.B. 121; 7 H.L. C. 531) and *Lassence* v. *Tierney* (1 Mac. & G. 551) distinguished. *Ib.*

—Sum Set Apart out of Residue—Devolution—Gift Over of Residue as a Whole.]—If the will of a testator shews an intention that the entirety of his residue should go over as a whole, a sum directed to be set apart out of residue will, on the failure of the trusts affecting it, fall back into and follow the destination of the remainder of the residue, and will not devolve upon the next-of-kin of the testator. *Skrymsher* v. *Northcote* (1 Swanst. 566; 1 Wils. C.C. 248) observed upon. *Parker, In re; Stephenson* v. *Parker*, 170.

—"Surviving" Tenants for Life—Settled Shares—Stirpital Survivorship.]—A testatrix gave a life interest in a one-third share of a money fund to each of her three daughters, M., C., and E., with remainder to the children of each tenant for life surviving their mother and attaining twenty-one, with a gift over on the death of any tenant for life without leaving such children to the "surviving" tenants for life for their lives, and then to the children of the "said surviving" tenants for life in like manner as their original shares were given, with an ultimate gift over on the failure of issue of all the tenants for life. E. survived her sisters, and died without leaving children. At her death there were living two of M.'s children who had attained twenty-one, but no children of C., although she had left two children surviving her, both of whom had attained twenty-one before their death:—*Held*, adopting the reasoning of LORD SELBORNE in *Waite* v. *Littlewood* (42 L. J. Ch. 275; L. R. 8 Ch. 70), and of SIR GEORGE JESSEL, M.R., and COTTON, L.J., in *Lucena* v. *Lucena* (47 L. J. Ch. 203; 7 Ch. D. 255), that the word "surviving" must be construed neither in its strict sense, nor as meaning "others," but as meaning "surviving by issue," and that consequently M.'s children were alone entitled to the accruing share. *O'Brien* v. *O'Brien* ([1896] 2 Ir. R. 459) not followed. *Bilham, In re; Buchanan* v. *Hill*, 518.

—Life Gifts to A, B, and C—Remainders to Respective Children—Referential Gifts to Survivors and Respective Issue—Intestacy.]—A testator bequeathed three shares in his property to his three sons respectively for their respective lives, and after the death of any of them the testator directed that the share of the one

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so dying should go to such of his children as should attain the age of twenty-one years or (being females) marry, with a proviso that, in case any of his said sons should die without leaving issue who should acquire a vested interest in the share of their father, then the share of such son should go to the surviving sons and their respective issue "upon such and the like trusts and to and for such and the like intents and purposes . . . as are herein declared with respect to their respective original" shares. There was no general gift over on the death of all three sons without issue. A and B predeceased C, each of them leaving issue. C died without ever having had issue:—*Held*, that on the true construction of the will there was an intestacy as to the share of C on his death. *Harrison* v. *Harrison*, 551.

The third rule of construction laid down by Kay, J., in *Bowman, In re; Lay, In re; Whytehead* v. *Boulton* (41 Ch. D. 525), examined and dissented from. *Hodge* v. *Foot* (34 Beav. 349); *Arnold's Estate, In re* (39 L. J. Ch. 875; L. R. 10 Eq. 252), and *Walker's Estate, In re; Church* v. *Tyacke* (48 L. J. Ch. 598; 12 Ch. D. 205), not followed. *Ib.*

—Trust to Repair Tomb out of Income of Legacy—Remainder of Income Given for Good Charitable Purpose—Object Partly Illegal—Whole of Income Applicable to Charity.]—Where a legacy has been given to trustees upon trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for valid charitable purposes, then, the trust for repair of the tomb being void, the result of the failure of that trust is that the whole of the income of the fund becomes applicable for the charitable purposes. *Fisk* v. *Att.-Gen.* (L. R. 4 Eq. 521), *Birkett, In re* (47 L. J. Ch. 846; 9 Ch. D. 576), and *Vaughan, In re; Vaughan* v. *Thomas* (33 Ch. D. 187), followed. *Rogerson, In re; Bird* v. *Lee*, 444.

Class Gift to Children—Illegitimate Children Alive at Date of Will—Reputation—Surrounding Circumstances — Extrinsic Evidence.]—Under a class gift to the children of the testatrix's nephew A, and of her nieces B and C, where A's children, although believed by the testatrix to be legitimate, are in fact illegitimate, but evidence of surrounding circumstances is given shewing a strong probability of the testatrix's intention to include such children in the gift, then such of the illegitimate children as have, at the date of the will, acquired the reputation of being A's children are entitled to take along with the legitimate children of B and C. *Holt* v. *Sindrey* (38 L. J. Ch. 126; L. R. 7 Eq. 170) and *Hill* v. *Crook* (42 L. J. Ch. 702; L. R. 6 H.L. 265) followed. *Du Bochet, In re; Mansell* v. *Allen*, 647.

Illegitimate Child Born after Date of Will—Reputed Child — Exclusion.]—An illegitimate child of A born after the date of the will, and about the fact of whose paternity there is no question or dispute, is not entitled to share under the gift, notwithstanding the fact that such child also has acquired the reputation of being A's child long before the death of the testatrix, and has always, equally with each of A's other illegitimate children who do take, been believed by the testatrix and her family generally to be the child of A born in lawful wedlock. *Bolton, In re; Brown* v. *Bolton* (55 L. J. Ch. 398; 31 Ch. D. 542), adopted and applied. *Ocoleston* v. *Fullalove* (43 L. J. Ch. 297; L. R. 9 Ch. 147); and *Goodwin's Trust, In re* (43 L. J. Ch. 258; L. R. 17 Eq. 345), not followed. *Ib.*

Discretionary Trust for Benefit of Person for Life — "Accumulation" of Surplus Rents — Devolution—Income or Capital of Residuary Estate.] — Where a testator, who died in 1865, gave certain freehold houses to his trustees upon trust to receive the rents, and after making certain payments thereout to apply the residue at their discretion for the benefit of his daughter for her life, and after her decease to stand seised of the premises with any surplus or accumulation of rents that might not be applied for the benefit of his daughter in trust for her children with limitations over in default of children, and he also gave his residuary real and personal estate to his trustees upon trust for, amongst other persons, his daughter for life, and after her decease upon trust for other persons, it was held that by means of the Accumulations Act, 1800, the surplus rents after the expiration of twenty-one years from the testator's death formed part of the capital of the testator's residuary estate, and must be invested, and that the income only of such investment was payable to the tenants for life. *Pope, In re; Sharp* v. *Marshall*, 26.

To direct the accruing income of a fund to be invested and the income of the investment to be paid to a tenant for life is not to direct an accumulation. *Ib.*

Crawley v. *Crawley* (4 L. J. Ch. 265; 7 Sim. 427) and *O'Neill* v. *Lucas* (2 Keen, 313) followed. *Phillips, In re; Phillips* v. *Levy* (49 L. J. Ch. 198), commented on and not followed. *Ib.*

Gift to a Class—Gift "to A and the children of B," equally.]—A gift to "A and the children of B," A and B's children being in the same degree of relationship to the testator, is a gift to a class, and on the death of A in the testator's lifetime A's share does not lapse, but goes to B.'s children. *Kingsbury* v. *Walter*, (H.L.) 546.

Gift to a Class—Substitutional Gift on Death Leaving Issue—Period of Vesting.]—A testator directed that, subject to the payment of the

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income of his residuary real and personal estate to his wife during widowhood, and of an annuity to her on her re-marriage, and subject also to the maintenance of his children until the youngest living should attain twenty-one, his trustees should hold his said residuary estate and the accumulations of the income thereof "in trust for all my children who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry to whom I give and bequeath my residuary real and personal estate in equal shares. I direct that if any of my children shall die leaving issue such issue shall take his or her deceased parent's share equally as tenants in common." The testator died, leaving surviving him his wife and three children, two of whom, a son and a daughter, had already attained the age of twenty-one:—*Held*, that there was nothing in the will to limit the contingency of death leaving issue to less than the whole life of the first taker whether a son or daughter, and that the divesting clause, or gift over, on death leaving issue, might operate not only during the lifetime of the widow, but also after her death. *O'Mahony* v. *Burdett* (44 L. J. Ch. 56*n*; L. R. 7 H.L. 388) considered and applied. *Schnadhorst, In re; Sandkuhl* v. *Schnadhorst*, 583.

Gift to Corps of Commissionaires—"To aid in purchase of barracks or in any other way beneficial to the corps"—Voluntary Association—Charity—Perpetuity.]—A gift to a perpetual institution not charitable is not necessarily bad. The gift is good if it is not subject to any trust that will prevent the existing members of the association from dealing with it as they please, or if it can be construed as a gift to or for the benefit of the individual members of the association. If the gift is one which by the terms of it, or which by reason of the constitution of the association in whose favour it is made, tends to a perpetuity, the gift is bad. *Clarke, In re; Clarke* v. *Clarke*, 631.

The Corps of Commissionaires is a voluntary association with a somewhat special constitution for the benefit of able-bodied and disabled soldiers and sailors alike, which is mainly supported by the subscriptions of the members and intended for their benefit; and although there are funds appropriated to the benefit of the corps which, taken separately, may be considered as charities, the corps as at present constituted would not appear to be a charity within the legal meaning of that expression. *Ib.*

A gift to the committee for the time being of the corps "to aid in the purchase of their barracks or in any other way beneficial to that corps" is good on the ground either that some of the objects of the corps are charitable, or else that it does not tend to a perpetuity, inasmuch as the committee for the time being of the corps can deal with it in any way they please for the benefit of the corps. *Dictum* in *Cocks* v. *Manners* (40 L. J. Ch. 640; L. R. 12 Eq. 574) approved and applied. *Dutton, In re; Peake, ex parte* (48 L. J. Ex. 350; 4 Ex. D. 54); *Amos, In re; Carrier* v. *Price* (60 L. J. Ch. 570; [1891] 3 Ch. 159); *Clark's Trusts, In re* (45 L. J. Ch. 194; 1 Ch. D. 497); *Thomson* v. *Shakespear* (29 L. J. Ch. 276; 1 De G. F. & J. 399); and *Carne* v. *Long* (29 L. J. Ch. 503; 2 De G. F. & J. 75) discussed and distinguished. *Ib.*

Gift without Reference to Age or Poverty—Perpetuity—Condition.]—The testator made the following gifts: "I bequeath to the Vintners' Company . . . the portrait of" a named person "to be hung up by them in a conspicuous part of their common hall and always retained in that position. And upon condition that they accept the said bequest of the said portrait with the obligation aforesaid I bequeath to the said company the sum of 4,000*l.* . . . enjoining the said company out of the income of the said sum of 4,000*l.* to keep in due and proper repair the said portrait, cleaning and re-gilding its frame not less than once in every four years, the surplus of the said income to be applied . . . . for the benefit of individuals" answering a particular description without any reference to age or poverty, "and if applied by way of annuity, no single annuity to exceed 50*l.* per annum":—*Held*, that the gift of the picture was valid, the condition imposed being a condition subsequent, but that no part of the gift of the 4,000*l.* legacy could be supported as a charitable gift, and therefore it failed wholly, as infringing the rule against perpetuity. *Gassiot, In re; Fladgate* v. *Vintners Co.*, 242.

Residue — Contingent Gift — Intermediate Income.]—The testator made a residuary gift in trust for all the children of his sister who being sons should attain the age of twenty-one years, or being daughters should attain that age, or marry under that age, in equal shares, and if there should be only one such child, the whole to be in trust for that one child; and in the event of his sister not having any children or child who should attain a vested interest then over. The sister had never had any children who lived more than a few hours, and was forty-six years of age:—*Held*, that the gift carried with it the intermediate income, and that the income undisposed of must be accumulated for twenty-one years from the testator's death, or until the fund became divisible. *Love, In re; Green* v. *Tribe* (47 L. J. Ch. 783), dissented from on this point. *Taylor, In re; Smart* v. *Taylor*, 535.

Specific Devise — Failure — "Residuary devise"—Restriction as to Tenure.]—A devise of "all other my freehold messuages or tenements at W. and elsewhere" is a good "residuary devise" within section 25 of the Wills Act, 1837,

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so as to include the subject-matter of a previous specific devise by the testator which has failed. It is not necessary in order to constitute a good residuary devise that it should apply to real estate of any tenure, copyhold as well as freehold. *Springett* v. *Jennings* (40 L. J. Ch. 348; L. R. 6 Ch. 333) distinguished. *Mason, In re; Ogden* v. *Mason*, (C.A.) 343.

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